JUSTICE IMPEDED:

A CRITIQUE OF THE NOVA SCOTIA HUMAN RIGHTS REGIME

by

Equity Watch

January 2021

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Contents

Executive Summary

Equity Watch has prepared a 50-page report on the Nova Scotia human rights regime. We are marking the third anniversary of the historic settlement of the case of Liane Tessier, a Halifax firefighter subjected to years of gender discrimination by her employer and neglect by the Human Rights Commission. The report can be accessed at www.equitywatch.ca/XXXXX

Despite demands from Equity Watch, to date there has been no public disclosure of progress on six promises made by Tessier's employer, Halifax Regional Municipality (HRM). Because the Tessier case is emblematic of much of what is wrong with how the Human Rights Commission pursues human rights offences, we have decided to submit the human rights regime to a thoroughgoing critique.

Twenty years have passed since the last critical review of the human rights regime and a new one is long overdue. Our report reviews the behaviour of the Nova Scotia Human Rights Commission and associated institutions, as well as several key cases in recent years. It then explores alternatives to the regime, and finally makes recommendations for reform.

WHAT IS EQUITY WATCH?

Equity Watch (www.equitywatch.ca), formed by human rights activists in the wake of the Tessier settlement: promotes workplaces free of bullying, harassment and discrimination; advocates for better governmental regulation of employment equity; encourages hiring, development and promotion of target groups; monitors bodies, like the Human Rights Commission and decisions of associated Boards of Inquiry; scrutinizes employers and their human resources departments to ensure they are upholding the principles of employment equity; assists, where possible, the bullied, the harassed, or discriminated-against at work; and encourages and helps unions to do even better at doing their part to fight against discrimination and for equity

LIMITATIONS OF THE NOVA SCOTIA HUMAN RIGHTS APPROACH

A statutory human rights regime is designed, and can do much, to promote fairness in employment, housing and services. But we list 35 serious, sometimes fatal, flaws of the Nova Scotia system. Among those are:

- The regime is oriented to unadventurous and re-active response to cases of individual discrimination and eschews aggressive, pro-active approaches to *systemic discrimination.*
- Even where systemic discrimination by a respondent is found or admitted, new cases are not acknowledged to be part of the pattern
- Even when remediation is agreed to, those remedies are seldom publicly monitored, and possibly ignored
- Answerable to the Attorney General and not the legislature, the regime is a creature of the government of the day, to manage, solve, or spin, as it sees fit.
- The system is dangerously underfunded and under-resourced compared to any reasonable need,
- Many potential claimants, especially from the African-Nova Scotian and Indigenous communities, have simply lost faith that the human rights regime will handle their complaints with sensitivity, respect, understanding and alacrity.
- The Human Rights Commission has total control over whether a complaint gets their "day in court" and far too few cases make it to adjudication.
- Cases take way too much time to process – often more than three years.
- The one-year time limit to file complaints is inadequate; it ignores the trauma that impedes many people in stepping forward.
- The Commission's staff is all too often neglectful and dilatory in handling cases

- In many instances, complainants are better off with legal representation, but there is no publicly available legal assistance program, leaving clients on their own.
- At Boards of Inquiry, the Commission represents, not the complainant, but the "public interest." Unless the complainant affords their own lawyer, the strength of their case is jeopardized.
- Although some adjudicators write comprehensive decisions, important details of hearings, especially ones that last over a long time, are not available to the public.
- Too many cases settled privately between complainant and respondent are subject to "non-disclosure agreements" or "gag orders," Thus the crucial element of public education is sabotaged.
- Another barrier to transparency and public education is the Commission's penchant for "restorative justice." This approach, perhaps appropriate to keep vulnerable populations away from incarceration in the criminal justice system, is less appropriate in human rights matters, where respondents are often employers or landlords and are powerful.
- The Commission's approach to remedies stresses training in "diversity and inclusion," a very passive approach to redress and improvement. There is no reliable proof that ticking the boxes of the currently popular "implicit bias" technique results in significant behavioural change.
- The list of grounds upon which discrimination is prohibited in Nova Scotia has glaring omissions and needs revision and flexibility. Blatant causes of discrimination have evaded justice for far too long.

REVIEW OF SALIENT CASES

The document critically reviews a raft of cases in some detail, among them Tessier (gender harassment and discrimination in employment), Andrella David (racial profiling in services), Kirk Johnson (racial profiling by police), the Halifax Black Firefighters Association (racial discrimination in employment), YZ (racial discrimination in employment), Kathy Symington (gender harassment and discrimination in employment), Reed et al. (disability discrimination in services), and McLean et al (disability discrimination in services) and concludes that:

- All too often, cases are rejected on trivial technicalities
- Either the Commission or the Board of Inquiry followed an overly timid orientation.
- Each case took an inordinate amount of time to conclude.
- Each case suffered from a lack of transparency and accountability to the public.
- Where the respondents made promises of rectification, there is no follow-up so the public remains ignorant of its progress.
- There is little evidence that the respondents are engaging in melioration over the long term
- Most cases began from individual complaints, each was very limited in its ability to solve deep systemic problems and required, but seldom if ever received, community involvement for complete success.

THE ONTARIO TRIPARTITE SYSTEM

In response to major problems similar to Nova Scotia's, Ontario moved in 2008 to a system of three autonomous agencies. Such an approach, adequately resourced and properly resourced, has much to recommend it:

Human Rights Commission. Its role is restricted to policy matters and public education and in bringing forward complex issues, like systemic discrimination and racial profiling, to the Tribunal.

Tribunal. This is the direct-access body dealing with complaints and adjudication. While screening, mediating and promoting settlement, it still allows complainants the possibility of a hearing. ***In other words, no complainant is denied access to their "day in court" of some sort if that is what they wish.***

Legal Support Centre. The Centre offers legal advice to applicants, assists them in framing their complaints and can act for clients before the Tribunal

WHY THIS REPORT IS CRUCIAL TO HUMAN RIGHTS

It has been nearly twenty years since the Nova Scotia Human Rights Commission has been critically evaluated. Yet in the last thirty plus years, the landscape of human rights has changed dramatically throughout Canada, due to immigration, demographic, cultural and other changes in Canadian society. More than one in five Canadians were born abroad and over 22% are visible minorities. The proportion who are non-Christians has expanded. Women, who made up 37.6% of the workforce in 1976, now constitute 47.4%. Individual rights to sexual identity and gender identity are firmly on the agenda. While people want to privilege their own individual rights, there are groups who have suffered systemic discrimination. While blatant and outright bigotry still exists, more subtle and systemic discrimination requires much more attention.

Much about the human rights regime needs to change.

TWENTY-FIVE RECOMMENDATIONS FOR REFORM

Finally, Equity Watch's Report makes twenty-five recommendations for reform. We want a bolder, more aggressive, more responsive, more creative, in short a more activist human rights regime. Some notable recommendations are:

- Moving to a tripartite set of agencies, similar to Ontario
- Clear service delivery standards/time limits, including lengths of investigations
- Adequate resourcing
- No imposed non-disclosure agreements
- Less reliance on "restorative justice," especially where power resources are tilted toward respondents
- A move away from the passive "diversity and inclusion" model of remediation toward more activist approaches

Introduction

We present this critique of the Nova Scotia human rights regime[1] as we mark the third anniversary of the historic settlement in December 2017 of the Liane Tessier case. The Tessier case is emblematic of the myriad problems surrounding the regime and thus is a perfect example of what is wrong. As we explain below, in the settlement brokered by the Nova Scotia Human Rights Commission, the Halifax Fire Service and Halifax Regional Municipality made six promises. To date, despite demands for information from Liane Tessier and Equity Watch, there has been no public disclosure of the progress of these promises. For the most part the regime works beyond public scrutiny and public and political accountability.

Since coming into existence, Equity Watch has had our ears to the ground, listening to those with human rights issues and monitoring the activities of the Human Rights Commission and its associated agencies and institutions. It has become clear that the human rights regime is failing Nova Scotians in so many ways.

This report reviews the behaviour of the Nova Scotia Human Rights Commission and associated institutions, as well as several key cases and issues in recent years. It then explores alternatives to the regime, most notably the system currently existing in Ontario, and finally makes recommendations for fundamental reform.

This critique has been put together by several individuals, unfortunately without direct access to the administration of the NS Human Rights Commission or any of the other institutions of the human rights regime. It relies on publicly available documents, on a host of informants who have dealt with the human rights regime, and on our own years of experience with the issues. A more formal and comprehensive review, provided with the kind of access which we lack, is urgently required.

In our opinion, the Nova Scotia human rights regime is broken and desperately in need of repair. In essence, we are calling for a move from an isolated, passive, reactive approach to human rights to a more fully engaged, activist and proactive orientation.

Acknowledgments to Those Who Came Before and Battle Still

Equity Watch is only a more recent and small group that has been battling for human rights in Nova Scotia. Many have come before. As well, there are many others currently in the struggle. Before putting forward this critique of the human rights regime, we want to acknowledge their contributions, particularly from those advocates in the African Nova Scotian and Indigenous communities and from those who have dared to be complainants in human rights cases. We also thank those who have, despite trauma and pain, so generously shared their stories with us.

To mix metaphors, we walk in their footsteps and we stand on their shoulders.

[1] We use the term “human rights regime” as it includes not only the Human Rights Commission, but a host of other associated institutions involved.

We also thank:

- Several specialists and knowledgeable individuals who read this report prior to its publication and who made very helpful comments and corrections.
- Certain independent media outlets, notably the Nova Scotia Advocate, and the Halifax Examiner for helping to expose inequities in the recent past.
- Equity Watch's steering committee: Joyclin Coates, Kelsey Crawford, Judy Haiven, Larry Haiven and Liane Tessier.
- Dalhousie University law student Noah Thompson, who worked for us in 2020. However, responsibility for the report belongs entirely to Equity Watch.

What is Equity Watch?

Equity Watch was formed in early 2018, after Halifax firefighter Liane Tessier finally received long-awaited apologies and promises of reform from the chief of the Fire Service, the Halifax Regional Municipality as well as the Nova Scotia Human Rights Commission itself. The Tessier settlement was the culmination of years of harassment, bullying and discrimination (both direct and systemic[2]) at work, and delays and refusals at the Commission. We will delve more into the Tessier case below, as we believe it is illustrative of many of the problems of our human rights regime.

Even findings of discrimination and promises to change need to be monitored constantly and consistently by citizens. The human rights regime simply cannot operate successfully without that essential, and presently missing, element of public scrutiny. That explains the word "Watch" in Equity Watch.

An excellent case in point is the 2003 human rights complaint by Kirk Johnson about multiple stop checks, otherwise known as "driving while black," and the accompanying Board of Inquiry decision. Several common-sense recommendations by that Board of Inquiry were subsequently forgotten or ignored. Other than a few which received media coverage, neither the African-Nova Scotian community, nor the public at large were informed of the progress of those recommendations.

One Johnson Board of Inquiry recommendation that did receive later public attention was the call for records to be kept on "the role of race in traffic stops by the Halifax Regional Police." These statistics stayed out of sight and examination until a freedom of information request by the CBC thirteen years later revealed that black people were three times more likely to be checked than white. Further investigation by a criminologist upped this to six times and for black males aged 24 to 34, nine times. Under great pressure from the African-Nova Scotian

[2] Systemic discrimination is described by the Ontario Human Rights Commission as patterns of behaviour, policies or practices that are part of the structures of an organization, and which create or perpetuate disadvantage for racialized persons.

community, the Human Rights Commission commissioned a former Chief Justice of the Nova Scotia Court of Appeal, who finally ruled that the whole system of police checks was illegal.

It was with the memory of the Johnson case, and on the heels of the Tessier case, that a small but determined group of citizens, led by Tessier, retired Saint Mary's University professors Judy and Larry Haiven, former HRM councillor Jackie Barkhouse, lawyer and advocate Connor Smithers-Mapp and several others decided it was time to hold the feet of Nova Scotia government, employers and the Human Rights Commission to the fire in the pursuit of employment equity, fairness for all workers and challenging discrimination.

Equity Watch would be watching.

Concentrating on human rights in the workplace, here is what Equity Watch does:

- Promotes workplaces that are free of bullying, harassment and discrimination
- Advocates for better governmental regulation of employment equity
- Encourages the hiring, development and promotion of women, racialized minorities, the disabled and Indigenous people so as to better reflect our society in all workplaces
- Monitors bodies, like the Human Rights Commission and decisions of associated Boards of Inquiry.
- Scrutinizes employers and their human resources departments to ensure they are upholding the principles of employment equity
- Assists, where possible, individuals who have been bullied, harassed or discriminated against at work
- Recognizing that unions are among the key organizations tasked with the fight against bullying, harassment and discrimination at work for over a hundred years, Equity Watch encourages and helps unions to do even better at meeting this challenge

Here are some more specific activities that Equity Watch has undertaken:

- Supported the cases of individuals before the Human Rights Commission, Boards of Inquiry, the courts and various levels of government
- Held a series of monthly public meetings, so that people who needed support could get it. Since the advent of the COVID-19 pandemic, we have changed to online webinars. Some of the topics covered in these meetings are:
    - "People with disabilities fight segregation & demand inclusion: The landmark Nova Scotia human rights case"
    - "Sick Workplaces Make Sick Workers: Turning Cultures of Burnout into Cultures of Care"
    - "How to Make Employers Women-Friendly"
    - "Measuring Stress in Restaurant and Bar Work"
    - "How Do We Protect Precarious Workers?"
    - "Bad Bosses: My Experience in Toxic Workplaces"

    - "Disability – A Neglected Human Rights Issue"
    - "The Politics of Police Checks in Halifax Regional Municipality"
    - "The Myths of Workplace Equity"
    - "The Struggle of Black Firefighters in the Halifax Fire Service"
- Sponsored a very lively Facebook group where victims and advocates could discuss common problems and solutions.
- Maintained a website full of information about issues of relevance to human rights in the workplace
- Spoken out publicly and in the media on issues involving human rights, especially those in the workplace.
- Promoted the addition of psychological harassment to Nova Scotia's Occupational Health and Safety legislation. Nova Scotia is the only Canadian jurisdiction to neither have, nor have promised, such provisions
- Held a rally to protest the clawback of the $2 per hour raise for employees for "hero pay", due to Covid, at supermarket chains
- Participated in Pride and Labour Day parades in Halifax
- Conducted research into pressing issues of workplace equity and discrimination and reform of human rights law and tribunals

Time and again, difficulties with the Human Rights Commission have arisen in complaints and it is to this issue that we now turn.

A point of clarification: The current Nova Scotia human rights legal regime consists of two legally separated parts. There is the Human Rights Commission, which is mandated to process complaints and conduct education, advocacy and some research. If a complaint is deemed legitimate to Commission staff, the Commission attempts to settle the complaint with both parties. If that is rejected, Commission staff may recommend to the Commissioners that the complaint go to a Board of Inquiry for adjudication. Boards of Inquiry, the members of which are external to the Commission, are set up on an ad hoc basis, to deal with individual cases. As we mention above, the system also consists of the superior courts and the Department of Justice. Thus, we will often refer to the "Nova Scotia human rights regime" to encompass the whole system and to the "Nova Scotia Human Rights Commission" or "the Commission" to denote that organization alone.

Previous reviews of the Human Rights Commission

It has been eighteen years since human rights legislation and procedure have received a thorough public review in Nova Scotia.

Compare this to other jurisdictions like Ontario, where its provincial Human Rights Code was reviewed in 2012-13 and New Brunswick which had a review in 2008.

There was a flurry of reviews in Nova Scotia in 2001-2 but nothing substantial since then, other than a peremptory set of recommendations for the Ombudsman's office in 2017. It is high time for a new thorough review. It is hoped that our critique spurs that initiative.

Moving Forward with Rights in Nova Scotia 2001

Praxis Research and Consulting prepared a discussion paper presenting issues and options. Among the issues it raised are:

- The Commission suffers from a lack of staff to fulfil its mandate, especially public education
- Consideration of a direct-access model
- Internal responsibility policies: similar to those mandated in occupational health and safety
- Replacement of ad-hoc boards of inquiry by a permanent tribunal
- Greater use of alternative dispute resolution techniques
- The possibility of using other tribunals e.g. Labour Standards, or the Labour Board

Public Consultations Organizational Review 2001

In 2001, Dalhousie University Social Work professors Wanda Thomas Bernard, Fred Wiens and Viola Robinson reported on public consultations they had conducted.

The Commission's mandate consisted of four priorities: 1. Research and policy development; 2. Public Education and Affirmative Action, 3. Investigation and management of complaints, and 4. Adjudication of complaints.

These are some of the observations and they will sound familiar to today's audience:

- Due to limited funding, the Commission was doing less of its first two priorities and more of the last two priorities, and not particularly well
- Too much bureaucracy in the intake procedure
- The absence of legal resources to help complainants organize and present their cases
- A massive backlog of cases, causing time delay and a failure of public confidence
- Considerable support for an open-access model, similar to what we propose below, with the Commission concentrating on the first two priorities
- A feeling that the complaint procedure was paternalistic, with pressure on complainants to settle
- A feeling that the disabled, African-Canadians, Women and Indigenous people still did not receive the consideration they deserved
- The elimination of non-disclosure provisions in settlements
- Increasing the compensation awarded
- A problem with unequal power resources in alternative dispute resolution mechanisms
- Strong support for the establishment of a permanent tribunal as opposed to ad-hoc boards of inquiry

Grant Thornton 2002

A review of the operation of the Commission by consultants Grant Thornton, recommended, among other things:

- Reduction of the time taken to resolve a complaints and reasonable expectations of time for completion
- Use of new technologies to improve case management and planning,
- Increased use of alternative dispute resolution; and
- Improvement of the public education and outreach functions
- The establishment of a permanent tribunal with complaint-processing capability, leaving the Commission to concentrate on policy, advocacy and research

Ombudsman 2016-17

Due to a flood of complaints received by the Ombudsman's office in preceding years, it initiated its own review. The full report was ***not made public***, which is lamentable, but some recommendations were published, including:

- Establishment of a committee to review the approach to human rights services
- Review, revision, and development of policy;
- Ensuring the education division of the NSHRC is appropriately resourced;
- Review of the restorative approach to case management; and
- Development and implementation of a quality assurance system

Please note that several recommendations appear, again and again in these reviews, to resounding neglect by governments of the day. We will return to these several times and again in our recommendations:

- Establishment of a permanent tribunal
- Direct-access by complainants to the boards of inquiry or tribunal (without being filtered by the Commission)
- Increasing responsibility of the Commission in the areas of public advocacy, education and research
- Establishment of an agency to provide legal advice to complainants

Limitations of the Nova Scotia Human Rights approach

Before we discuss limitations, let us consider the value of a statutory human rights regime. Human rights laws and government-sponsored human rights bodies have been in effect for about a half century in Canada, and in Nova Scotia from the 1960s. They serve a valuable function in our society.

- Rather than force aggrieved individuals to go to the courts for redress of breaches of human rights, with the accompanying time, cost, inefficiency and inefficacy problems, legislatures have set up statutory bodies like human rights commissions and tribunals

where quicker, less costly and more efficient justice can be accessed. At least that is the goal.

- Human Rights legislation sets out a list of grounds upon which we collectively, as a society, say it is wrong to discriminate. Persons or organizations found culpable of such discrimination can be ordered to cease and can be required to pay financial penalties or do limited training.
- We, thereby, attempt to protect people or groups from hurtful behaviour and denial of services based on characteristics over which they have little or no control e.g. race, age, sex, sexual orientation.
- Through legislation and the human rights adjudication process we signal what kinds of behaviour we want to encourage and discourage from those with some measure of power over employment and housing.
- Although retention of legal counsel by a complainant can be helpful, there should be no charge to the complainant to launch a complaint to the Human Rights Commission. Individuals can start a case, simply by contacting an intake officer at the Commission. Of course, not all cases are taken on. At the discretion of Commission staff, settlement can be attempted. And if the Commission chooses to refer the case to a Board of Inquiry, complainants can appear at a hearing, and argue their case themselves. Commission lawyers do not represent complainants. Complainants wishing to have legal representation must do so at their own expense. If an applicant's case is dismissed by the Commission or the Board of Inquiry, by law they are not burdened with costs. That is as it should be. Prior to modern human rights legislation, one had to sue offending employers or landlords in the courts, at considerable expense. Suing in court for something like wrongful dismissal is still an option but taking action through the Human Rights Act can sidestep a lawsuit.

However, the human rights regime in Nova Scotia has a number of serious, and perhaps fatal, flaws:

1. The Human Rights Commission is geared toward *re-active* response to individual complaints of overt discrimination. For example, employer or employees of organization X insult, humiliate or refuse to hire or promote employee Y who is a woman or racialized person. Or a landlord W refuses to rent to person Z who is a homosexual. While the Commission is empowered to deal with "class actions" or multiple complaints against the same employer, or landlord, it hardly ever seems to do so. Such non-individual cases often take time, research, expertise, an understanding of systemic discrimination and a tolerance of complexity. The Commission is often overwhelmed with a torrent of individual complaints and has little or no opportunity, nor is given the resources, to deal with larger problems.
2. This reactive approach promotes a blinkered orientation on the part of the human rights regime. The emphasis is on weighing evidence of individual wrongdoing and fashioning

remedies to remediate individual occurrences. If a series or program of correctives is recommended by a Board of Inquiry, or agreed to by settlement, there is no guarantee that the correctives are carried out. And the public, the media and interest groups are not involved in monitoring compliance.

3. Boards of Inquiry all too often look too narrowly at human rights problems that have a systemic character and sometimes even amplify arrangements of discrimination that exist in society. For example, a 2019 Board of Inquiry found the Province had withheld or limited access services to three disabled people. However, rather than naming it systemic discrimination, it found discrimination happened to only the three applicants. A person in similar circumstances would have to make a new complaint and go through the entire process afresh. The relatively small size of the monetary award to the three complainants, it is suggested, replicates societal prejudice against the disabled. The decision is currently under challenge in the Court of Appeal.
4. While the Act allows the Director (or an officer acting under the authority of the Commission in the investigation of a complaint or other process) to compel any person to furnish any information or records that may be necessary to further an investigation or process, this power is used sparingly, and the Commission, often, capitulates when an organization or institution objects. Commission staff do not appear to always know which information they should be requesting.
5. The whole human rights regime in Nova Scotia is too "Politicized" (with a large "P.") By this we mean that, although the Commission is ostensibly at arms-length from the government of the day, the Commission reports to the Minister of Justice. The problems of the Commission are problems for the government of the day to manage, solve, or spin, as it sees fit. This does not help attain the goal of serving the people of Nova Scotia. In Ontario, for one, the agencies in its human rights regime are answerable not to the Minister of Justice but to the legislature as a whole and observers report that it enhances the independence of those agencies.
6. The human rights regime is dangerously underfunded and under-resourced compared to any reasonable need. For example, its expenditures in 2019-20 are actually 4.52%% lower in real terms than they were in 2013-14. Its staffing also declined in that period from 24 to 23[3].
7. Whether the applicant's case goes to a Board of Inquiry in Nova Scotia is totally within the power of the Commission's staff and the Commissioners. There is no direct access to a Board of Inquiry. "Successes" for complainants are few and far between. According to the figures in the Commission's annual reports over four fiscal years from 2014 to 2018, of 9,683 (the latest available,) inquiries received by the Commission, only 445 complaints (4.6%) were "accepted" (deemed worthy of processing.) Of all 9,683 inquiries, only 39 (0.4%) were referred to a Board of Inquiry. To put it in the obverse,

[3] These numbers are taken from the NSHRC's Accountability Reports in 2019-20 and 2013-14. The expenditure numbers have been corrected for inflation using the Bank of Canada Inflation Calculator

99.6% of inquiries do NOT lead to a Board of Inquiry. Of the 445 complaints accepted, only 39 (or 8.8%) were referred to a Board of Inquiry, and 130 (or 29.2%) were concluded by a settlement.

8. While the Act allows for a Board of Inquiry of three members, it is, usually, comprised of one. Any adjudicative body benefits from having more than one adjudicator and, at minimum, one should be from the same protected group as the complainant.
9. While it is possible for advocacy groups to be granted intervenor status, the Act does not, specifically, contemplate intervenor status. The process to be granted status is cumbersome and not guaranteed and depends on groups applying. The Commission and Boards of Inquiry should, actively, seek the participation of community groups who can bring a wealth of expertise and knowledge to proceedings.
10. On the other hand, in the very few instances that a case gets to a Board of Inquiry (an average of about five a year,) complainants fare passably. In those four fiscal years, only 21 Board of Inquiry decisions were rendered. Of those 21 decisions, complainants "won" 12 (or 57%,) but that could simply be because the Commission is enormously fastidious in choosing a few "winners." There are so many examples of egregious discrimination out there and those "winners" are a miniscule proportion. We will say more about this presently.
11. The above numbers vastly understate the problem. We are reliably informed, and we believe, that many potential claimants, especially from the African-Nova Scotian and Indigenous communities have simply lost faith that the human rights regime will handle their complaints with sensitivity, respect, understanding and alacrity. Many potential claimants, therefore, refrain from having any dealings with the Commission.
12. The Commission's process of screening complaints may filter out some cases that are unsubstantiated or otherwise faulty. But, compared to regimes that have direct access to tribunal, Nova Scotia's system also rules out meritorious cases that could help "make new law" or act as examples and precedents and arguments for the future. The more chances to push the boundaries of the law, the more law can be "made."
13. We have heard many reports by claimants that their intake officers take a long time to respond the queries and emails or fail to respond at all. Too many say they have been passed to several staff.
14. The Commission's process of screening complaints, although better than it used to be, remains notoriously slow. In the two fiscal years from 2016 to 2018, the average time from inquiry to filing a complaint was about 46 days. The average time from filing a complaint to conclusion is about 320 days (taken together this amounts to more than a year) but that is an average. Many complaints take several years to work their way through the system. The Commission's spokespeople claim that this record has improved. However, we call for independent confirmation of these claims.
    a. We note that the mandate of the US Equal Employment and Opportunities Commission (EEOC) stipulates that the entire pre-complaint stage shall not

exceed 90 calendar days and complaints must be investigated and completed within 180 calendar days from the filing of the complaint.

b. We doubt, in the Nova Scotia case, whether there are clear service delivery standards/time limits, including lengths of investigations
c. If there are service standards, neither the complainant nor the public knows anything about them.

15. The biggest criticism that Equity Watch receives from complainants is the high rate of rejection by the Commission. An allied criticism is the long delay complainants experience and the dilatory, indifferent and disrespectful attitude of some Commission staff.
16. When the Commission refuses to take on a complaint or refer it to a Board of Inquiry, a complainant wishing to challenge the decision must do so through Judicial Review. The courts can reverse the decision only on very limited grounds, and such reversals are very rare. And, many argue, they may be growing harder to win.
17. Moreover, though hiring legal counsel to present their case to the courts is the best course, it is often prohibitively expensive. If appellants lose, the court can award costs against them. Thus, judicial review can be quite costly, and hence prohibitive, to the appellant.
18. Under S. 36(1) of the Human Rights Act, complainants can appeal the decision of a Board of Inquiry to the Court of Appeal on more extensive grounds than those afforded by judicial review. But again, hiring counsel is advisable. This can also be prohibitively expensive for the appellant.
19. Notwithstanding that, in theory, complainants can argue their own case at a Board of Inquiry, it is not advisable for them to do so, especially where legal or procedural complexities prevail. We review a recent example below. The Commission does not act as counsel for the individual complainant. Rather, the Commission considers itself to be acting in "the public interest." Though the Commission's lawyers attend the hearings, they do not explicitly represent or assist the complainant. And, as we will show, in at least one case, despite having brought the case to a Board of Inquiry, they argued *against* the complainant. In many of the successful cases before a Board of Inquiry, complainants are represented by their own lawyers. As the Commission says:
    a. The Commission's legal counsel represents the public interest and the interest of the Nova Scotia Human Rights Commission. Commission counsel does not represent either party although, will sometimes assist with procedural questions and explanations of the process. Commission counsel cannot provide legal advice to the parties, but is tasked with ensuring the board chair has all of the relevant legal and factual information before them to make a decision.
    b. It is always advisable for each party to have their own legal counsel. Nevertheless, there are some non-complicated cases where this would not be necessary. It is therefore the parties' choice to retain

legal counsel. Parties who hire legal counsel are responsible to pay for them. In all matters, if a party chooses not to have legal counsel, it is advised that they seek legal advice.

20. Even before a complaint is submitted to a Board of Inquiry, i.e. during the investigation stage, complainants are prudent to retain their own counsel, either for direct representation or for advice. While there are no statistics on this, Equity Watch's impression from the cases it has dealt with, is that the involvement of legal counsel on behalf of complainants increases the chances that the Commission staff will pay the proper attention and respect to the complaint. Of course, lawyers do not come cheap. Moreover, the retention of a lawyer merely to ensure that the Commission staff are doing their job, is another systemic barrier and is bizarre.
21. Notwithstanding the need for legal assistance described above, in Nova Scotia there are very few, if any, free or inexpensive legal clinics or services providing assistance with human rights complaints compared to those that exist in other jurisdictions (like the British Columbia Human Rights Clinic or the Mile End Legal Clinic in Montreal or the Black Legal Action Centre in Ontario.) In Ontario, there is the statutory Human Rights Legal Support Centre, of which we will say much more, below.
22. Board of Inquiry hearings are supposed to be transparent. They are open to members of the public and the media. Despite this, they often extend over many hearing days and a lengthy period. Some have lasted several years. Adjudicators produce a written decision, which is valuable, but it is a summary of reasons for judgement and, often, short on details. Unless an observer is assiduous in attending every hearing and taking detailed notes, it can be very difficult to follow those details. Often, Commission staff will hire a court reporter to record the proceedings and provide a transcript to counsel and the adjudicator. But these transcripts are not available to the public or observers, except at exceptional cost. Thus, even the most important cases lack a key element of transparency.
23. Board of Inquiry decisions are public and their publication can contribute to the important goal of public education. However, as per the statistics cited above, about 30% of claims accepted by the Commission are "settled" before they reach a Board of Inquiry i.e. resolved by private agreements between the complainant and the respondent. In nearly all of these instances, at the request of the respondent(s), the complainant signs a "non-disclosure agreement," otherwise known as a 'gag order' and the resolution is barred from public knowledge. This arrangement is an offence against the goal of transparency, public education and general deterrence. We will talk more about this, below.
24. Another barrier to transparency is the Commission's penchant for "restorative justice." By following a settlement through negotiation, the parties agree to non-disclosure. We will talk more about this, below.
25. In its public education and advocacy function and also in its approach to remediation in individual complaints, the Commission stresses training in "diversity and inclusion"

(D&I). This is a very passive approach to redress and improvement. Part of this approach is too often ticking the box of "implicit bias" awareness training, in which actual or potential wrongdoers are made aware of how they harbour subconscious bigoted orientations. There is no reliable proof that implicit bias training in and of itself, or any awareness training actually results in significant change in people's behaviour. Indeed, research indicates that training can, actually, justify and reinforce biased behaviour[4], if people become aware of how widespread implicit bias is. A better approach to changing behaviour in organizations is to concentrate on the 3Ps (processes, policies and procedures.) We have seen, and will see that some of the more seemingly impressive judgements or settlements in our human rights regime (Kirk Johnson, Liane Tessier, YZ, Andrella David) have, sadly, not resulted in a major change in behaviour of the organizations involved. Racial profiling, bullying and misogyny are still endemic. A better way must be sought. We will talk more about this, below.

26. The general approach by the human rights regime is that bad behaviour is the result of a small number of "bad apples" and what is necessary to set things right is to single out the bad apples and their bad behaviour and correct them. We believe that a wiser orientation might be the opposite: to see organizations, especially employers, as sitting in a reservoir of institutionalized oppression and exploitation, enabled by the pursuit of profit and the rewarding of callous and dictatorial behaviour. *Ab initio*, treating organizations, in addition to individuals, as sick, might lead to better outcomes.
27. The ostensible goal of the human rights regime is to favour rehabilitative over punitive approaches. This sounds good in theory, but coaxing and cajoling and modeling better behaviour may not be effective. Imposing a significant award of damages sends a message to both the perpetrators and the public. Some of the recent cases in the Nova Scotia human rights regime display a rising penchant for monetary indemnities. However, much of this has come about to compensate catastrophic loss of income (because of job loss) to individual claimants. The use of higher damages awards separate and apart from loss of income has been introduced in Ontario and other provinces.
28. Thresholds for examining what constitutes racism and other forms of discrimination need to be revisited. The standards were established at a time when racism and discrimination was more overt than they are today. This needs to be redesigned to meet modern day realities of more subtle (but just as damaging) systemic discrimination.
29. The time limit for lodging complaints is currently twelve months. This denies the impact and trauma of discrimination on victims. Routinely, the aftermath of discrimination is rife with emotional and physiological injuries which mirror post-traumatic syndrome disorder. Complainants frequently have no job, their relationships are in turmoil, and their self-worth has taken a beating. To expect all victims to have the emotional energy to file a complaint during this time is patently unfair and downright unhealthy.

[4] Noon, Mike. 2018. "Pointless Diversity Training: Unconscious Bias, New Racism and Agency." *Work, Employment and Society*. 32(1):198-209.

30. The Act exempts discrimination against citizens if a landlord is letting a room in an owner-occupied house. This is too big a loophole.
31. The Act permits discrimination by employers against those employed as domestics in homes. Again, this sends a bad message to a vulnerable group of workers.
32. What information is required of complainants at the complaint stage is inconsistent, uneven and often onerous. Some intake officers appear to employ unreasonably high standards and hefty burdens on complainants, while others, actively, discourage victims from filing complaints or encourage them to seek informal redress. For example, while contravention of a prohibited ground need not be shown to be the ONLY factor, some officers are still looking for it to be the sole, contributing factor and are discouraging, or rejecting, complaints on this basis. In still other cases, intake officers fail to recognize that there may be additional prohibited grounds of discrimination that should be named in the complaint (e.g. a complainant may be alleging discrimination based on disability without recognizing that, for example, sex or sexual identity may also be factors in the discrimination. Because a complaint may not be amended once it is referred to a Board of Inquiry, it is incumbent on Human Rights Commission staff doing intake and investigation to ensure complaints are not so narrowly defined or written that it limits an otherwise valid inquiry that can be undertaken by a Board of Inquiry.
33. The Commission is less proactive than it could be in the pursuit of initiatives designed to remedy the historic and systematic disenfranchisement of Blacks and other historically disenfranchised groups. To begin, it should conduct horizontal audits of large employers and provincial departments to identify key employment gaps and barriers to the recruitment, promotion and retention of members of disenfranchised groups in management and executive positions and identify best practices.
34. Systemic discrimination seems to be an afterthought, in the Act, when defining "discrimination", merely, contemplates a "person" discriminating and not an organization or institution. As well, a previous finding of systemic discrimination on the part of an organization or employer is apparently of no consequence in subsequent complaints involving the same organization or employer.
35. There is a limited list of grounds upon which discrimination is prohibited in human rights law. Evolving with society's sensitivities and the claims of vulnerable groups, today's legislation includes several grounds that were not involved in earlier years. Still, the number is limited.

    One of the newest, gender identity and gender expression (identity or expression different from one's birth sex) entered the Nova Scotia regime as recently as 2012. In 1991, Nova Scotia added several new categories, including sexual orientation (the gender to which people are attracted). That new group of grounds, eight years into the HIV-AIDS pandemic, also included "Irrational Fear of Contracting an Illness" offering help to those unfairly shunned.

Aside from the basic grounds shared by all Canadian jurisdictions (e.g. age, race, sex, religion, place of origin,) coverage is not uniform across the country. For example, political beliefs and activities are included in nine (including Nova Scotia) but are missing in five (including Ontario and the federal jurisdiction.) Issues of class (social disadvantage, social condition and social origin) are included in five but excluded in nine. The "irrational fear" ground mentioned above appears explicitly only in Nova Scotia.

Mere absence of a ground from a certain jurisdiction's human rights legislation does not completely exclude ultimate claims. Perhaps the most prominent example is the *Vriend* case. Prior to 1998, Alberta human rights legislation omitted sexual orientation as a prohibited ground. But a legal challenge invoked Section 15 of the Charter of Rights and Freedoms (general equality rights) and the Supreme Court of Canada in that year ordered that sexual orientation be "read into" the Alberta legislation whether the province wished it or not[5].

Another major problem with human rights law is that if the discrimination does not fall under one of the prohibited grounds, a complainant at the Human Rights Commission is out of luck. For example, overweight people are subject to discrimination, both overt and systemic, at work, in housing , to obtain services and in treatment by physicians. This type of discrimination can do great harm. But body size is not included in the list of grounds. If size discrimination can be attached to one of the other prohibited grounds, such as disability, or sex, the complaint might have a chance. However, if body size alone is the reason for discrimination, they do not.

Another example is bullying (or harassment, violence, gaslighting and mobbing). If the bullying is based on a prohibited ground like sex, sexual orientation or race, then a human rights case can be made. But if it is plain old bullying, then the complainant is out of luck despite the devastating repercussions it may have had for the individual. And bullying is a major problem in workplaces in Canada.

Just because a form of discrimination appears among the prohibited grounds in human rights legislation does not necessarily mean that it will be litigated. For example, Nova Scotia has "source of income" as a ground. However, of the more than 100 Boards of Inquiry since 1999 listed on the Commission's website, there is record of only a single case where this ground was raised. That is the case of Andrella David (see below), where the complainant was found subject to profiling based on race and perceived source of income. The perpetrator of David's victimization made explicit references to a (unjustified) presumption of poverty.

[5] According to Section 33 of the Canadian Charter of Rights and Freedoms, the Alberta government could have invoked the "notwithstanding clause" and ignored the Supreme Court decision. But that government chose not to do so

It is reasonable to assume that there is a lot of discrimination based on poverty or perceived poverty in Nova Scotia. After all, the province has had the highest rate of poverty in Canada for several years. So why would there be so few complaints at the Commission? Unlike other forms of discrimination like sex, race, and sexual orientation, where there is a growing movement for justice, poverty bears a strong stigma and shame, and poor people lack the self-confidence to complain about their treatment. Discrimination based on source of income can be even more subtle than other forms.

Given that the Commission has a passive or reactive approach that depends on who initiates complaints, it is understandable that "source of income" is seldom encountered. That is why we recommend, later, that the human rights regime stop waiting around and move to adopting a much more activist approach, where complaints are encouraged and initiated, based on good research and good engagement with diverse communities.

If the Commission staff decides that there is no prohibited ground on which to base a complaint, the complaint fails. What recourse does the complainant have in this eventuality?

The complainant can:

- Lobby the provincial government to amend the list of prohibited grounds (but such amendments will not be retroactive)
- Launch a Section 15 Charter challenge, à la Vriend, arguing that a new ground should be "read into" the Human Rights legislation. This, however, is excessively expensive.
- Sue the offender in court. If the claim is based on contract or tort and the compensation requested is $25,000 or less, the complainant can appear in small claims court without counsel. Small claims judges, however, do not have special expertise in human rights matters or jurisdiction to award more than $100 in general damages. If the claim is outside the jurisdiction of the Small Claims Court, the suit must go to the Supreme Court and, while plaintiffs can theoretically represent themselves, they can expect procedural rules that may act as a barrier, less forbearance and deference from the court (the judges cannot advise them on strategy) and may do harm to their cases.
- If the behaviour complained of does not come under one of the prohibited human rights grounds, but causes physical harm to the victim, the victim can go to Occupational Health and Safety. If the harm is psychological, then the Nova Scotia victim is out of luck, as mentioned above.

This is a long list of limitations to the Nova Scotia model of Human Rights redress. The worst predicament is that these serious flaws bring the entire Nova Scotia human rights regime into disrepute. So egregious are the faults that many believe that they have no access to justice at

the Commission. This is a legitimacy problem for the government as well. Equity Watch has seen widescale disenchantment not only from actual complainants to the Commission but also among a larger set of those subject to discrimination.

A system that purports to assuage societal discrimination must offer hope to those suffering from it. Given the deficit of hope, the system is broken and requires serious repair.

Picking winners

Some might argue that the Nova Scotia human rights regime has scored a number of high-profile "wins" in the fight against discrimination and bigotry. Why, then, would we have the presumption to criticize the regime and insist that it is deeply-flawed?

An example of an apparent "win" is the Kirk Johnson case cited above, despite the problems of its recommendations being almost buried for years. More than anything, this case reveals faults in the human rights process, in that stop checks did not cease and, despite the de jure ruling that they are illegal and should be banned, have not ended in practice.

Another high-profile case is the racial profiling of Andrella David. Using surveillance footage, an employee of a Sobeys store stopped David, an African-Nova Scotian woman in 2009 in front of other customers and accused her of being a "known shoplifter in the store." A Human Rights Board of Inquiry *seven years later* ruled that the company had no proof and that David had been the victim of profiling on the basis of race and perceived source of income. The Board ordered that the company:

- issue a written apology to David,
- pay her general damages of $21,000.00 (plus 2.55 per cent interest from 2009),
- at its own cost, participate in training approved by the Nova Scotia Human Rights Commission with respect to consumer racial profiling, discrimination based on race, colour, and perceived source of income, and
- within two months of completing the training, deliver a report to the Commission confirming details of the training that has been delivered

At first, Sobeys challenged the Board's decision and decided to take it to the Court of Appeal. But after a large protest from the African-Nova Scotian community and a threatened boycott of Sobeys' stores, the company dropped its appeal. Has Sobeys fulfilled all of the above obligations? As usual, none of this has been shared publicly. We are eager to know.

The case of the Halifax Black Firefighters Association, which will be discussed in more detail below, was another seeming high-profile triumph. Yet, a deeper dive discloses that it too had problems, not the least of which was an imperfect "restorative justice" solution. We will discuss that topic later.

In yet another ostensible "win," a Board of Inquiry in 2019 vindicated the complaint of YZ, a former employee of Halifax Transit. YZ had been subjected to a seven-year reign of terror by

some co-workers because his wife was African Nova Scotian. Two of YZ's workmates, both people of colour, had also been recipients of this hatred. Ruling *thirteen years after* the initial complaint, the Board awarded YZ a record almost $600,000 in general damages, (including general damages to his wife) money toward the cost of future care and for past and future lost income. Nonetheless, the following irony was noticed by the Black community: that the largest human rights award in Nova Scotia history, and one involving race, went to a white man.

And, of course, there is the settlement brokered in 2017 by the Commission between firefighter Liane Tessier and the Halifax Fire Service for discrimination due to gender. We will zero in on this case and its fallout and associated complaints below.

Each of these cases, as commendable as each may seem, reveals hidden problems.

- Each took an inordinate amount of time to conclude.
- Each suffered from a lack of transparency and accountability to the public.
- Where the respondents made promises of rectification, the public remains ignorant of their progress.
- Each was incomplete in its own way; beginning from individual complaints, each was very limited in its ability to solve deep systemic problems and required, but seldom if ever received, community involvement for complete success.

And yet, despite the level of "bragging rights" that any of these cases might afford to the Nova Scotia human rights regime, the following fact is inescapable: In our society, so many denials of human rights exist, so much injustice prevails, so much bigotry is visited upon the vulnerable, so many societal horrors involve discrimination, that it is not difficult for the human rights regime to hand-pick a very few and appear to be "doing something." As one informant familiar with the old Ontario human rights regime told us, "it's easy to pick winners in this business." As with the brave little Dutch boy with his thumb in the dike, compulsive focus on some efforts may mask a host of other breaches.

Talking about breaches, it is to the Liane Tessier case that we now turn.

Tessier Case: A History of Problems

We will argue that a review of selected recent cases shows disturbing patterns of behaviour on the part of the Nova Scotia human rights regime.

If one story can be said to symbolize the numerous problems with the Nova Scotia Human Rights Commission and suggest that those problems continue essentially unabated, it is Liane Tessier's decade-long battle with the Commission (and the longer and continuing reign of unfairness by her employer.) It is a tale of discrimination, abuse and neglect by the latter and shocking delay, carelessness and negligence by the former. The Commission was forced to apologize to Tessier when she finally won her battle in late 2017. Commission Senior Legal Counsel Kymberly Franklin, referring to Tessier's travails, said, in astonishing understatement,

“We’re sorry that Ms. Tessier had to go through such a lengthy process in order for this matter to come to resolution…We credit her for sticking with her complaint.”

Some cheerleaders might argue that the eventual “happy ending” of the Tessier case is the “exception that proves the rule.” In other words, the Tessier case is a one-off, or a terrible mistake, which has been rectified by the Fire Service and the Human Rights Commission “doing better.” We would argue the exact opposite. In light of subsequent and ongoing events, the problems seen in the Tessier story are all too common and continue.

Tessier began working as a volunteer firefighter in Halifax 1998. But within a year she was subjected to a tsunami of disrespect, mistreatment and outright cruelty by male fellow firefighters and members of Fire management.

By all accounts she was a model member of the Fire Service and was promoted at one point to captain. She won first place in the Canadian Scott Firefit Championships in 2006 and third place at the World Firefighter Championships in 2007.

Like many firefighters in a competitive profession, she saw the volunteer route as the way to a full-time, permanent position but was denied. As a direct result of submitting a human rights complaint against the HRFES, intake officers at the Commission neglected to call all her external references and relied heavily on negative internal references from her station supervisors.

When she probed, HRFES refused to reveal the names of the references they used and she believes this was further retaliation.

Says Tessier, “The harassment in its beginning stages involved little incidents of exclusion, alienation, personal devaluation, ignoring and gossip which just grew bigger and more obvious over time. All of this was ignored and minimized by my employer.”

Her colleagues and supervisors denied her opportunities for further advancement and made her work life miserable and even dangerous, including depriving her of and tampering with her personal equipment. She complained to her superiors, but the harassment only became worse. She was denied shifts and promotions. A vicious rumour campaign stamped her as promiscuous, negligent, vindictive, unreliable, and mentally unstable. As Tessier puts it “Women who are suffering from gender discrimination [are labeled] as crybabies, attention-seekers, weak or trouble-makers.”

In May 2007, Tessier filed a complaint with the Human Rights Commission against Halifax Regional Municipality and the Halifax Fire and Emergency Service alleging discrimination based on gender.

The Commission’s investigators were dismissive and dilatory at best. Tessier claims that her case was passed through six different investigators. Says Tessier, “They were vague, secretive, they didn't give me any sort of reason. There were times when I had my lawyer send documentation asking for an update and there would be months going by where no one would

even get back to her or me about what was going on. It was awful," Four years later, in 2012, the Commission declared her complaint rejected based on "lack of evidence."

Tessier launched a judicial review at the Nova Scotia Supreme Court against that rejection. In November 2013. Justice Arthur Leblanc found in favour of Tessier, quashed the Commission's decision to reject her claim and remitted the matter back to the Commission for re-consideration, with a new investigation to be conducted by an investigator with no prior involvement with her complaint.

As mentioned earlier, getting a court to reverse the decision of an administrative body like the Human Rights Commission is an uphill battle and seldom successful. As Leblanc wrote of the limited powers of the courts in his decision, "It is well established that human rights Investigators are masters of their own procedure and are afforded broad discretion in choosing who they interview and how they gather information."

Because of the wide-ranging leeway of the Commission, the court's ultimate decision in *Tessier* is even more damning. The court found that the Commission staff neglected to interview key witnesses and gave undue courtesies to the respondent HRM and Fire Service such that the investigation was "a breach of procedural fairness…sufficient to invalidate the investigation and render the Commissioners unable to make a proper screening determination on this case based on the sufficiency of the record before them."

A second decision by the same court, this time on costs, is even more candid and scathing about the Commission, and deserves to be quoted at some length:

> Those individuals who file a complaint with the Commission are entitled to expect that their matters will be conscientiously reviewed and investigated in accordance with the rules of procedural fairness and the Commission's own policies. When the Commission fails to exercise due diligence in the investigation process the consequences for a complaint can be profound…
>
> In Ms. Tessier's case, the Commission's conduct left her in a difficult position. She could abandon her complaint entirely, or assume the stress and expense associated with filing an application for judicial review. While the application was successful, her complaint against HRMFES is no closer to being resolved. Ms. Tessier must now participate in a new investigation, seven years after her complaint was initially filed, and nine years after some of the events described in the complaint. It is reasonable to expect that the cogency of the evidence will be compromised by the passage of time. Memories fade and witnesses may now be unavailable.

The court made the unusual move of awarding costs against the Commission, saying:

> I am satisfied that the circumstances of the case are exceptional and bring it outside the general rule of immunity for cost on part of the administrative

> decision-makers. In my view, it would be contrary to the public interest for the Commission to avoid liability for costs in situations *where it has mishandled a complaint to the degree seen in this case*. [emphasis added]

As background to the Tessier complaint, another case of discrimination in the Fire Service against non-traditional employees was continuing. By the beginning of the millennium, fire departments across North America were attempting to remedy their sorry record of white-male-only employment. Halifax attempted several intakes of women and Black recruits.

However, those intakes themselves became a problem in Halifax. As one Black firefighter writes:

> In 2001 the fire service, with best intentions, decided to have a dedicated all-Black hire, but neglected to prepare the service or any of its providers for the entry of ten Black firefighters…
>
> When management found out about [ill treatment of the recruits] they responded in a fashion that was typical of their approach; they ignored the injustice in the hope that it would go away. In fact, the more the Black firefighters complained the more we were intimidated, bullied and harassed.

The Halifax Association of Black Firefighters complained in 2008 to the Commission about discrimination dating back to 2002. In 2013, in a settlement brokered by the Commission, the then Fire Chief apologized and a resolution procedure was put in place.

Compared to the Black firefighters, who had a strong cohort and a degree of unity, women were fewer in number and split amongst different fire halls. Liane Tessier's battle was waged very much on her own and with much more resistance from the Human Rights Commission. It makes one wonder about the role of expediency and small-p "politics" at the Commission.

Submitting to the 2013 court order in her case, the Commission re-opened the Tessier investigation. But, par for the course, resolution was not quick in coming. The Commission finally referred the case to a Board of Inquiry scheduled for October 2017, a full four years after the Supreme Court decision.

As the Inquiry date approached, several things appeared to induce the respondents to seek a settlement. First was the prospect of embarrassment at the public hearing where Tessier had lined up several female colleagues to testify about their suffering and the discrimination they faced. Second, a new Fire Chief was coming on board. Third, the admissions and settlement with the Black firefighters had made the absence of progress in the case of women more significant. Fourth, and perhaps most important, the "#MeToo" movement had recently burst upon the scene. Behaviour by the boys, once relegated to the shadows was being exposed in full public glare. Depending on one's point of view, the employer decided to "do the right thing" or "cut its losses" -- or perhaps both.

Tough negotiations followed. Departing from the usual procedure in settlements of human rights cases, Tessier refused to agree to a gag order, insisting on the right to tell her story publicly.

In December 2017, the new Fire Chief Ken Stuebing appeared at a media conference, along with Tessier and representatives of the Halifax Regional Municipality and the Human Rights Commission and delivered the following:

- An admission that the Fire Service had engaged in **systemic gender discrimination**
- An apology to Tessier and all women affected by gender discrimination
- An undisclosed monetary settlement to Tessier
- Six promises. The Halifax Fire and Emergency Service and HRM agreed to:
    - Ask the Human Rights Commission to schedule a human rights education program. *Was this done?*
    - Produce a policy with respect to handling complaints in the workplace, hiring, and around human rights matters. *What has happened regarding this policy?*
    - Have appropriate members of designated groups on their hiring panels for those candidates who have self-identified as female. *What proof does the HRFES have that this was done?*
    - Provide all hiring panel members with specialized training in proper hiring and interviewing practices. *Has this been done?*
    - Conduct a policy review and update on an annual basis of the Workplace Rights and Harassment Prevention Policy to ensure they have effective policies in place and to review compliance with those policies? *What is the progress of this initiative?*
    - Provide to the Human Rights Commission all of the collected statistical data on the recruitment and hiring process for review and recommendation. *When will these data be made available to the public for review?*

Thus, the Tessier saga seemed to end. In reality it was far from over. There are many indications that neither the Fire Service nor HRM in its oversight capacity, nor the Human Rights Commission have done what was expected of them. It is becoming clearer that none of those parties is taking the resolution seriously and that the "settlement" was merely an attempt to jettison the case, escape the negative publicity, and engage in some easy and convenient virtue-signalling.

To illustrate just how persistent the problems with the Fire Service continue to be, we offer the following examples:

In late 2018, an anonymous female volunteer firefighter complained of the lack of opportunity to access the career track and said she "has dealt with inappropriate and sexist remarks from colleagues and superiors during her time with HFRE and has watched people she deems much less qualified than her move into career firefighting positions."

As recently as 2019 one sitting Halifax councillor commented that women were not generally suited for jobs as police officers or firefighters.

Another, black male, firefighter is suing the Fire Service for what he claims is a history of ridicule and withholding of advancement opportunities due to his race.

To date, three years after the Tessier settlement, neither the public nor Liane Tessier herself, have been informed of the progress of the Chief's promises. The only publicly known positive outcome was the promotion to assistant chief of two long-serving firefighters, a female and an African Nova Scotian. But as for the **six promises** – total silence. On the last two anniversaries of the arrangement, Equity Watch demanded to know which of the promises have been kept and how. But the Fire Service and the municipality have refused to provide any information and data. The Human Rights Commission, which is a public body and has the obligation of public education, has failed Tessier once again. And now, on the third anniversary, Equity Watch asks once again, "what is happening?" The fact that even Liane Tessier can get no response on the outcome *of her own case* suggests that the other parties have no intention of living up to their part of the bargain.

As in the Kirk Johnson case mentioned earlier, a high-profile resolution to an outrageous case has been subsequently buried and, possibly, in the hopes of the Commission and the employer, forgotten. This is another indication that a regime of negligence, expediency and indifference to victims continues.

Another fact that shows the lack of seriousness on the part of the Fire Service is this: Liane Tessier gave to the employer, and the Commission, a list of the male firefighters who had made her life a living hell. To our knowledge, none of the perpetrators has been disciplined. Indeed, some of them have been promoted.

Another reason to believe that the system is still failing is the way that the Commission is now using the decision of Tessier judicial review (and the courts are agreeing) as a precedent, not to demand *better* performance of the Commission, but *as a cudgel* against other, subsequent appellants complaining of the Commission's inattention and delay.

This is how it works: The Commission treated Tessier very shabbily and the provincial Supreme Court castigated the Commission roundly for that treatment. Now, when complainants come before the court to protest the Commission's neglect, its lawyers pull out the Tessier case and argue that any treatment less egregious than that afforded to Tessier should be acceptable! And, more often than not, the court agrees with them. Without Tessier's intention, her case has raised the bar for review of the Commission's attention to complaints.

One such case is that of M.A. (name withheld upon request.) The latter was a home care personal caregiver who was sexually assaulted by a client at work in the client's home. She complained to the Commission that, among other things, the employer had failed to fully protect her and had blackballed her from other jobs. The Commission rejected her complaint

and MA took her case to judicial review, arguing that the Commission staff had failed to interview key witnesses and otherwise gave her short-shrift à la *Tessier*. At court, lawyers for the Commission, with amazing *chutzpah,* used the Tessier decisions *against* MA. They compared the handling of MA's case by the Commission to that of Tessier and argued MA's treatment wasn't as bad.

Another example of using *Tessier* to trivialize other cases appears in the Wright decision of the Supreme Court in 2017:

> …the within case is readily distinguishable from Tessier v. Nova Scotia (Human Rights Commission), 2014 NSSC 65. In Tessier, Justice LeBlanc made key findings that the investigator breached procedural fairness (para. 66) and that the investigation was not thorough (para. 67). He accordingly quashed the Commission's decision and remitted the matter back with another investigation to be conducted by an investigator with no prior involvement with the complaint (para. 70). Here, I have found no such flaws.[6]

Yet another example was the case of Liz Cummings and Shannon Sampson, who complained to the Commission in 2018 of discrimination by their employer, the Halifax Irving Shipyard. The Commission case rejected their complaint and the complainants applied for judicial review. Again, the Court upheld the Commission's decision, suggesting that the rejection didn't, as it were, pass the *Tessier* test.

The irony of this new use of the Tessier case is flabbergasting. Tessier's treatment by the Commission, it argues, was so egregious, that virtually no subsequent neglect can meet that standard of neglect.

Symington Case

Another case involving a female firefighter illustrates the less-than-optimal fallout from *Tessier.* Kathy Symington began her career as a full-timer with the Fire Service in 1997, one of the first women in its ranks. In 2004 she complained to the Human Rights Commission of sexual harassment by male co-workers and the failure of the employer to take action. As in the Tessier case pre-2014, the Commission dismissed Symington's complaints for lack of evidence. When Tessier won her judicial review and the Commission re-started the latter's inquiry in 2014, Symington decided to renew her own complaint. This time she added discrimination and failure to accommodate on the basis of disability due to injuries she had sustained since her prior complaint.

We know that the Fire Service and HRM admitted publicly in the Tessier settlement of 2017 to a climate of systemic gender discrimination. If "systemic" means anything, it is that vulnerability to discrimination affected not just Tessier but **all women in the Service**. In that context, Symington, for all relevant parts of her employment, was sitting in the same toxic stew as Tessier. Accordingly, post-Tessier, the Fire Service's admission should have made it *easier* for

[6] The judge in the Wright decision found the Commission erred, but on an issue unrelated to procedural fairness.

Symington to show gender discrimination. That was not the case. It became *harder*. An argument could be made, as per the Chief's admission in *Tessier*, that if *all* women firefighters were susceptible to discrimination, then it would be the exceptional woman who was not. Was Symington that exceptional woman who was *not* suffering from systemic gender discrimination? One can be forgiven for thinking that both the employer and the Commission were attempting to nullify the impact of Tessier. Or what we are increasingly led to believe is that the Commission has no serious notion of what systemic discrimination means, or how to assess it.

Yet, once again, Commission staff decided to reject Symington's complaints. Symington held a media conference and went public with her case. The Commissioners of the HRC overturned the staff decision and sent her case to a Board of inquiry.

At the inquiry, at first, the employer made technical objections. As described by journalist Stephen Kimber:

> In lawyer terms, it probably made sense. Scrounge in the legal underbrush for a technicality, a loophole to crawl through to derail potential litigation against your client. Save your client some unwanted publicity, maybe even a little — or a big — cash settlement. All good, all standard-issue Litigation 101.
>
> Unless, of course, your client happens to be an agency of the Halifax Regional Municipality — which is to say the citizens of Halifax — and there is already a demonstrated and pernicious history of workplace hostility by your client toward women and minorities: to wit, the Halifax Regional Fire Service

At another point, lawyers for the Commission, whom the Commission claims to be neutral (defending the public interest) at a Board of Inquiry hearing actually came out and argued *against* Symington. That may have been the final nail in the coffin of her case.

Symington's lawyers argued that if the employer had merely "treate[d] her like a human being," rather than a "project" requiring boxes to be ticked off, then the outcome would have been better.

In the end, the Board of Inquiry ruled against Symington, sending an ominous message to other female firefighters.

If the goal of the public process has been to hold the Fire Service to account for the position of women in the service, then the future appears bleak.

Black Human Rights Matter

On August 21, 2020 close to fifty people held a rally at headquarters of the Human Rights Commission under the rubric "Black Human Rights Matter." Speakers claimed that the Commission did not serve African Nova Scotians well and that complaints by members of that community had been dismissed or rejected, or in some cases, gone missing.

Writer and activist Angela Bowden said, “We have a system designed and tasked to uphold human rights, that marginalizes, violates, dismisses, denies the very human rights that they are tasked and legislated to uphold.”

The protesters called for reform of the Commission and cultural competency training for all Commission employees.

Said rally organizer and long-time activist Raymond Sheppard “If you don't have any direction from the top and if there's no one going over the procedures and making sure they are working in a timely fashion and so on, then maybe the CEO should step down.”

Demonstrators demanded the following:

- Amend the Nova Scotia Human Rights Act to allow a minimum of three years to file complaint
- Increased penalties for human rights violations, including jail time
- Cultural competency training for all employees and commissioners
- Community information sessions to be held across the province
- More diversity in hiring of intake workers, with a particular emphasis on hiring more Black intake workers
- Consistent follow up with complainants after a complaint is filed
- Shorter assessment times
- Public, periodic, reporting on follow-up actions/progress

As for the current one-year window for filing claims, speaker Angela Bowden maintained:

> They have a one-year window that protects the perpetrators, because we know what trauma does to an individual. And we know how trauma can flatline somebody. It certainly flatlines me, and I am a strong individual and it flatlines me.

The Commission would have us believe that the kind of dilatory, inconsiderate, insensitive and careless behaviour by staff toward claimants is a thing of the past. However, over the last two years and even very recently, Equity Watch has heard from a number of complainants to the NSHRC. Without considering the individual merit of their cases, we have noted similarities in their treatment by the NSHRC.

- Human rights officers often did not return calls, emails or texts. This left complainants wondering if their cases were proceeding or not, and if there was anything they could do to speed up their cases. In a recent case, the complainant did not hear from the officer for more than four months straight.
- In at least one case, complainants’ witnesses were not interviewed .

- The Commission sometimes relied on the expertise and the professionalism of the employers and their representatives and paid less attention to the complainants' side of the case.
- In one case, the human rights officer exhibited signs of implicit bias. When the complainant became offended and asked for a new officer, that request was denied.
- Cases are routinely dismissed, and there is virtually no way a complainant can, successfully, appeal the decision.

The Wheelchair Case

Yet another, more recent, indicator of deep problems within the Commission of indifference and peremptory rejection is *Reed et al. v. Nova Scotia Human Rights Commission,* or what might be called the "Wheelchair Case." In 2016 Gus Reed and five other wheelchair users complained to the Commission that the provincial government was discriminating against wheelchair users by selectively enforcing its regulations on equal access to restaurant washroom facilities on patios and at bars and restaurants. They claimed that this amounted to a pattern of systemic discrimination in the enforcement of provincial Food Safety Regulations.

Twice a Commission intake worker peremptorily refused to accept the claim, first suggesting the applicants go to the provincial ombudsperson, second telling them to complain about individual restaurants, not the provincial government. We would argue that these refusals are part of a pattern at the Commission to seek loopholes and excuses to lower its workload. Moreover, demanding that the complainants name individual restaurants is part of a bureaucratic pattern that refuses to see the systemic forest for the separate trees. Reluctance to cause inconvenience for businesses may also have played a role here, as subsequent events suggest.

The complainants took their case to judicial review, where Justice Frank Edwards ordered the Commission to accept and process the case. At one point, the lawyer for the Commission argued that the Commission would be overwhelmed if it had to entertain all inquiries. To this, the judge responded (as acerbically as jurists can):

> Counsel for the Commission argues that the HRC would be overwhelmed if every inquiry had to be treated as a complaint. I am not impressed with that argument. Mr. Reed was not simply making an "inquiry", he was lodging a complaint. As such, he had the right to expect that his complaint would be "inquired into" [s.29(1)]. If the Commission or the Director ultimately decided to dismiss the complaint, then that dismissal must be on the basis of one of the reasons set out in s.29(4). It is simply not an option for the intake worker to decide not to accept a complaint.
>
> … Counsel for the HRC referred to the "sheer volume" of inquiries. What that means and how it relates to Mr. Reed's complaint is somewhat puzzling. If there are statistics available to show that unless staff can refuse to accept complaints

the Commission will be overwhelmed, those statistics should be shown to the appropriate legislative authority. They have no relevance in the context of this review.

Would the Human Rights apparatus in Nova Scotia (or any other province) in fact be overwhelmed if it had to entertain all or even a large proportion of the complaints? We will revisit this in a later section of this report.

Self-represented litigants

As we have seen above, complainants are on their own if they wish to have counsel as their case wends its way through the Commission. If their case is referred to a Board of Inquiry, the Commission's lawyers attend but do not act for complainants. If complainants challenge the Commission or a Board of Inquiry's decision, they must retain their own counsel and they will find the lawyers for the Commission or the Board of Inquiry on the other side, arguing against them.

In many of the important cases that have come before Boards of Inquiry (such as Kirk Johnson, YZ, Warren Reed et al, Darlene Lawrence, Beth MacLean et al, Lindsay Willow, Kathy Symington) complainants retained their own lawyers at their own expense. This is a wise, but expensive, move. Although Boards of Inquiry are somewhat more relaxed than the courts and are used to self-represented complainants appearing before them, they do roughly follow the rules of courtroom procedure. Not infrequently, lawyers for respondents will raise issues of some legal complexity.

In a 2012 review of Ontario's Human Rights Tribunal system, Andrew Pinto enumerates some of the problems of the old system, faced where litigants self-represented:

- Understanding and navigating the court procedure and litigation process
- How to best articulate their legal position and present their case
- Knowledge of the law and their legal rights
- Concern that the opposing side may take advantage
- Proceedings may take longer
- Filing of incomplete court documents
- Relying on judges or adjudicators for assistance, which may lead to a concern of bias or partiality
- Relying on opposing counsel for assistance
- With respect to human rights cases, there are additional concerns including:
    - The power imbalance between parties is exacerbated because many applicants tend to come from already disadvantaged groups
    - There is a public-interest dimension to human rights proceedings where the importance of the proceeding transcends the private interests of the parties

- Human rights cases can be extremely complex dealing with novel situations and involving constitutional or competing principles of law that sometimes require resolution by appellate courts
- Parties, including respondents, are not permitted to recover costs in human rights proceedings

An apt recent example in Nova Scotia is the Board of Inquiry dealing with complainant Gyasi Symonds in November 2020. Symonds, an African Nova Scotian male, alleged racial discrimination by two Halifax Regional Police officers for an altercation *almost four years* earlier. The two officers had accused Symonds of jay-walking and issued him a summary offence ticket. Symonds insisted that the officers treated him over-aggressively and did not act in a similar fashion with white people crossing the street at the same time.

Even though Symonds was very competent in directing his own case, he is not a trained lawyer and had no experience in the courtroom atmosphere. He did not have experience in the workings of a Board of Inquiry, including cross-examination, the difference between testimony and argument, and the use of case law, to mention only a few. While Symonds was aware of the findings of Scott Wortley on the disproportionate stopping by Halifax police of African Nova Scotians, he might not be expected to be aware of the Ontario Human Rights Commission Report finding that Blacks in Toronto are subject to charging, over-charging and prosecution by police heavily disproportionate to their numbers in that city.

In addition to the lawyer-adjudicator at the hearing, Symonds faced a bevy of lawyers representing the respondents (the HRM police) and the Human Rights Commission. Also, as he pointed out, all of those attending the hearing were being paid for their time and services, except for him.

In the Symonds hearings, there was a complex argument to be made of systemic discrimination (arguments of systemic discrimination are always complex.) That required legal training and research. The Commission's legal team *could* have made that argument, but did not. And Symonds could hardly have been expected to do so.

Thus, no matter what their level of legal knowledge, with no outside legal assistance Symonds and many other complainants like him are at a great disadvantage in the human rights system.

We are not saying that the human rights regime should become even more juridified (or, to use the vernacular "lawyered-up") than it is now. In simple, straightforward cases, complainants should be able to make their own arguments, state their own case. On the other hand, if the adjudicators are lawyers and the respondents have lawyers, and if the Commission's lawyers do not represent the complainant, then the unrepresented litigant is at a distinct disadvantage.

A thorough 2013 review of the problem of self-represented litigants summarizes the following social impacts and consequences:

> …depletion of personal funds and savings for other purposes, instability or loss of employment caused by the amount of time required to manage their legal case themselves, social and emotional isolation from friends and family as the case becomes increasingly complex and overwhelming, and a myriad of health issues both physical and emotionally. The scale and frequency of these individually experienced consequences represent a social problem on a scale that requires recognition and attention.

Trade unions and the human rights regime

In addition to the statutory human rights regime, workers represented by trade unions have another avenue to redress violations of their human rights – their union. Union collective agreements are deemed to contain the same provisions as the human rights legislation in their jurisdiction. A union member can submit a grievance that his/her rights have been violated and potentially proceed to arbitration. Moreover, the parties to a collective agreement can negotiate any other safeguards from discrimination in addition to those in human rights legislation.

For example, where Nova Scotia's human rights laws do not mention body size, there is no reason that such a prohibition could not appear in a collective agreement and that violations of that prohibition could not be litigated by an arbitrator and appropriate redress ordered by that arbitrator.

Indeed, arbitration boards are considered, legally, as entitled as commissions and the courts, to adjudicate human rights matters.

Moreover, where the offence has resulted in dismissal of the grievor, and a breach of rights is evident, arbitrators have the power, and do not hesitate to use it, to overturn the dismissal and order reinstatement. As we will discuss below, it is not clear if a Human Rights Board of Inquiry has that power to reinstate, or will use it. Arbitrators, on the other hand, can and do, regularly.

Truth be known, some of the most important and ground-breaking cases in Canadian human rights law have emerged from union arbitrations. For example, there is the 1995 case of a British Columbia forest firefighter dismissed for failing a physical fitness test even though she had performed the job well for several years. Her union grieved the dismissal. In 1999, the Supreme Court of Canada upheld the arbitration decision to reinstate the grievor. The court decision clarified the law and set precedent regarding the viability of employment tests.

Equity Watch is a big champion of trade unions. However, sad to say, too many trade unions are not very good at embarking on human rights cases. They don't understand human rights law and they don't like to spend their money on these kinds of arbitrations. Sometimes, they or their members have actually participated in the discrimination carried out by the employer and are subsequently dragged in as parties in human rights complaints. As well, sometimes one group of union members carries out workplace discrimination against another, causing a

conflict of interest for the union. Finally, as with human rights commissions, unions like winners. They don't like to take chances or push boundaries.

Moreover, labour relations law insists that in the matter of grievances and arbitrations, it is the union, and not the individual aggrieved member, that has "carriage" (i.e. the power to decide if and how the matter proceeds). Subject only to the legal "duty of fair representation," (to not act arbitrarily, discriminatorily, or in bad faith against the member,) the union can decide to pursue or not pursue a human rights complaint.

Unfortunately, all too often, unions are where human rights complaints go to die. It should not be so.

Although its actual policy in this is not clear, it appears that the Nova Scotia Human Rights Commission asks unionized complainants to first go to their union for redress. All too often unions fumble the ball. Unionized complainants should be able to use whichever forum they wish.

We feel that unions can do much more. The Nova Scotia Human Rights Commission can do much to help unions do their job in human rights better in this situation and we make recommendations on this matter, below.

The remedy of reinstatement

As mentioned above, most Human Rights tribunals have the theoretical power to order reinstatement of employees dismissed on prohibited grounds.

However, our research suggests that Nova Scotia Boards of Inquiry hardly ever use this tool. Why would this be so? Sometimes the complainant, if successful, prefers not to return to a poisoned work environment, but rather to seek damages. It could also be that tribunal chairs follow the lead of the courts when it comes to wrongful dismissal. No matter how egregious a wrongful dismissal, the courts do not have the power to order reinstatement but rather use monetary damages of pay in lieu of notice. Or perhaps tribunal adjudicators feel that reinstatement is cruel and unusual punishment for employers or that rejoining the former workplace will not work out for the dismissed employee. This creates an additional burden for workers, as prospective employers may avoid hiring someone who asserted their rights and may be seen as troublesome.

Successful complainants, though receiving damages, may remain unemployed, for prolonged periods, post-decision. In some cases, the trauma occasioned by the human rights offence may seriously hobble or ruin careers. Can monetary compensation and damages really fully "make [the complainant] whole?"

We do have an example of a forum where reinstatement is frequently used – labour arbitration. The evidence is that, save for exceptional circumstances, returning grievors to their jobs is the

corollary to the failure by the employer to prove it had just cause for dismissal. Historically, the reinstatement remedy has proven quite successful[7].

The prospect that an unjustly dismissed employee would walk back in to the workplace is a more powerful corrective than all but the greatest sum of damages. It sends a powerful message not only to employers but, also, to fellow employees. Possibly this is what the Commission wants to avoid.

The "Restorative justice" approach

The Nova Scotia Human Rights Commission is noted for its extensive use of the "restorative justice" approach. The philosophy behind this approach emerged from reforms in the criminal carceral regime over the past thirty years. It was a response to the placement of offenders from socially-disadvantaged groups on a one-way conveyor belt to the penal system. A better response would be to try to avoid incarceration by getting the accused to admit and take responsibility for their offence, appreciate the harm caused and give them the chance to redeem themselves to the community affected and make amends.

In a human rights setting, complainants meet with defendants and other stakeholders and attempt to work out solutions in a no-fault, problem-solving way.

In theory, this sounds laudable. However, a solution meant to keep relatively powerless and disadvantaged offenders out of jail in the criminal system may not be totally appropriate in a human rights setting, where the offenders are usually privileged and powerful employers, landlords or business owners.

Lyubanski summarizes nine criticisms of restorative justice, (in reference to its use in schools):

- It takes an inordinate amount of time
- It is emotionally draining on all parties, but especially the ostensible victim
- It is distracting from other work at hand
- If there is no punitive aspect, it can leave perpetrators unaccountable
- Perpetrators may feel they are being manipulated and controlled by the process
- Victims/survivors may also feel manipulated by a process that forces them to talk to those who did them harm
- Victims/survivors, especially of sexual assault or racism, may feel re-victimized and also feel pressured to forgive their antagonist
- Restorative processes forced on people rather than created with them, can breed resentment and resistance rather than closure

[7] Barnacle, Peter J. 1991. *Arbitration of discharge grievances in Ontario: outcomes and reinstatement experiences*. (Kingston, Queen's University Industrial Relations Centre)

Annalise Acorn, in *Compulsory Compassion*[8], her critique of restorative justice, suggests that sometimes "the bad guy getting skewered can still potentially be a very good thing."

Several of us have been involved in what the Commission calls "resolution conferences." These meetings involve the complainant(s), the respondent(s), their lawyers, and others on both sides having a knowledge of the circumstances of the complaint and several "stakeholders" whose interests could be affected by the outcomes. We have found several problems with this approach:

- With so many stakeholders involved, these conferences can eat up time in a system not renowned for its haste
- The involvement of "stakeholders" not directly connected to the events in question can be confusing and frustrating
- There is not-so-subtle pressure on the complainant to settle with the respondent prematurely and sometimes inappropriately
- Although input from victims is valuable, they may not advocate well for themselves, know all the remedies possible, or engage in the same type of analysis as a professional might
- As with many complaints involving systemic discrimination, the Commission representatives and lawyers for the respondents have a very imperfect understanding of this concept. They concentrate on the hunt for a "smoking gun" and become impatient if such does not readily appear
- Although the process is meant to hear from the parties themselves, and their lawyers are cautioned not to speak, lawyers intervene regularly

While restorative justice may be a viable method of resolving some complaints, there is a danger in relying on it too exclusively or in applying it in a cookie-cutter fashion to try to address deep structural problems in the human rights regime. Systematic study of the Commission's use of restorative justice is needed, including after-the-fact follow-up with how complainants view it in retrospect.

We have been told that the resolution conference is not employed as much now as it was in the past, but we would like to see more systematic study. But we have also been told that the restorative approach is still in vigorous use by the Commission.

Gus Reed, one of the main protagonists in the above-mentioned Wheelchair Case, is especially disapproving of the restorative approach into which the six complainants were cajoled after all of the struggle they went through to get the Commission to accept their complaint and their victory in the courts and at a Board of Inquiry.

[8] Acorn, Annalise. 2003. *Compulsory Compassion*. (Vancouver, University of British Columbia Press) 161

More than four years after their initial complaint and more than two years after their Board of Inquiry victory, the six are still mired in restorative discussion with a throng of "stakeholders."

The wheelchair complainants found themselves in restorative discussions with parties like the provincial government and representatives of the food and beverage industry, both of whom had ample incentive to avoid the full consequences of the Board of Inquiry decision.

Says Reed, "As practiced by the Human Rights Commission, restorative Justice doesn't honor seekers of justice, it hides them. It also shields the perpetrators of human rights offenses from public view. Since there is no precedent set, the [Human Rights Commission] permits, no encourages, further offenses. By not penalizing offenders, it turns an offense to society into a mere inconvenience."

The restorative justice concept has also been tried in the case of the black firefighters mentioned above. Black firefighter Kevin Reade, eloquently writes of the many challenges in implementing a restorative approach in an organization run with a traditional command-and-control approach: "The approach demanded that orders be followed with no input. People are perceived as resources to be managed and deployed. This fire ground mentality is essential for effective chain of command and fire ground tactics at a scene. But these same officers who are brilliant on the fire ground commanding skilled crews could not maintain healthy and safe relations among crews in the stations. One hundred per cent of our training is oriented to excellence in fighting fires; the problem is we only fight fires 10% of the time; the rest is living, learning and working together." He goes on:

> One of the major challenges in implementing a restorative approach focused on these relational skills and work is buy in: we do not understand what being restorative means. This is true right across the board in the department and the city. The lack of understanding is not just a failure to define restorative. It is connected to misconceptions in at least four ways: (1) management thinks restorative is about taking away the right to discipline; (2) corporate human resources believe it is a tool to put in their tool kit for conflict resolution but that it does not have any greater implications for policy and practice; (3) the union believes it is a way of circumventing punishment; and (4) the membership believes that all we do is hold hands and hug.

The Nova Scotia Human Rights Commission is due for a thorough and honest review of its love affair with "restorative justice."

Settlements and non-disclosure agreements

As we have seen above, close to one-third of complaints accepted by the Nova Scotia Human Rights Commission are settled by private agreement among the parties.

Respondents who offer settlements want accusations against them settled without findings of guilt. They also don't want their names disparaged and bruited about in the community. So they demand the successful complainant sign a non-disclosure agreement (NDA).

Private settlements can be helpful in avoiding costly and time-consuming boards of inquiry. Settlements also enable a victim to have some control over the outcome rather than leave it in the hands of a third-party adjudicator where there is often an all or nothing result, and they can avoid the time, expense, and, more importantly, the emotional outlay involved in continuing a complaint. As well, victims sometimes prefer a private resolution rather than have what happened to them be a matter of public record.

However, if one the main purposes of the human rights regime is public education and general deterrence, then a gag order renders the settlement route absolutely useless. One need look only at the case of women harassed by producer Harvey Weinstein, to see the damage NDAs can do to the women and to the public interest.

When respondents negotiate a settlement with a complainant, counsel for respondents will nearly always ask the complainant to sign an NDA. This is often an agreement by the complainants that they will disclose nothing about the terms of the settlement, not only the amount of compensation, but anything at all. Sometimes the respondent demands to be released not only from the initial complaint but from *any and all related claims.*

Failure to abide by the terms of an NDA can result in part or all of the settlement being nullified. In one case, a complainant commented on her settlement on Facebook and the Tribunal ordered her to pay part of the settlement back to the respondent. Settlements can be nullified due to breaches of a non-disclosure agreement. In another case, a complainant merely mentioned to another employee, without any details, that the employer had settled a human rights complaint with her. This was enough for the employer to demand that the settlement be reversed. In that case, the Tribunal disagreed that the mere mention of a settlement was a breach. It shows, however, the extent to which some respondents will go in enforcing the silence intended in NDAs.

Usually, complainants are so glad to have concluded their case that they are happy to "take the money and run," but what of the public interest?

A case in point was that of *Radha Koilpillai v. Saint Mary's University*[9]. Ms. Koilpillai's complaint was that, in the matter of hiring, the university discriminated against her on the basis of her race. Faced with the challenge, the university closed the job competition entirely. The Human Rights Commission accepted the case and referred it to a Board of Inquiry. Many important issues of employment equity were raised in the hearing as witnesses testified on her behalf and a Board of Inquiry decision, either vindicating or rejecting her complaint would have been

[9] Willick, Frances. 2015. "Complaint gets OK to proceed; Ex-SMU prof raised rights issue." *Halifax Chronicle-Herald.* February 4. A7

educative. However, the respondent avoided having to present its case by negotiating a settlement with Koilpillai, who signed an NDA. The non-disclosure agreement presumably prevented her from discussing any terms of settlement or issues pertaining to the case. The public will now never know any more about the alleged racial dimensions of the case at a leading Nova Scotia university. This is one of many instances like it where non-disclosure shuts down the public debate.

The Ontario model

The Nova Scotia model of human rights regime clearly has numerous existential problems and cries out for change. It would not be an exaggeration to say that we and others are fed up. Thus we are compelled to examine alternative models in Canada

Such an alternative has existed in Ontario for sixteen years – a tripartite system with a clear division among three different agencies, a Human Rights Commission, a Tribunal, and a Human Rights Legal Support Centre..

We know that the Doug Ford government has ruthlessly starved the Ontario human rights regime of resources and it is, therefore, seriously hampered in its operation. However, there is considerable evidence that before that deliberate political sabotage, the new system was working well.

It is also important to remember that the Ontario model comes as a package. As we will describe below, the model works only if all three elements exist. Take one of the three agencies and its function away or starve it of resources and the model suffers irreparable damage.

For example, in British Columbia, the government abolished the Human Rights Commission, once in 1983 and again in 2002. The only avenue available for complainants was a direct-access tribunal. The experience for human rights was brutal. Without a Commission, there was no direction, no research, no public advocacy, and no education. Despite a rudimentary "Human Rights Clinic" or unless they hired their own legal representation, complainants were very much on their own, sitting ducks for better-funded respondents like employers, landlords and service-providers. So merely going to a direct-access tribunal is very much NOT recommended.

But the Nova Scotia model, as we have shown, has many problems. Prior to 2008, Ontario faced dilemmas like those we have described confronting Nova Scotia. As in Nova Scotia there was a Human Rights Commission that held exclusive jurisdiction to receive and process complaints of violation of the Human Rights Code. Ontario had a permanent Tribunal to which the Commission referred cases which the Commission believed had merit. However, there was no public agency to provide complainants with assistance in preparing and presenting their cases.

The *Pinto* Report, a thorough 2012 review, described the old Ontario system and evaluated the new one. The role of the Human Rights Commission under the old system was much like Nova Scotia's:

> The Commission staff accepted complaints, processed them, offered mediation and investigative services, and made non-binding recommendations to the Commissioners as to whether or not to refer a complaint to the Tribunal [similar to a Board of Inquiry in Nova Scotia.] The Commissioners reviewed the staff's recommendations along with submissions from the parties themselves, and made legally binding decisions about whether or not to send complaints to the Tribunal.

As in Nova Scotia, the pre-2008 Ontario Commission took control of complaints and gave complainants very restricted opportunity to participate in their own cases. The Commission screened complaints and either rejected them with very brief reasons or referred them (with few, if any, reasons) to a tribunal. As with Nova Scotia's Boards of Inquiry, the tribunal was a separate legal entity from the Commission, but a complainant could access it only if the Commission made the referral.

According to Pinto, only a small fraction of Ontario complaints made it to a Tribunal. In the ten years before the 2008 system change, only about 7% of applications accepted for investigation (still more than in Nova Scotia) made it there, though some were settled by mutual agreement.

As in Nova Scotia, the Ontario Commission was charged with representing "the public interest" rather than representing the complainant, especially at the tribunal. Complainants could self-represent there or hire their own legal counsel, but there was no legal support offered to complainants.

Pinto describes the impetus for change. First, the purpose of a Human Rights Commission had changed since its inception in the 60s. As one review reported:

> The human rights enforcement system was originally developed at a time when discrimination was commonly understood to be an individual problem arising from isolated events. Over time, it has become apparent and widely accepted that discrimination often arises from deep-rooted systemic patterns of behaviour and institutional practices that reinforce the disadvantage faced by traditionally marginalized groups within society. In conjunction with these developments, our understanding of how best to eradicate discrimination and build a culture of human rights has also evolved dramatically[10].

Second, the volume of complaints grew in size and complexity, and calls for reform abounded. The efficacy and legitimacy of the system were increasingly under critical scrutiny. Similar problems plagued other Canadian jurisdictions and an abundance of reviews appeared in the 90s and early 2000s.

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[10] Cornish, Mary, Fay Faraday, Jo-Anne Pickel. 2009. *Enforcing Human Rights in Ontario* (Aurora, Ontario: Canada Law
Book)

As early as 1992, an Ontario task force chaired by lawyer Mary Cornish was recommending changes for reform similar to those that eventually appeared in 2008. At the federal level, an inquiry led by Mr. Justice LaForest made similar recommendations for the Canadian human rights regime.

Despite the Cornish report, the Ontario NDP government at the time did not act to implement the recommendations. It would take a subsequent Liberal government, fourteen years later, to do so.

Pinto cites five problems of the pre-2008 Ontario system, which should be quite familiar to critics of the current Nova Scotia human rights regime: Delay, Conflict of Roles, Duplication of Efforts, Gate-keeping, and Inability to Tackle Systemic Discrimination.

Delay

Pinto's analysis of Ontario's old system showed that the average timeline from the filing of a complaint to referral to a Tribunal was over 2 ½ years. Stakeholders were simply fed up with the amount of time it took to get their "day in court."

Conflict of Roles

The Ontario Human Rights Commission was simply wearing too many hats. It was expected to be investigator, mediator, complaints-processor of individual cases as well as educator, researcher and promoter of human rights in general. Although the Commission was supposed to be neutral, both complainants and respondents felt the Commission favoured the other side. As Pinto points out, at judicial reviews, where complainants challenged the Commission's decision not to proceed to a Tribunal, all pretence of neutrality disappeared and the Commission faced complainants as a legal adversary. This did not contribute toward good will and it does not do so in Nova Scotia.

Duplication of Efforts

The old Ontario process often involved several iterations of the same action. For example, both the Commission and the Tribunal would make their own attempts at mediation. Even the practice of the parties laying out their cases was repeated, once in the investigation and once again, at the hearing. This duplication added to the time and expense of the parties and for the government funding the whole system.

Gatekeeping

The old Ontario Human Rights Commission made decisions on whether to go forward to a Tribunal behind closed doors. There were allegations that small-p (and perhaps large-p) politics, cost and the identity of complainants and respondents played too much of a role in those decisions and the legal and societal merits of cases played too small a role. The fact that such a small proportion of cases were being referred to Tribunal suggested that the Commission was acting, not as an enabler, but as an inhibitor, of human rights.

Improper Focus on Individual, as Opposed to Systemic, Problems

As we have criticised about Nova Scotia, the old Ontario Commission focussed almost exclusively on the flood of separate and discrete complaints, while overlooking background issues of a systemic nature. Using Nova Scotia as an example, it was not until one man, Kirk Johnson, decided he had been stopped for "driving while black" once too often, that the question of race-based stop checks came before the Commission. And even then, it took a further thirteen years after the Johnson decision for the full systemic nature of the problem became evident. Mere research before the Johnson complaint, had it been done, would have told the Commission that this type of systemic discrimination was there. In terms of prevention of human rights abuse, approaching this question as a possible systemic problem could have been dealt with much earlier and much more effectively. As we will see below, the *new, post-reform* Ontario Human Rights Commission did just that in 2020.

In Ontario, the pressure for reform reached a climax in 2006 when Attorney General Michael Bryant introduced Bill 107, giving credit to Cornish for the inspiration. The government held public hearings over five months, and then, before rolling out the new system, instituted several amendments. One of those was that the Commission would report to Ontarians directly through the legislature rather than through the Attorney General.

Pinto was assigned to review the new Ontario human rights regime four years after its inception. His mandate included assessing "the extent to which the current system is delivering against universally desirable objectives such as access to justice, transparent adjudication, timely disposition of cases, and the elimination of systemic discrimination."

We are impressed by so-called Ontario or tripartite model of human rights bodies and feel that Nova Scotia would be well-advised to follow that reform.

In brief, the Ontario regime has the following structure. There are three separate bodies, each with a distinct mandate:

- A Commission responsible for research, education, monitoring and advocacy.
- A direct-access Tribunal responsible for complaint intake and adjudication, and
- A Human Rights Legal Support Centre providing legal advice and representation to individuals suffering discrimination.

Human Rights Commission. The first agency is the Ontario Human Rights Commission. In the new Ontario model, the Commission does not take and screen complaints of discrimination from the public. The Commission's role is restricted to policy matters and public education. It does have the power to act on its own initiative in bringing forward complex issues, like systemic discrimination and racial profiling, to the Tribunal.

For example, in August 2020, the Ontario Human Rights Commission compiled and issued its report *A Disparate Impact*, which confirmed that Black people are disproportionately arrested,

charged and subjected to use of force by Toronto police. Again, had the Nova Scotia Human Rights Commission not sat by and waited for someone like Kirk Johnson to walk in the door, but rather applied this kind of analysis on its own initiative, think about how much sooner Nova Scotia could have dealt with the problem of Halifax Police stop checks than was eventually the case.

Tribunal. The second agency, the Ontario Human Rights Tribunal is the body dealing with complaints. While it plays a role in screening, mediation and settlement, and tries to whittle down the sheer number of cases, it still allows complainants the possibility of a hearing.

Section 43 (2) of the new Ontario Human Rights Code reads:

> 1) An application that is within the jurisdiction of the Tribunal shall not be finally disposed of without affording the parties an opportunity to make oral submissions in accordance with the rules; and 2) An application may not be finally disposed of without written reasons.

In other words, though forms of mediation are encouraged, no complainant to the Tribunal is denied access to their "day in court" of some sort if that is what they wish. That "day in court" may be as short as a "summary hearing" to decide whether the case merits a full inquiry. But unlike in Nova Scotia, every complainant who so wishes has a chance to be heard. Moreover, written reasons must be given by the adjudicator(s).

We are informed by those familiar with the Tribunal that allowing direct access has brought forward numerous cases that might have been rejected in the old system but, under the new system, made their way to adjudication and helped expand the opportunity to address new challenges and new issues in human rights.

There is saying that "good cases make good law." It means that we want adjudicators and judges to make strong and clear decisions and judgments that help the public better understand the law and what kind of conduct we want to encourage in our society. Such verdicts are facilitated where the facts contribute to a decision that almost "writes itself." But life is more complex than that. As we mention above, the world is full of subtleties and unadventurously "picking winners" leaves a lot of justice undone. In Appendix 1, we give an example of a human rights case from Saskatchewan that looked extremely unlikely to succeed and where the Commission warned the complainants against proceeding. But the Commission eventually recommended going ahead and an astute adjudicator threaded a needle to fashion an inventive decision that furthered the cause of human rights.

Legal Support Centre. The third agency is the Ontario Human Rights Legal Support Centre. It offers advice to applicants, assists them in framing their complaints and can act for clients before the adjudicators.

The main reason for the Centre is that, in the old system, about 65% of applicants were self-representing (i.e. did not have their own lawyer.)

The Legal Support Centre fulfils its mandate by providing:

- a telephone helpline offering callers to obtain legal information by listening to recorded information and/or speaking to a Human Rights Advisor.
- A website, www.hrlsc.on.ca, offering information about the Human Rights Code Code and the Centre itself
- A Toronto main office offering in-person assistance by appointment.
- Staff located in community clinics in five other cities

The Centre operates separate from the Legal Aid system and does not apply means tests.

Among the services provided by the Centre before, after and during the Tribunal process, are:

- Assessing the merits of claims for clients
- Helping individuals to complete a Tribunal application form (sometimes through a self-help process or an application "clinic")
- Providing representation during settlement negotiations
- Providing representation at a mediation or hearing
- Providing assistance related to enforcement of settlements and Tribunal orders.
- Full representation at mediation
- If mediation does not work, and the applicant meets the Centre's criteria, it may offer full representation at a hearing of the Tribunal

The degree of support provided depends on the needs of the individual, the merits of the claim and "the complexity of the evidentiary and legal issue."

At the time of the Pinto Report, the Centre was representing 12% of the applicants before the Tribunal. The rest either received initial support from the Centre, or hired their own counsel or self-represented in full.

Pinto found that "the Centre, once engaged, provides high quality legal assistance, support, advice and representation." However, among the challenges found by Pinto:

- The demand for its services outweighed the ability to deliver
- There was a challenge getting the right mix between assistance to, and actual representation of, the client in the Tribunal

Despite these challenges, Pinto concluded that

- Up to the point of publication of his report, the tripartite system was working well, and far better than negative critics claimed
- The Centre was never intended to provide free and complete legal representation throughout the Tribunal process
- The Centre's criteria for deciding how much assistance to deliver were in keeping with expectations

- The fact that it had to refuse some services to some clients based on its assessment of their cases' merits did not, as some critics charged, render the Centre a "new gatekeeper."

We note the idea of a direct access model of human rights regime and a legal support centre is by no means new:

- They have been operating in Ontario for twelve years,
- They were recommended for the federal jurisdiction by the LaForest Report in 2000
- They were recommended by the several previous reviews of the Nova Scotia human rights regime, as mentioned above
- Aspects are contained in the US Equal Employment Opportunity Commission

Thus, we recommend that Nova Scotia look seriously at an Ontario-style human rights regime..

Recommendations

1. Tripartite set of agencies
    a. We recommend that the current Nova Scotia human rights regime seriously consider moving to a tripartite set of agencies, similar to that which exists in Ontario, as follows:
        i. A Human Rights Commission, whose responsibility will become both more restricted and broader at the same time: research, analysis, education, monitoring and public advocacy
            1. One of the key functions of the Commission will be researching, identifying and initiating prosecution of systemic discrimination
            2. The Commission will ensure that decisions of the Tribunal and commitments made in settlements are monitored for compliance
        ii. A permanent Tribunal, with direct access by complainants, which would process complaints, arrange for mediation and settlement where possible, and ensure, as in Ontario, that no applicant or respondent is denied the opportunity to make oral submissions to and to receive a written decision from an appropriate decision-making group
        iii. A Human Rights Legal Support Centre which would provide legal and paralegal assistance to claimants, on the Ontario model
2. Serious support for a new regime
    a. As we mention above, the tripartite set of agencies must come as a package. Like a stool with three legs, the absence or weakness of one leg jeopardizes everything. Each of the three agencies must be supported and not starved of resources. For example, the Commission must have a serious research capacity and commitment to addressing systemic discrimination. The Tribunal must be staffed with competent adjudicators/mediators. The legal support centre must offer effective assistance to complainants.

3. We mentioned above how the high rate of rejection of complaints by the Commission results in a crisis of public confidence in the Nova Scotia human rights regime. The combination of a direct-access Tribunal and a legal support centre alone will do much to raise the public's trust in their opportunities for justice in the system.
4. We mentioned above that the present Commission tends to narrow its recommendations to the Boards of Inquiry to a small set of "winners." One of the findings in the new Ontario system is that direct access, allowing individuals to own their own "day in court", leads to some surprises. A wider variety of cases now are examined in Ontario and this serves the interests of human rights very well.
5. If there is a finding by the Tribunal or an admission in a settlement that a climate of systemic discrimination exists with a particular respondent for a particular class of people, then in future litigation it will be assumed that all members of that class of people subject to the systemic discrimination, without need for new proof. For example, if systemic discrimination against women is found, then it will be assumed that it applies to all women, unless the respondent can prove otherwise.
6. All stages of the process at the Tribunal should have clear service delivery standards/time limits, including lengths of investigations
7. Adjudicative panels (e.g. Boards of Inquiry, Tribunal) should, where appropriate, have three members and, at minimum, one should be from the same protected group as the complainant.
8. The human rights regime should make it easier for advocacy groups to be granted intervenor status.
9. The Commission should establish liaison committees with each equity-seeking community, not only to promote the work of the tripartite agencies, but also to encourage members of those communities who might otherwise be hesitant to make complaints, to overcome their hesitation and use the Tribunal for complaints and the Commission for investigation of systemic discrimination, as well as encourage community members to do likewise.
10. There should be some guarantee that the three agencies will be resourced and staffed at an adequate level. This is especially important in the Tribunal. The Ontario experience shows us that the quality of Tribunals depends crucially upon the existence of a core of trained, experienced, sensitive and competent adjudicators and mediators.
11. Political reporting structure
    a. The three agencies should report directly to the legislature and not to the Minister of Justice
12. Review of operation of the new human rights regime every five years
13. Review of grounds upon which discrimination is prohibited
    a. The government should set up a task force to recommend new human rights grounds upon which it is prohibited to discriminate
    b. We suggest that the task force consider discrimination on body size, and bullying, as candidates for inclusion

    c. The Tribunal should have the legal power to invoke equality rights as in S. 15 of The Charter in order to rectify cases of discrimination and bigotry which do not fall directly under one of the already-prohibited grounds
14. Inclusion of psychological harm in the Occupational Health and Safety Act
15. A complainant who is unionized should have the option of processing the complaint through the union or through the Tribunal and should not be limited by the union
16. The Commission should initiate a training program for trade unions to help them better understand human rights and their role in helping their members in human rights issues
17. Increase time limits for complaints to Tribunal to three years
    a. The time limit for filing a complaint at the Tribunal shall be three calendar years from the behaviour giving rise to the complaint or from when the complainant should reasonably have become aware of the behaviour
18. No imposed non-disclosure agreements
    a. No complainant party to a settlement with a respondent can be required to agree to sign a non-disclosure agreement unless they themselves initiate it.
    b. The substance of settlements will be made publicly-known, except for parts that the complainant themselves wish to remain confidential
19. Citizens' Review Board
    a. There will be established a "citizens' review board" independent of the Human Rights Commission, which shall include representatives of equity-seeking groups. Its mandate will be the monitoring of progress on any set of remedial measures ordered by the Tribunal or agreed to by settlement
20. Progress on remedial measures
    a. Reports on progress on any set of remedial measures ordered by the Tribunal or agreed to by settlement will be made available to the media and the public
21. Trusteeship
    a. Where a particular respondent has engaged in a particularly egregious or continuous set of offences, the Commission should have the power to declare a "trusteeship" over that respondent. This would entail the Commission establishing a careful watching brief over the respondent and obviate the necessity of new formal complaints to initiate new Tribunal hearings.
22. The question of thresholds for finding discrimination
    a. Thresholds for examining what constitutes racism and other forms of discrimination need to be revisited. The standards were established at a time when racism and discrimination was often overt. This needs to be redesigned to meet modern day realities of more subtle (but just as damaging) systemic discrimination. For example, more time and resources need to be dedicated to developing sophistication in understanding intersectionality, both for the NSHRC and the Tribunal.
23. Publicly available records of Tribunal decisions

a. We have mentioned above that transcripts of Board of Inquiry hearings, though available to counsel and adjudicators, are prohibitively expensive for members of the public
b. In these days of digital recordings, voice-recognition software and other marvels, it should not be terribly difficult or expensive to make digital transcripts of testimony and arguments at hearings available to members of the public and the media who wish them

24. A move away from one-size-fits-all "diversity and inclusion" emphasis in the Commission's remedial efforts and public education
    a. We recommend that education programs concentrate on equity and behaviour modification through the 3Ps (processes, policies and procedures) rather than things like "diversity" or "anti-bias" as there is no credible research buttressing its sustained effectiveness. Diversity and anti-bias are not the functional equivalents of equity and it is equity that can make tangible improvements in the lives of Nova Scotians. Amelioration of systemic discrimination and harassment should not depend on changes in individual consciousness or virtue. A start would be a requirement for all employers under provincial jurisdiction to provide information on the rights and responsibilities of employers and employees under the Act and Charter. As well, the Commission should audit government and employer policies to identify barriers and disparate impact faced by disenfranchised groups, as well as adverse impact discrimination
25. Penalties and damages
    a. In general, penalties and damages awarded by the Tribunal to successful claimants shall be high enough to send appropriate deterrent messages to the public and to potential respondents
26. Restorative justice
    a. We recommend that restorative justice approaches be sparingly-used, entirely voluntary; and that there be strict time limits; if the approach is recommended by the Tribunal, then the Tribunal remains seized of the matter. Where there is little progress, the matter should revert back to the Tribunal. Resort to restorative justice approaches should be the choice of the complainant to both begin and terminate the process, and independent assistance/guidance should be provided to the victim. Restorative justice is dependent upon the skills of the facilitator, as is the quality of resolution. Moreover, restorative justice is not appropriate in all cases. Many perpetrators of workplace discrimination and harassment feel supported by their organization and its dysfunctional culture. However, restorative justice focuses on individuals and, essentially, ignores the role of the workplace or organization.
27. Increased "Situation" and "Paired" Testing
    a. Unfair discrimination among groups of people in employment, housing and other services exists but is sometimes difficult to target and verify. Passively waiting for

the right complainant to walk through the door of a human rights agency in order to investigate discrimination is not the most effective way to combat bigotry. Victims may not be aware of the discrimination; they may be unable to "prove" that their bad treatment is a result of discrimination, and they may simply be discouraged, or cynical about the possibilities of getting help. A pro-active technique is for an agency to use "situation" or "paired testing." These techniques involve assigning characteristics and qualifications that are comparable in key respects to test groups, or pairs, with the only significant distinction between the groups or between the pairs being the factor that may lead to discrimination. For example, test subjects from different racial groups are sent to access services or apply for housing or enquire about employment. Differential treatment between the groups or pairs can then be analyzed. These techniques have been widely used throughout Canada, adopted in the United States and Europe but, rarely, if ever, utilized in Nova Scotia.

b. In keeping with the suggested new duties, we recommend that the Human Rights Commission move from a reactive to a proactive approach with such techniques.

Appendix 1: Fancy v. Saskatoon School Division No. 13

We have mentioned above that the habit of picking only clear "winners" can lead to a stultified, unadventurous human rights regime. Moreover, we trust that opening up the intake system will present adjudicators with new opportunities to "make new law" and to pursue and achieve justice.

A case at the Saskatchewan Human Rights Commission in 1999 is an example of how new human rights can be fashioned in a difficult case.

In the 1990s, Advocates of Respect for Diversity in Public Schools, a group of parents of school-age children, had approached the Saskatoon Board of Education to complain of its practice of allowing principals and teachers the discretion to conduct The Lord's Prayer and Bible readings in their classes or at assemblies.

During these events, children who did not wish to participate or whose religion found the practice offensive were allowed to be silent, or to exempt themselves in another part of the school, or to say their own silent prayer.

Several children complained that these exceptions still put them at a disadvantage, exacerbated difference, and sometimes subjected them to scorn from other students and discomfort.

The issue of prayer in public schools had been visited before in several provinces and ruled counter to the Charter of Rights and Freedoms under the rubric that freedom *to practise* religion also means freedom *not to practise* religion. In other words, if we should not

unreasonably be restricting people from practising their religion, we should not be restricting people from practising now religion.

When the Saskatoon parents approached the provincial Human Rights Commission, they learned that Saskatchewan and Alberta were considered exempt from those Charter rulings.

The 1905 deal by which the two provinces (formerly known as "The Northwest Territories") entered Confederation allowed certain old laws or ordinances to continue in effect. One of these ordinances imported into The Saskatchewan Act prescribed recitation of The Lord's Prayer and Bible readings in public schools. The Saskatchewan Act became part of the Canadian Constitution, and as such, could not be trumped by another part of the Constitution, like the Charter of Rights and Freedoms.

Nonetheless, the Human Rights Commission allowed the case to go forward to a Board of Inquiry, chaired by K.R. Halvorson, a retired superior court judge.

The parent's group was joined by the Unitarian and the Jewish congregations in town, as well as the League for Human Rights of B'nai Brith.

The complainants called several children and their parents to testify about their experience of discrimination. An adult member of the Jewish congregation also testified about his own feelings of affront as a pupil. A psychologist from the League for Human Rights spoke as an expert witness about the impact of the practice on offended children.

The Board of Education, confident of the strength of its legal position, chose not to seriously cross-examine the witnesses nor call any of its own. If there was discrimination, the Board insisted, it was allowed under the Saskatchewan Act.

Despite the legal difficulties inherent in the case, the Board of Inquiry chair managed ingeniously to thread the needle to allow a "win" for the parents. This is now a significant decision in the annals of Canadian human rights law.

The adjudicator considered two questions: first, did the recitation of the Lord's Prayer and Bible readings discriminate on the basis of religion; second, if there was discrimination, was it excused by the sections of the Saskatchewan Act which allowed for such recitation and readings.

It is clear in reading the decision that the adjudicator felt that the practice was offensive from a common sense human rights standpoint, especially given legal precedent in other provinces. It contains pithy barbs like urging the Board of Education to "shed its image as a backwater of religious tolerance." But was it offensive to the law?

On the first question, he ruled that yes, there was such discrimination. It is on the second question that he fashioned a creative response. In essence, he said, if the School Board wished to employ the provisions of the Saskatchewan Act, then they must follow the letter of the law and apply them in precisely the way they were specified at the turn of the 20th century. In other

words, prayer and readings are to be carried out daily in all schools, both elementary and secondary.

The adjudicator had awarded the Saskatoon School Board a poison pill. Faced with the prospect of following hundred-year-old ordinances to the letter, the Board declined thereafter to continue the practice of the Lord's Prayer and Bible readings in its schools.

Faced with a case that presented prodigious legal and logistical difficulties, the Saskatchewan Human Rights Commission decided to take some risks in the pursuit of justice. And thus was new law creatively built in the realm of human rights.