On the Right(s) Path: A Study of Human Rights Law and Practice in British Columbia

by

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A thesis submitted in partial fulfillment of the requirements for the degree of

Master of Arts

Department of Sociology

University of Alberta

Abstract

Canada's anti-discrimination legal regime is among the oldest and most established in the world. In this thesis, I examine those human rights institutions in Canada that were created to enforce anti-discrimination statutes to determine which system is more accessible to people from marginalized populations. Human rights legislation works to disrupt discrimination through the administration of human rights complaints and through human rights education. Human rights institutions have, however, faced a backlash since the 1980s from the media and prominent political figures that challenge the legitimacy of the commission system. As a result, some jurisdictions have replaced the commission system that has been a cornerstone of the Canadian human rights landscape since the 1970s. Both British Columbia and Ontario have implemented the direct-access system. In this thesis, I analyze which system is more accessible to people from marginalized populations using British Columbia. British Columbia is the ideal choice for comparative research of this nature because the provincial government has switched between both systems multiple times since the 1960s.

In order to determine which system is more accessible to people from marginalized groups, I analyze data from government-sponsored reports which have been produced in multiple jurisdictions in Canada. These reports contained information on how to improve the accessibility of human rights institutions. Furthermore, I examine annual reports produced by the British Columbia Human Rights Tribunal from 2006 to 2016 and the British Columbia Human Rights Commission from 1996 to 2002. The statistical data derived from these reports supports the contention that the commission is more accessible than the direct-access model. In sum, based on the data from these reports as well as a detailed review of a dozen expert reports on human rights institutions in Canada, I argue that the commission system is more accessible to people from marginalized populations than the direct-access system.

Acknowledgements

There are many people that I would like to thank for their continued support throughout my thesis. First and foremost, thank you Dr. Dominique Clément for supervising my thesis. Without your guidance and support throughout this project this thesis would not have been possible. Your assistance has helped me grow as a writer, a researcher, and an academic. Thank you also to my two committee members Dr. Michelle Maroto and Professor Linda Reif your feedback throughout this project was invaluable. I would also like to thank the sociology department. The faculty and students at the University of Alberta have helped to make my master's degree an enjoyable and engaging experience.

I would also like to thank those close to me who helped me through my education and this thesis. My friend Melissa Wilson, who helped motivate me and kept me company during late night work-sessions. My friend Garrett and my cousin Alysha who believed in me and offered their support whenever possible. To my sister Ashley who was always there for me. Finally, my parents Tim and Betty Arkinstall, thank you for always believing in me and for providing me with everything I needed to be successful. I would not have been able to achieve all I have without your constant encouragement.

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Chapter 1: Introduction

Human rights are those rights that people have by virtue of their humanity. But human rights have particular salience to people from marginalized populations (Donnelly, 2007). Marginalized populations include people who have a reduced presence in the economic or political spheres of society (Walker & Walker, 1997; Jenson, 2000). According to Joanne Hall and Kelly Carlson (2016), marginalization occurs because "persons or groups are socio-politically peripheralized from dominant, central experiences, that is, deprived of mobility, control over self will, and/or critical resources; undignified and humiliated; exposed to toxic environments; and/or exploited physically or mentally, such that they are at increased safety, health, social, and political risk" (p. 202). Similarly, Hall and Carlson argue that the ongoing effects of colonialism, racism, sexism, classism, and similarly oppressive ideals disproportionately affect people from marginalized populations. People on the margins in society can overcome and survive these pressures. However, many do not and instead encounter increased distress, negative health outcomes, and a higher risk of illness and death (Hall & Carlson, 2016). The effects of marginalization are broad and lead to scientifically observable inequality between those who are socially included or part of the dominant group and those who are on the margins.

People who are visible minorities, immigrants or Indigenous face many unequal opportunities related to, for example, employment. Visible minorities, new Canadians, and Indigenous people are more likely to be unemployed or to be in a job for which they are overqualified. Furthermore, they are often underpaid or work in low-pay industries. Indigenous people and people who belong to visible minority groups with university educations are less likely to be managers or in executive positions. Moreover, people who are indigenous or who

belong to a visible minority rarely make enough money to rank within the top 20 per cent of the highest paid employees in society (Tepperman et al., 2020)

Some of the most pervasive forms of discrimination that human rights laws were designed to address involve gender and sexual orientation. Compared to men, women are still in fewer top paying jobs. Women working full time make less than men – they earn 87 cents per hour for each dollar made by men in the same types of jobs (Tepperman et al., 2020). Furthermore, this gap widens for women who are part of a minority group in Canada. Women have a higher chance to be destitute than other demographic categories. Women are also more likely to have a disability then men. Furthermore, women with a disability make much less than men who are disabled, on average (Tepperman et al., 2020). LGBTQ2S+ people also encounter marginalization in society. Transgender people, particularly transgender men are at an extremely high risk for sexual offences. According to Bauer and Scheim (2015) in Ontario, 20 per cent of trans people stated that they were either physically or sexually abused because of their gender identity. Moreover, in the workplace, gay and lesbian people face discrimination, and many feel compelled to avoid revealing their sexual orientations at work in fear of being discriminated against (O'Ryan & MacFarland, 2010).

Marginalized people are socially excluded and face rampant inequality in society. Interventions that can improve the lives of marginalized people are ones that help to better integrate marginalized people into the dominant culture in society (Jenson, 2000). Anti-discrimination laws are one such intervention. In Canada, most anti-discrimination statutes are referred to as Human Rights Acts or Human Rights Codes. In this study, federal, provincial, and territorial human rights statutes are referred to as human rights laws. The purpose of human rights law is to provide people with an avenue to seek redress from discrimination in employment, services, and accommodation. These laws help to ensure that groups who have been historically

excluded in society are included (Walker, 2002; Howe & Johnson, 2000; Clément, 2014). Moreover, without human rights legislation people could be refused service at, for example, a bar or accommodation at an inn solely because of their race, gender, or sexual orientation.

Canadian human rights law is diverse.[1] Quebec and Saskatchewan have passed human rights statutes that include a range of human rights (Clément, 2017). Some of the rights included in Quebec's *Charter of Human Rights and Freedoms (QCHRF)*, for instance, include the right to life and personal security, the right to assistance when someone is in peril, and the right to the non-disclosure of confidential information, among others (1975). However, the primary focus of Canadian human rights statute law is discrimination (Clément, 2017). Human rights laws in Canada primarily target discrimination in employment, services, and accommodation. They prohibit discrimination based on physical and mental disability; sexual orientation; gender identity and expression; race or creed; religious beliefs; and much more.[2] The two most common models for enforcing human rights legislation in Canada are the direct-access and the commission model (Eliadis, 2014a). In this study, the commission model and the direct-access model are both referred to as human rights institutions.

Human rights institutions process human rights complaints and educate the public about human rights. Human rights institutions administer and adjudicate complaints filed from complainants when they are subject to discrimination. These complaints are filed against a respondent (often an employer or business owner) (Canadian Human Rights Commission About the Process, 2020). Effective human rights education informs the public of their rights so that

[1] The *Canadian Charter of Rights and Freedoms* also includes a plethora of human rights provisions including mobility rights, democratic rights, legal rights, and more (1982).
[2] The complete list of grounds in Canada are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability, and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered (Canadian Human Rights Act, 1985).

places of work and the services they provide can be void of discrimination and discriminatory practices. In addition, education helps people understand the meaning of human rights and the purpose of human rights law (Brodsky & Day, 2014, p. 31).

Human rights institutions, therefore, have a pivotal role in society for discouraging discrimination and engendering respect for the rights. However, despite the importance of these institutions they have been the source of intense controversy in recent years (Moon, 2010; Eliadis, 2014a; Eliadis, 2014b). People in the media and parliament have presented misleading statements as if they were true that weaken confidence in human rights institutions (Moon, 2010). Furthermore, significant legal reforms in multiple jurisdictions have undermined some of the primary strengths of the Canadian model of human rights law (Clément, 2017). Some jurisdictions in Canada have even deviated from the traditional commission model that includes a commission and a tribunal or board of inquiry. Saskatchewan, for instance, has eliminated its tribunal. The province now sends complaints to the courts for adjudication. Other jurisdictions have either removed the commission completely or have retained the commission but no longer have it responsible for the administration of complaints (Clément, 2017).

In 2008, Ontario implemented a direct-access system. In this system, the tribunal processes all cases directly, and unlike most other Canadian jurisdictions, the commission does not function as a gatekeeper in processing human rights complaints. However, Ontario has retained its commission which produces education and research relating to human rights and discrimination (Eliadis, 2014a). British Columbia has gone even further to restructure their human rights system. British Columbia has transitioned numerous times between a commission and a direct-access model (Clément, 2014). While Ontario's direct-access model has retained the commission, British Columbia's direct-access model did not (Eliadis, 2014a). Those periods from 1984 to 1996 and 2002 to 2019 where British Columbia did not have a commission created a

void. Human rights education became the jurisdiction of the B.C. Human Rights Clinic and B.C.'s Ministry of the Attorney General, which largely disregarded education (MacNaughton, 2011 as cited in Brodsky, & Day, 2014). British Columbia's tribunal system also lacks an institution to perform tasks related to research and education.

There has been limited research comparing the commission system and direct-access system in Canada.[3] Although a select number of researchers have examined British Columbia's human rights institutions, none of these studies has offered an in-depth analysis comparing both models of human rights law (Eliadis, 2014a; Clément, 2017). This project addresses this gap in the research by comparing both systems to determine which is more accessible to marginalized populations. One of the primary sources for this study are 14 government-sponsored reports that contain information gathered by human rights experts on human rights institutions from across Canada dating from (1977 to 2017). They include investigations on multiple jurisdictions in Canada: British Columbia, Alberta, Saskatchewan, Ontario, Nova Scotia, New Brunswick, and the federal government. In addition, this study examines annual reports produced by the British Columbia Human Rights Commission from 1996 to 2002 and the British Columbia Human Rights Tribunal from 2006 to 2016. The information in these reports is analyzed to determine how many cases are opened and closed in each system each year; how many complaints are screened out; how many final decisions are rendered by the tribunal; and the impact of not providing complainants with counsel.

The primary research questions for this study include: How has human rights law in Canada evolved over time? What best practices have been identified among human rights

[3] There are a few studies that have examined the impact of switching to a direct-access model in Ontario (see Flaherty 2014, or Eliadis 2014a).

institutions in Canada for processing human rights complaints? Which model – commission or direct-access – is more accessible to people from marginalized populations?

In Chapter Two, I document key themes in the scholarship on human rights law in Canada. Moreover, I examine gaps in the current scholarship. Multiple scholars have discussed the difficulties plaguing human rights institutions such as delays and backlogs. Some scholars have discussed implementing a direct-access system to address some of these issues. However, other scholars defend the commission system. They argue that the direct-access system forgoes important aspects of human rights adjudication like carriage of complaint that guarantees representation before the tribunal for complainants. Direct-access defending scholars also claim that the direct-access system does away with the gatekeeping of complaints by the commission. Scholars who defend the commission system claim that the direct-access system does not forgo the gatekeeping process it simply reassigns it to the tribunal.

The importance of human rights education, as well as the backlash against human rights institutions, are also discussed in Chapter Two. The backlash has provided support for reforming human rights law in Canada, including implementing direct-access systems. The chapter ends by discussing another key theme in the scholarship: How to ensure that human rights commissions and tribunals are more independent of the government? Independence is an approach to improve public confidence in human rights commission and tribunals. As it is currently, there is a misconception that human rights systems are not sufficiently independent.

In Chapter Three, I examine the history of human rights law in Canada with a specific focus on British Columbia. Moreover, I relate the history of human rights legislation as it pertains to accessibility for people from marginalized populations. Early human rights systems focused on intent and dispensing fines for acts of discrimination. This changed in the 1970s to a system focused on conciliation. British Columbia switched several times from a direct-access system to a

commission system as governments changed over time. The New Democratic Party favoured the commission system whereas the Social Credit Party and Liberal Party favoured the direct-access system. Support for one system over another was due in part to the importance each party placed on human rights. The New Democratic Party saw discrimination as engrained in society. The party supported a system that discouraged discrimination through a plethora of educational initiatives and an active human rights institution that did more than simply process complaints. The Social Credit Party and the Liberal Party viewed discrimination as isolated incidents and human rights laws as an infringement against private businesses. Both parties favoured a system that was less proactive.

In Chapter Four I analyze government-sponsored reports. These reports have been produced across Canada from multiple jurisdictions beginning in the late 1970s up until 2017. These reports were produced by human rights experts with feedback from multiple sectors of society: other human rights experts, members of non-profit organizations, and lay people from across the country. A majority of the report's authors argued that a commission system was more accessible because it guarantees representation for complainants at a formal hearing and provides a trained investigator to assemble complaints. The authors argued in favour of a strengthened commission system with proper funding and more resources designated to the production of human rights education initiatives. The report's authors also discussed the importance of independence for human rights institutions and how these institutions should implement reporting to the legislature to increase independence.

In Chapter Five I analyze annual reports produced by the British Columbia Human Rights Commission (1996 to 2002) and the British Columbia Human Rights Tribunal (2006 to 2016). In this chapter, I argue that, under both systems, fewer cases receive a full hearing over time. However, complainants have a higher chance to receive a ruling in their favour in the

commission system compared to the direct-access system. One reason posited for this is that complainants are not guaranteed representation in the tribunal system. This is supported by the annual report data that shows that complainants with representation are more likely to win their cases than those who do not receive support. Chapter Five also discusses how the commission model is more efficient at closing complaints and reducing backlogs and therefore delays than the direct-access model. People from marginalization populations require a system that efficiently processes cases as a system that more quickly processes cases is more accessible overall. Moreover, people on the margins require guaranteed representation at a formal hearing. Many respondents are large governments or corporations; thus, without guaranteed representation, many complainants appear self-represented at their trial and often fail to win their complaints. This disadvantage leaves complainants without effective access to redress

1.1 Methodology

In order to compare the accessibility of direct-access and commission models, I conducted secondary data analysis on two sources – annual reports and government-sponsored reports. The annual reports contained information on cases processed during the use of the direct-access system (2003 to 2019) and the commission system (1996 to 2002) in British Columbia. These reports represent every year each system was in operation since the latest iteration of the commission system in 1996. There was no available report for the year 2002/03 because this was the transition year where the commission system was replaced with the direct-access system. To gauge the effectiveness of the direct-access model, I analyzed annual reports from the years 2006 to 2016.[4]

[4] For reasons that are not explained in these publications, the annual reports published in 2003/04 to 2005/06 provided far less data than other reports. These years were excluded from the analysis.

1.1.1 Annual Reports

The reports include data on how cases are closed by each system. Cases can be closed by screening, mediation, or adjudication. Screening of complaints ensures that complaints are within the mandate of the Code and within time limits for complaints. If the complaint is not deemed satisfactory at screening, it is closed at this stage. Mediation occurs at various times in the process and entails both parties attempting to come to an agreement without a hearing (BC HRC, 1996 to 2002; BCHRT, 2006 to 2016). If mediation is successful, then the respondent usually provides the complainant with a settlement (Eliadis, 2014a). Adjudication occurs at the end of the process and entails both parties arguing their cases at a hearing (BC HRC, 1996 to 2002; BCHRT, 2006 to 2016).

I compared how many cases each system closed relative to how many they opened. I did this to determine which system closed more complaints and which system closed complaints more quickly and, in doing, - reducing backlogs and delays (BC HRC, 1996 to 2002; BCHRT, 2006 to 2016). According to some studies, the direct-access system has been purported to process cases faster (Eliaids, 2014a; Flaherty, 2014). I determined which model processed cases more quickly, in part, to either corroborate or refute these findings as they relate to British Columbia. I also analyzed the data from each system to assess whether either model screened out cases considerably more than the other. A common complaint against the commission system is that it acts as a gatekeeper by preventing many complaints from reaching a formal hearing (Eliadis, 2014a). Determining the system that screened out more complaints allowed me to corroborate whether this was the case in British Columbia.

Although not every complaint can be adjudicated in a formal hearing, some complaints are best suited for adjudication. Formal hearings are a transparent method that includes publishing findings for future reference as opposed to mediation where results are kept hidden

(Leslie, 2014). In order to determine if this was occurring in British Columbia, I compared how many complaints were sent to adjudication between the two systems and over time. The annual reports, however, from the commission period did not have complete data concerning complaints sent to adjudication. The only year that data was available was 1996/97. In order to address this missing information, I utilized the Canlii legal database. The database contained information for the years of 1997 to 2002 (Canlii, 1997 to 2002).

One critique of the direct-access system is that it does not provide legal representation at hearings to argue the case in the public interest. Under the commission system, this practice, which involves the commission sending legal counsel to the hearing to argue the case *on behalf of the commission* (not the complainant) is called carriage of complaint (Clément, 2017).[5] According to some research, complainants who represent themselves before hearings often fail to successfully argue their case (La Forest, 2000). I wanted to determine how many complainants went without representation in the direct-access system and if there was a correlation between legal representation and the outcome of the case. In turn, I also compared the rates that complainants and respondents won their cases under the commission system.

1.1.2 Government-Sponsored Reports

I also analyzed 14 government-sponsored reports initiated by human rights institutions or governments. Using document analysis, I first read all the reports and decided which information to include or exclude mostly based around accessibility and consensus (in other words whether

[5] Carriage of complaint is common to commission models. This is discussed in more detail in Chapter Two, Carriage of complaint ensures that someone from the commission will present the details of a case during the hearing. This member, however, is not specifically there on behalf of the complainant. However, the lawyer is there to "lead evidence and make representations in support of the case" (La Forest, 2000, p. 77), and thus complainants do not need their own lawyers.

the authors of multiple reports discussed the same issue). I then coded the documents and organized the information into themes, many of these themes make up the major findings discussed in chapter 4. The reports cover 40 years' worth of material (1977 to 2017). They have information curated by experts on Canadian human rights law. These reports comprise data from both experts and lay people on how to improve human rights institutions. Many of the reports contain information from town halls, non-governmental organizations, letters from the public, and more. Information curated in these reports include multiple jurisdictions such as British Columbia, Saskatchewan, Ontario, New Brunswick, and Nova Scotia. There are 14 reports including six from British Columbia. The most recent report was produced in 2017 (Kahlon, 2017; O'Neill et al., 1994; Black, 1994; La Forest et al., 2000; Paris et al., 1983a; Paris et al., 1983b; Greschner et al., 1996; Cornish et al., 1992; Symons et al., 1977; Strongitharm, 1979; Sims, 1998; NSHRC, 2002; NBHRC, 2004; NBHRC, 2008).

Six studies are the focus of this study. These six reports were the most comprehensive reports on the topic of accessibility for people from marginalized populations. The reports included two studies on British Columbia the (Kahlon report from 2017 and Bill Black's report from 1994); two Ontario reports, (the Cornish report from 1992, and the Symons report produced in 1977); the Greschner report produced in Saskatchewan in 1996; and the longest report in the sample produced by the federal government in 2000. The author(s) of each report offered a unique perspective; however, each report's author(s) also discussed many of the same issues and offered similar suggestions on how to improve the accessibility of human rights institutions. This allowed me to synthesize the information in the reports in order to identify common recommendations for reforming human rights law in Canada.

I analyzed the government-sponsored reports to determine what experts in the field of human rights had to say concerning ways to improve the accessibility of human rights institutions

for the marginalized. Some scholars have discussed in length the importance of education related to human rights (Day, 2014; Clément, 2017; Brodsky & Day, 2014; Elidis, 2014a). Prior research has neglected to determine the impact of no longer providing human rights education in British Columbia. Thus, I analyzed the reports in order to ascertain the importance of human rights education and its role among Canadian human rights institutions. The report's authors also discuss the advantages and disadvantages of both the commission system and the direct-access system. I compare and contrast the arguments for both systems. However, a majority of the report's authors are in favour of the commission model.

1.2 Conclusion

No research to date has compared the direct-access system and the commission system to determine which is more accessible to people from marginalized populations. The focus of this research is on British Columbia. The province is an ideal choice because it is the only jurisdiction to use the commission system and the direct-access system multiple times since the 1970s. Marginalized people are victims of oppressive structures that render them socially excluded in society. This can lead to inequality between those on the margins and those in the majority. Human rights legislation can help to reduce that inequality by disrupting discrimination in society as discrimination is one reason that people from marginalized populations struggle to fully integrate in society. Determining the system that is most accessible is necessary as people from marginalized groups require the most effective system possible to provide redress for discrimination and effective human rights education.

Chapter 2: Themes in Human Rights Law

2.1 Introduction

National Human Rights Institutions (NHRIs) have been active in most countries since the 1990s (Reif 2000; Cardenas 2014). France introduced the first NHRI during the 1940s while other countries gradually introduced NHRIs in the 1960s and 1970s. Canada, along with New Zealand, were the first two countries in the world to implement the human rights commission model (Cardenas, 2014). NHRIs are designed to, among other things, ensure compliance with the requirements of international treaties. Furthermore, they also work to defend the human rights of a countries' citizens (Reif, 2000). Although human rights commissions often assist with the implementation of treaty requirements, the focus of the human rights commissions in Canada is discrimination. Cardenas (2014) argues that Canada's NHRIs were first created to deal with inequality related to racism and have, since that time, been primarily concerned with issues of discrimination. This, claims Cardenas, has allowed Canada's government to prioritize discrimination while not addressing "internationally recognized economic and social rights" (p. 87). To do that would put Canadian authorities in the position of having to address poverty and other instances of inequality in Canada such as the systemic mistreatment of Indigenous people (Cardenas, 2014).

There are two common models – the commission system and the direct-access system – utilized in Canada to enforce human rights law and administer or adjudicate human rights complaints. The commission model is the most common system in Canada. It is employed in 11 jurisdictions in Quebec, Alberta, Manitoba, Saskatchewan (although it lacks a tribunal), Nova Scotia, New Brunswick, Newfoundland, PEI, Northwest Territories, the Yukon, and the federal government (Eliadis, 2014a). A central obligation of the commission model is the requirement

that it promote human rights through education (Brodsky & Day, 2014). The defining feature of the commission system that differentiates it from the direct-access system is its role in processing complaints. As Eliadis (2014a) explains, commissions are "first deciders" that process complaints – rejecting the complaints that are not covered within human rights legislation. If the commission deems the complaints to have merit, the commission forwards the case to mediation. In situations where mediation is unsuccessful, the commission sends the case to investigation. Upon completion of the investigation, the commission decides if the complaint could be processed through conciliation (meditation), rejected, delayed for further processing, or sent to the tribunal for adjudication (Canadian Human Rights Commission About the Process, 2020). If the commission forwards the claim to a tribunal, then the commission argues the case before the tribunal on behalf of the public interest, rather than the complainant, who can have separate representation before the tribunal (La Forest et al., 2000).

The second model, which is employed with some variations in British Columbia and Ontario, is the direct-access model. In this system, the tribunal processes all cases. The tribunal receives cases, oversees the mediation of cases, and selects which cases go forward to hearings (Flaherty, 2014; Eliadis, 2014a). In Ontario, the commission was retained but with a restricted mandate that mainly involves education. The commission in Ontario can also "initiate complaints or represent individuals before the tribunal" (Clément, 2017, p. 1325). However, even though it can support complaints in these ways, the commission rarely utilizes these options (Clément, 2017). In British Columbia, the commission was eliminated completely in 2002 (Eliadis, 2014a). This left the system in British Columbia with no commission to produce education or to support complaints (Clément, 2017). The government does provide funding to the BC Human Rights Clinic, which provides some legal assistance and general information and support to complainants. However, many complainants are left without representation because the Clinic

cannot support everyone (Clément, 2017) Moreover, the clinic does not have enough capacity to fulfill the educational mandate (Brodsky & Day, 2014).

Canadian human rights institutions have the potential to assist people who are marginalized from the social, economic, cultural, and political life of the nation. When people who belong to marginalized groups are victims of discrimination, they often seek out human rights commissions and tribunals in order to obtain justice. However, these institutions are under considerable strain as they encounter long case delays, and substantial case backlogs. These issues have prompted some jurisdictions to stop using the commission system.

This chapter examines key themes in the scholarship on human rights law in Canada with a particular focus on comparing differing models of human rights institutions. The scholarship is divided on which model is most accessible to marginalized populations. Some scholars have argued that direct-access systems reduce backlogs and delays by no longer having commissions handle complaints. However, other scholars have argued that direct-access systems forgo key facets of human rights institutions that help to provide better access to complainants such as carriage of compliant and arguing cases in the public interest. In addition, according to several studies, the direct-access system in British Columbia lacks the means to produce education related to human rights. These scholars argue that forgoing education undermines the purpose of human rights institutions, which should be more than simply complaint processing institutions. Education is an essential feature of human rights law because it is preventative and is the best tool for addressing systemic discrimination. It is also an essential feature in ensuring that human rights institutions are accessible to marginalized populations.

2.2 Obstacles to Accessibility: Caseloads, Delays, and Backlogs

Most of the scholarship on human rights law in Canada examines the challenges facing human rights institutions in fulfilling their mandates. According to Howe and Johnson (2000), Clément (2017), Langer (2007), Day (2002a), and Flaherty (2014), human rights institutions face delays and a growing backlog of cases. Delays are especially concerning as commissions were supposed to adjudicate claims faster than the courts (Howe & Johnson, 2000; Clément, 2017). [6] When claims are delayed, it can also deter some complainants from putting forth their claims. Waiting long periods because of delays also can engender anger and frustration for individuals as their cases are in processing for long periods of time (Flaherty, 2014). Some cases are delayed so long that respondents can successfully apply to get them dismissed (Howe & Johnson, 2000).

In her study on the Ontario Human Rights Commission, Langer (2007) documents some of the difficulties facing frontline staff. The commission's staff struggle to keep up with inquires that have increased over time. Inquiries from 2002 were double what they were in 1997 while there was no comparable increase in staff. Langer argues that there is mounting pressure on staff due to increasing financial restrictions, rising case delays, and growing case backlogs. The workers at the commission feel disheartened because they are not able to keep up with the complaint volumes amid delays. Moreover, staff and commissions are under pressure by multiple groups who think that they are purposely dissuading meritorious complaints (Langer, 2007).

As these studies demonstrate, backlogs and delays are a major problem facing human rights institutions in Canada. This has an especially severe impact on marginalized populations, who might not have the resources to, for instance, wait several years to resolve a complaint.

[6] According to Howe & Johnson, the structure of human rights commissions allowed for the more efficient processing of cases more generally. This is due in part to members having specific knowledge in the field of human rights, while working for an institution dedicated to the specific realm of human rights promotion and administration (Howe & Johnson, 2000).

Some scholars, such as Eliadis (2014a) and Flaherty (2014), argue that the direct-access system can help address these issues. Flaherty and Eliadis identified several problems affecting Ontario's ability to address human rights complaints before Ontario switched to a direct-access system. These issues include both delays in case processing, and the low likelihood a case would reach the tribunal (Flaherty, 2014; Eliadis, 2014a). In Ontario, only 75 of 2500 cases went to adjudication each year under the previous model (Flaherty, 2014). Both Eliadis and Flaherty insist that cases processed using a direct-access system have a greater likelihood to reach the adjudication stage because there is no commission acting as a gatekeeper (Eliadis, 2014a; Flahtery, 2014). In 2012, the average wait time under the direct-access system in Ontario was 12.7 months (Pinto 2012, as cited in Eliadis, 2014a). This was a significant improvement from the pre-tribunal system in Ontario when the average case took approximately five years to be adjudicated (Ontario annual report as cited in Flaherty, 2014). Flaherty also argues that the commission processes cases more efficiently as Ontario's tribunal cleared 95 per cent of their cases during 2009/10 and 62 per cent of its cases in 2010/11 (Ontario Human Rights Tribunal Annual Reports 2008/09, 2010/11 as cited in Flaherty, 2014). Moreover, in 2010, Ontario's tribunal processed a greater number of cases than it received (Flaherty, 2014). People also attained greater access to hearings once Ontario switched to the direct-access system (Flaherty, 2014).

Delays and backlogs have plagued human rights commissions for many years. This is detrimental to the accessibility of these institutions. People who have already endured discrimination should not then be subjected to long wait times to attain redress as "justice delayed is justice denied" (Howe & Johnson, 2000, p. 148). Flaherty (2014) and Eliadis (2014a) argue that direct-access systems close cases faster and reduce delays more effectively, which in turn makes human rights institutions more accessible to marginalized populations. Yet these

studies are premised largely on anecdotal evidence or small case samples. They lack detailed empirical research to support the contention that tribunals are more efficient at processing complaints. Eliadis' study, for example, which is one of the most exhaustive examinations of Canada's human rights legal system, provides little empirical evidence to support the contention that the direct-access system produces fewer delays and backlogs.

2.3 Gatekeeping, Investigation, and Carriage of Complaint

There are three common themes in the scholarship on human rights law in Canada for differentiating the commission system from the direct-access model. The first relates to the commission's role in gatekeeping complaints. Gatekeeping involves the commission determining how to proceed with a complaint. These decisions occur at several stages in the complaints process. The commission determines whether a claim should be rejected early in the screening stages, sent to investigation, sent to mediation, or forwarded to a hearing. In performing this function, the commission acts as a barrier to the tribunal (Leslie, 2014).

The second feature of the commission model that differentiates it from the direct-access model is the investigation of complaints. During the processing of a complaint, if the complaint has not been rejected or mediated it will be sent to investigation. When a case is investigated, the commission assigns a case worker to investigate the details of the case by attaining information from both the complainant(s) and respondent(s). This includes a commission member talking to both parties about their opinion of events, gathering and interviewing any applicable witnesses, and assembling documents.[7] They use this information to produce a "report [that] includes an analysis of the complaint and may also contain recommendations about the case" (Black, 1994, p.

[7] Human rights statutes provide investigators with powers to compel the production of documents for their inquiry, such as employment records from an employer.

24). Because the commission investigates claims in this manner, it controls the complaint throughout the process. After the investigation is completed, the commission can reject the complaint, offer to mediate the complaint, or send the complaint to adjudication (Canadian Human Rights Commission About the Process, 2020). Moreover, if the complaint is deemed justified to go on to adjudication by a tribunal, they are provided with carriage of complaint before the tribunal (Clément, 2017).

Carriage of complaint is the third feature of the commission model that sets it apart from the direct-access model. Carriage of complaint involves a representative from the commission arguing the facts of the case before a hearing. The representative, however, is not there on behalf of the complainant. People filing complaints are told that they can count on the commission lawyer to "lead evidence and make representations in support of the complaint" (La Forest, 2000, p. 77). The purpose of carriage of compliant is to allow the commission to argue a case before a hearing where they believe that the public has an interest in the outcome of the case, such as discouraging sexual harassment in the workplace.

Leslie (2014) argues that, rather than detrimental to human rights complaints, the commission model's gatekeeping function is to the benefit of complainants. Gatekeeping is necessary to ensure that human rights complaints are processed effectively and impartially. Moreover, gatekeeping ensures that human rights claims deemed suitable for further adjudication are accepted. It is necessary in multiple steps of the complaint process "from initial in-take through investigation or mediation up to settlement, dismissal, or referral to a hearing" (p. 142). Proper gatekeeping is necessary to ensure that human rights claims are dismissed (screened out) when they "fail to meet statutory and jurisdictional requirements, have no reasonable prospect of success at hearing, or [if they] fall into a category of complaints which the statute says should be dismissed" (p. 146). Gatekeeping decisions can be difficult to overturn because the judiciary

rarely overrides decisions made by these bodies unless there is a mistake in legal reasoning, the decision is unjustifiable, or in circumstances where procedures are not followed correctly. For these reasons, human rights institutions must gatekeep cases in a manner that is open and accountable to the public, and "decisions should not be or appear to be arbitrary, unfair, or inconsistent" (Leslie, 2014, p. 147).

Leslie (2014) argues that the gatekeeping role is important as commissions are under financial pressure to reduce their caseloads. However, Leslie cautions that cases must not be disposed of improperly due to financial restraint. There is a tendency in some jurisdictions to send cases to mediation as often as possible. Mediation is useful in some circumstances; however, commissions should not process all cases using mediation because adjudication fulfils an important function. Leslie argues that one of the objectives of human rights law is to create "established standards or behaviour which respect individual dignity and equality" (Leslie, 2014, p. 163). This is easier to achieve through adjudication because it is a transparent method which fosters an open debate about the facts of a case, while introducing precedents that lead to the further evolution of human rights law. Leslie states that this is preferred to mediation which involves settlements made in private that are seldom made public (2014).

There is also a debate within the scholarship on human rights institutions in Canada about the benefits of carriage of complaint. Scholars who defend the commission system point out that the direct-access system forgoes carriage of compliant (Clément, 2017). Because the direct-access system does not provide carriage of complaint, many complainants are in the position of needing to hire their own lawyers or having to rely on NGOs for legal assistance (Day, 2014). As Clément (2017) points out, "more people are self-represented before tribunals in Ontario and British Columbia than other jurisdictions" (p. 1325). Furthermore, complainants are often not

able to get their case ready for their hearing because they lack the proper expertise (Clément, 2017).

Day argues that the direct-access system neglects an important aspect to combating discrimination, namely arguing a case in the public interest. Discrimination complaints have become about cases between individual parties. Yet, as Day (2002b) points out,

> A fundamental principle underlying human rights legislation is that eradicating discrimination is in the public interest. Discrimination is not just a problem for the individual who experiences it--it is also an offense against shared public values of equality and fairness for all individuals and groups. Because of this, the elimination of discrimination has been understood to require a many-pronged approach, including education, preventative measures and complaint-handling. As well, complaints of discrimination have been viewed not as disputes between private parties, but rather as matters in which the community as a whole has a stake (para, 2).

However, the direct-access system, especially in British Columbia, reduces discrimination cases to complaints between two parties. It therefore, excludes this public interest component (Day, 2014). This reduces the ability of human rights institutions to promote a culture of non-discrimination through the complaints process.

Removing the gatekeeping practice is one of key justifications for the direct-access system. However, as Leslie demonstrates, human rights institutions must not process cases improperly or haphazardly. In other words, claims should not be poorly mediated or screened out. There are, therefore, benefits to the gatekeeping function. Moreover, the tribunal model dispenses with carriage of complaint, which Day argues was a central feature of human rights law in Canada. Again, though, none of these studies provide empirical evidence to better understand which system screens out a large number of cases or relies excessively on mediation. In other

words, the lack of studies comparing the effectiveness of the gatekeeping function is a significant gap in the scholarship on human rights institutions in Canada.

2.4 Education

Every study on human rights law in Canada, including those that examine the direct-access system, emphasize, the essential role of education as part of human rights institutions' mandates. Prior to its dismantling in 2002, British Columbia's Human Rights Commission was one of the most prolific institutions in producing education materials related to human rights (International and Human Rights Law Association, as cited in Clément, 2017). However, from 2003 to 2019, British Columbia did not have a human rights commission. During this time, the government and the British Columbia Human Rights Clinic (the Clinic) –an organization funded by the Ministry of the Attorney General – had to fill the void. In 2011, Heather MacNaughton (Chair, BC Human Rights Tribunal) claimed that the Attorney General had given minimal funding to the Clinic to produce educational materials and information on the Clinic's website. However, MacNaugthon argued that this was not enough to properly offer education in the province. Furthermore, according to MacNaughton British Columbia was not producing sufficient human rights education initiatives when compared to other provinces (MacNaughton, 2011 as cited in Brodsky & Day, 2014).

Human rights education is necessary to properly promote and protect human rights. Effective human rights education informs the public of their rights so that behaviour of a discriminatory nature can be avoided. Moreover, education also informs the public so that places of work and the services they provide can be void of discrimination and discriminatory practices (Brodsy & Day, 2014). Furthermore, education helps to promote acceptance in society and it is

important for the prevention of future discriminatory behaviour (Clément, 2017). Education is essential to handling systemic discrimination. Systemic discrimination refers to

> patterns of exclusion and disadvantage caused by systems, politics, and practices… Inequality and discrimination do not result only from the deliberate actions of a few wrongdoers motivated by malicious prejudice. Discrimination is also built into systems and institutions. It flows from the accumulated effect of many years of doing things in particular ways that exclude and harm individuals and groups, usually unintentionally (Greschner, 1996, p. 2).

Education and research programs help disrupt systemic discrimination by informing the public and employers about recurring cases of discrimination (Day 2014; Eliadis, 2014a). Alternatively, British Columbia's direct-access system places all the concern of disrupting discrimination solely on the complaints process (Day, 2014). Discrimination complaints are necessary to help curtail discrimination, but they are not the only way that human rights institutions disrupt discrimination. The preventive work of commissions through education is intended to have a more lasting impact than each individual case (Howe & Johnson, 2000).

Howe & Johnson (2000), discuss how commissions were designed to be more than an institution to punish people who committed human rights infractions. They argue that commissions are not supposed to be "punitive and declaratory (as with the courts) but rather educative and transformative" (p. 43). The purpose of human rights institutions is not to punish one group, but rather to get both the injured party and the accused together to remedy grievances and overcome any misconduct. Canada's approach to ensuring that human rights are protected resolves around using information and encouragement to stop prejudicial behaviour. Adjudication is meant solely as the last resort when attempts to persuade and educate has failed (Howe & Johnson, 2000).

Eliadis argues (2014a), similar to other scholars, that human rights institutions must employ a multi-pronged strategy which includes education in order to effectively disrupt discriminatory behaviour. Eliadis states that the lack of education in British Columbia is unacceptable and that British Columbia "lacks a publicly funded independent and statutory body that proactively promotes human rights" (2014a, p. 92). According to Eliadis, tribunals and NGOs can provide some assistance to promote human rights in British Columbia, but they are not as suited to perform this function as a commission. NGOs can assist with various duties fulfilled by a commission such as the production of research or publications related to human rights. However, NGOs are vulnerable to replacement or discontinuance at any time because the government can rescind contracts at their leisure. According to Eliadis, although tribunals can produce some materials with educational value, such as annual reports, they must remain neutral and are ill-equipped to engage in meaningful promotional activities (2014a). She claims that the most accessible system is a direct-access system with a commission like the system currently employed in Ontario. In Ontario, the commission does not gatekeep complaints. However, the commission does perform the education functions and additional commission roles not related to complaints. (Eliadis, 2014a).

British Columbia has been without a commission since 2002. Since this time, British Columbia has lagged behind other provinces in the production of education related to human rights (MacNaughton, 2011 as cited in Brodsky & Day, 2014).

2.5 Backlash

Another central theme in the scholarship on human rights law in Canada is the backlash in recent years that has taken the form of outright attacks against human rights institutions. In two separate publications, Richard Moon (2010; 2014) studies hate speech complaints that are

processed by the Canadian Human Rights Commission. In both studies, he argues that people have directed false claims against human rights institutions because of their role in processing hate speech complaints. Statements are presented as fact by people in parliament, in popular newspapers, and featured by a variety of other outlets (Moon, 2010). One such claim is the federal human rights commission had a perfect conviction rate in hate speech cases. This statement appears correct because every case that went to court came to a conviction. But this does not include hate speech cases that are dismissed or mediated before trial, which is how most hate speech cases were resolved by the Commission. This is even further misleading because only two per cent of total cases that are adjudicated through the Canadian Human Rights Commission involve hate speech (Moon, 2014). The section that allowed the Canadian Human Rights Commission to process hate speech complaints (section 13 of *Canadian Human Rights Act*) has since been removed.

Disparaging human rights institutions has come from various individuals and the media. Many politicians and commentators across Canada have discussed limiting the functions of human rights institutions or even eliminating human rights commissions and tribunals altogether (Eliadis, 2014a). Future Prime Minister Stephen Harper, stated in 1999, that "human rights commissions, as they are evolving, are an attack on our fundamental freedoms and the basic existence of a democratic society" (2014a, p. 152). Critical comments were also directed against the federal commission from a variety of sources from reporters and activists to legal professionals. These groups argue that commissions are not adequately promoting and protecting human rights (Eliadis, 2014a).

Eliadis (2014b) states that many people have misconceptions regarding human rights institutions. Moreover, these misconceptions have tarnished the reputation of human rights institutions as many people now believe that they are unfair. One misconception, according to

Eliadis, is that people falsely believe that human rights commissions and tribunals are governed by the same rules and procedures as the criminal justice system (2014b). In truth, as administrative agencies, human rights commissions and tribunals are bound to different rules and procedures. In some situations, human rights institutions may use the same or similar tactics, but it is for different purposes than in the criminal justice system.

One issue that comes from confusing human rights commissions and tribunals with the criminal justice system relates to "punishments" for discrimination. Eliadis notes (2014b) that, unlike a criminal case, human rights systems seek not to condemn but to ensure that complainants are remunerated as they work to eliminate discrimination in society. However, there are some circumstances where a tribunal will render a particularly harsh penalty in a judgement. Eliadis argues that in these situations the penalty is meant as a deterrent for future behaviour. Similarly, tribunals can order sanctions such as fines (2014b).

Eliadis (2014b) claims that this conflation with the criminal justice system also includes the belief that there should be a consideration of intent in tribunal proceedings. Although intent is important in the justice system, it is not required in human rights proceedings. Instead, the focus in on the impact of discrimination. Eliadis illustrates this with an example of a business that is only hiring men. In this example, it is irrelevant if the complainant is hiring only men intentionally or not, because the effect is the same (2014b).

This backlash can have implications for accessing the human rights system in Canada. People who belong to marginalized populations should trust these institutions to provide them with redress when they encounter discrimination. If people from marginalized populations no longer trust these institutions, then ensuring that they are more accessible will become irrelevant as they will no longer feel comfortable bringing their complaints forward.

One approach to improve public confidence in human rights institutions is to ensure that they are independent from government in order to avoid political interference (Eliads, 2014a; Hucker, 1997; Flanagan et al., 1988). Norman (1987), Hucker (1997), and Eliadis (2014a) argue that commissions can increase their independence by reporting to the legislature rather than government ministers. This is a reality in some jurisdictions in Canada: Quebec, the Yukon, and the Northwest Territories each have their commissions report to the legislative assembly (Kahlon, 2017). According to Eliadis "reporting to legislatures enhances transparency and direct public accountability" (2014a, p. 190). Norman and Hucker claim that another way to ensure greater independence is to legislate that commissioners serve for a set amount of years (1987; 1997). Hucker states that this allows members to openly criticize the actions of a government or large organization (1997). Norman argues that without designated set terms people are in jeopardy of being replaced when opposing political parties are elected to form a new government.

Norman (1987) and Ruff (1992) suggest that commissioners are often selected on the basis of how well they align with the current political party rather than based on their merits as experts in the field of human rights law. To illustrate, Kathleen Ruff argues that human rights commission chairs

> have sometimes been pulled from the ranks of senior government bureaucrats, closely aligned with government policy, such as deputy ministers or executive assistants. In other cases, successful members of the establishment are chosen such as university presidents or church ministers, who have demonstrated no previous track record of courage of commitment to defend human rights (p. 31, 1992).

Ruff states that the individuals who are chosen to serve as members of human rights institutions must be independent of the government. She suggests two conditions to help ensure this. First, individuals must be selected by a process that is both public and transparent. Secondly, those who

are selected should be chosen based on their prior knowledge and experience in human rights law (1992).

The backlash against human rights commissions has been rampant across Canada for many years (Clément, 2017). Some scholarship has demonstrated that public faith in human rights institutions is being threatened. One solution to this problem is to provide greater independence for human rights institutions.

2.6 Conclusion

There is a debate in the scholarship on human rights law in Canada over which system – the commission system or the direct-access system – is more accessible to people from marginalized populations. Experts who favour the direct-access system claim that it reduces rampant delays and backlogs. According to these studies, the direct-access system more efficiently processes cases by no longer having the commission in charge of gatekeeping. Alternatively, scholars who favour the commission system claim that gatekeeping is an important function of human rights institutions. Furthermore, they argue that the direct-access model does not provide carriage of complaint and favour arguing cases in the public interest, which is pivotal to disrupting discrimination.

Although experts disagree on which system to implement, most agree that education is an important preventative feature of human rights institutions. Scholars in favour of both the direct-access system and the commission system argue that education has been largely abandoned in British Columbia. These authors argue for the re-introduction of a commission for the purpose of education; however, they differ on the value of having a commission or Ontario's hybrid system. While people are increasingly critical of human rights institutions, many are also concerned that human rights commissions and tribunals are too dependent on the government to exact

meaningful difference to mitigate discrimination in the lives of the marginalized. Among other things, the current scholarship lacks empirical data that correlates issues such as backlogs and delays with the direct-access or commission models.

This study addresses some of these gaps in the scholarship. It explores to what extent carriage of complaint is necessary for complainants and if it is important to ensure that the system is accessible to marginalized people. It also examines if carriage of complaint or proper representation can be achieved without the commission system and whether or not the direct-access system can promote the public interest. This research studies the result of removing the commission from the province in 2002. It demonstrates why human rights institutions are essential to people who have been historically excluded from participation in mainstream society. Having human rights institutions report to legislatures is one approach that could be implemented to protect institutions against backlash. This study also considers the implications of ensuring greater independence for human rights institutions.

This project addresses many of the debates identified in the scholarship on human rights law in this chapter. Chapter Three provides context for these debates by documenting the history of human rights law in Canada with a particular focus on British Columbia. Chapter Four is a detailed review of over a dozen government-sponsored reports on human rights institutions that have been produced since the 1970s. Chapter Five is based on a detailed examination of annual reports produced in British Columbia. One of the key issues addressed in this chapter is which system better addresses delays and backlogs. It also provides evidence to determine which system more efficiently closes cases. None of the current scholarship compares the direct-access system and the commission system to determine which system is more accessible to people from marginalized groups.

Chapter 3: British Columbia's Human Rights Legal System

3.1 Introduction

Early anti-discrimination legislation was flawed and inaccessible to most Canadians. It relied on the courts, placed the burden of assembling and arguing cases on the victims of discrimination themselves, and most people were unaware of the legislation. In most jurisdictions, human rights law has evolved to placing the burden of responsibility for human rights cases on government funded human rights commissions and tribunals. Additionally, education and promotion have become cornerstones of the human rights institutions in most jurisdictions. Despite similar trends among jurisdictions, the history of British Columbia's human rights legislation is unique. The governments of British Columbia have repeatedly adjusted how they administer and adjudicate human rights. The New Democratic Party (1972 to 1975; 1991 to 2001; 2017 to 2020) has often followed the Canadian model of providing administrative support to complainants and consistently supported human rights education. The New Democratic Party viewed human rights legislation as necessary to combat deeply rooted discrimination in society. They viewed human rights legislation as a necessary part of a system aimed at preventing discrimination. The Liberal/Social Credit Parties in British Columbia, however, have not prioritized robust human rights legislation. The Social Credit Party (1952 to 1972; 1975 to 1991) viewed human rights legislation as placing inappropriate restrictions on businesses. They viewed discrimination as overt. The Social Credit Party envisioned a human rights system that only processed discrimination cases. Overall, the Social Credit Party desired less expansive human rights legislation. Alternatively, the Liberal Party (2001 to 2017) has focused their attention more towards reducing delays, however this also comes at the expense of proper human rights education (Clément, 2014).

In this chapter, I review the history of human rights legislation in Canada and British Columbia. I document the flaws with early anti-discrimination laws. I showcase the move to a more accessible system in Ontario, which many jurisdictions replicated across Canada, that focused on conciliation and education. The chapter then focuses on British Columbia by documenting its unique history related to human rights legislation. The New Democratic Party and the Social Credit/Liberal Parties both implemented competing versions of human rights legislation based on how they viewed the role of human rights legislation in society. I argue that, in British Columbia, the New Democratic Party has consistently made human rights legislation more accessible while the Social Credit and Liberal governments have consistently restricted the accessibility of human rights legislation.

Marginalized people face unequal treatment in society as they endure economic, political, and cultural exclusion (Cook, 2008). People can face marginalization in society for a plethora of reasons such as their income level, political affiliation, or racial background (Cook, 2008). However, different marginalized groups face different barriers (Mandlis, 2011). For example, people who are transgender face barriers to full participation in society that people who are homosexual do not (Mandlis, 2011). Human rights institutions aim to address the barriers and discrimination that marginalized groups face, but these institutions are not always accessible. The four following factors enhance human rights institutions' accessibility to marginalized populations: a broad range of grounds of discrimination recognized under the law; legal aide for complainants; professional human rights investigators; and a mandate for human rights education. Each of these factors has become an essential feature of human rights law in Canada. Moreover, as this chapter will demonstrate, human rights redress and education are necessary to create a system that is responsive to the changing nature of discrimination.

3.2 Human Rights Law in Canada

The first anti-discrimination statute introduced in Canada was Ontario's *Racial Discrimination Act 1944* (Howe, 1991). The statute made it illegal to display discriminatory signs in public (Ontario Racial Discrimination Act, 1944). The Act banned discriminatory signs based on race or creed (Ontario Racial Discrimination Act, 1944). Ontario's 1944 statute was extremely narrow. Saskatchewan's 1947 *Bill of Rights* was more extensive than Ontario's statute. The statute "provided not only for equality rights but also for fundamental freedoms and political rights… it provided protection against discrimination in a wide range of areas including employment, housing, the workplace, land transactions, and education" (Howe & Johnson, 2000, p. 7). The statute made it illegal to discriminate against anyone based on race, religion, or national origin in employment, professional associations, union membership, property, services, and educational institutions (Saskatchewan Bill of Rights 1947).

Ontario's *Racial Discrimination Act 1944* and Saskatchewan's 1947 *Bill of Rights* required that discrimination cases be adjudicated through the courts. Having the courts process these cases created issues for victims of discrimination because it was difficult to prove perpetrators' intent. Furthermore, judges rarely convicted the plaintiffs. A fine could be ordered against anyone convicted of discrimination, but fines did not go very far to assist those who were victims of discrimination (Tarnopolsky, 1968). Moreover, lower income complainants had a difficult time accessing justice, people thought the court cases were slow and drawn out, and many people felt that court procedures were intimating (Howe & Johnson, 2000). A large proportion of people, including employers, did not know about the legislation (Clément, 2014). Lack of public awareness regarding the legislation coupled with the poor administration and adjudication of human rights claims rendered these early human rights laws ineffective especially for marginalized populations.

Ontario introduced the *Fair Employment and Practices Act* and the *Fair Accommodations Practices Act* in 1951 and 1954 respectively (Walker, 2002). The statutes prohibited discrimination based on "race, creed, colour, nationality, ancestry, or place of origin" (Fair Employment Practices Act 1951, & Fair Accommodation Practices Act 1954). Fair employment and accommodation acts created new procedures for addressing human rights claims. The statutes required that civil servants, who were appointed ad hoc in response to complaints, investigate discrimination cases. If the complaint fell within the mandate of the statute and the complaint had merit, then the respondent and complainant would enter mediation. If the respondent and complainant failed to agree to a settlement, officers would send the case to adjudication through a board of inquiry. If the board of inquiry found the respondent guilty of discriminating against the complainant, the respondent would have to compensate the complainant. Compensation included offers of employment/accommodation/service, letters of apology, or monetary reimbursement (Howe & Johnson, 2000).

Although the *Fair Employment Practices Act* and the *Fair Accommodation Practices Act* were progressions toward more accessible legislation, they were still flawed. Most people were unaware of the legislation; only a few people filed complaints; and only a fraction of the complaints was successful (Clément, 2014; Howe & Johnson, 2000). Additionally, those responsible for investigating and mediating complaints were civil servants who had a range of other responsibilities unrelated to human rights (Howe and Johnson, 2000). They were not specialists. Few complainants filed complaints under either statute. Between 1951 and 1962, complainants only filed 502 complaints and only one person was ever found guilty under the statutes (Clément, 2014).

Ontario also implemented the country's first law for equal pay: The *Female Employees Fair Enumeration Act 1951*. The other provinces and the federal government would soon

introduce similar legislation in the 1960s. Equal pay legislation was merely a symbolic achievement, however, as it did little to guarantee equal pay for women. The laws were poorly enforced, and most women were apprehensive to utilize these laws because they were afraid of retaliation from their employers. Moreover, the legislation was only enforceable in situations where women did work that was identical or extremely similar to that of men (Clément, 2014).

The next major development in Canadian human rights law was the introduction of Ontario's *Human Rights Code 1962* (Howe & Johnson, 2000). This innovative statue incorporated the former individual fair practice acts into one overarching piece of legislation (Howe & Johnson, 2000). The statute banned discrimination based on race, creed, colour, nationality, ancestry, or place of origin (Ontario Human Rights Code, 1962). Additionally, Ontario implemented a human rights commission to enforce the legislation (Howe & Johnson, 2000). The new Code was administered by full time members and a director specifically dedicated to human rights work for the commission (Howe & Johnson, 2000). Finally, under the new system "the commission would represent the complainant before the board of inquiry" (Clément, 2014, p. 76). This created a system that employed the commission to both investigate and argue the case for complainants, further increasing accessibility of human rights legislation. "Complainants did not shoulder the burden of investigating and litigating the complaint, which was a major obstacle to seeking remedy through the courts" (Clément, 2014, p. 76-77).

Ontario's *Human Rights Code* contained several provisions that ensured that the law would be more accessible to marginalized populations. First, the new system guaranteed that cases would be properly investigated by professionals. This provided complainants with improved access to the complaints process because human rights cases were often intricate and hard to properly investigate as they "[required] evidence of motive, consent, or reasonableness" (Greschner et al., 1996, p. 38). Often those in charge of investigating claims had to assemble

cases without witnesses, which resulted in people needing to find "evidence of credibility or evidence showing whether there [was] a pattern of discriminatory behaviour" (Greschner et al., 1996, p. 38). Furthermore, marginalized people often lacked proper resources, spoke English as a second language, and were vulnerable in their places of work, or neighbourhoods because of their race, sexual orientation, gender, etc. (Greschner et al., 1996). Provisions in the *Human Rights Code* ensured each case received dedicated support from trained professionals.

Carriage of complaint was another critical innovation that facilitated broader access to human rights institutions. Carriage of complaint ensured that a commission representative would argue the facts of a case at a hearing. The representative was not at the hearing on behalf of the complainant. However, those who filed complaints could count on the commission lawyer to "lead evidence and make representations in support of the complaint" (La Forest et al., 2000, p. 77). This resulted in complainants not needing to attain a lawyer and ensured that every person had equal access to legal representation regardless of resources. Proper legal representation increases accessibility to human rights redress (La Forest et al., 2000; Cornish et al., 1992). Other studies have shown how, without legal representation, complainants are less likely to succeed in arguing their cases before a formal hearing (La Forest et al., 2000).

Finally, a mandate for education became a cornerstone of human rights law in Canada beginning with Ontario's *Human Rights Code* and the creation of the Human Rights Commission. Education related to human rights is necessary to prevent discrimination. "These activities [education] …. [helped] to ensure equality of access to the enforcement process" (Black, 1994, p. IV). Proper education helped to inform employers about the rules and procedures related to anti-discrimination legislation and decreased the chance that people discriminated in the future. Additionally, people who did not have proper awareness of human rights were less likely to know about human rights legislation or the process concerning the filing of complaints.

Human rights education helped marginalized people know about their rights and informed employers about the rules so that they could better follow the law (Black, 1994). Human rights education was meant to "foster a culture of respect for human rights by promoting dialogue, discussion, and knowledge about discrimination and its causes and consequences" (Broadsky & Day, 2014, p. 24).

Ontario's *Human Rights Code* relied on education and conciliation to enforce human rights legislation (Howe & Johnson, 2000; Day, 2014). The commission could educate people about the Code and give direction to the government regarding adjustments to human rights legislation while also adjudicating human rights claims (Howe & Johnson, 2000; Day, 2014). Conciliation aimed to have the complainant and respondent overcome their differences so they could agree upon an appropriate settlement (Howe & Johnson, 2000). The basis of the new system was that the average person who happens to discriminate is not a malicious person (Howe & Johnson, 2000). Moreover, people were often misinformed, acting based on incorrect stereotypes or unawareness (Howe & Johnson, 2000). People needed to be persuaded and educated to alter their ways of acting (Howe & Johnson, 2000). However, when conciliation did not work "the commission could recommend that a board of inquiry or human rights tribunal to be appointed to decide the case" (Howe & Johnson, 2000, p. 11).

Ontario's *Human Rights Code* set an important precedent. It represented a shift from anti-discrimination to human rights law that was far more accessible to marginalized populations. The new system included a mandate for education and research, was enforced by people trained in human rights enforcement, and was oriented around conciliation and education (Howe and Johnson, 2000). By 1979 every jurisdiction had implemented a system similar to the one employed in Ontario including a commission, carriage of complaint, and conciliation practices (Clément, 2014). Moreover, "each statute prohibited discrimination on the basis of race, colour,

religion, sex, ethnicity, age, and marital status" (Clément, 2014, p. 83). Although most provinces implemented this system by 1979, it would not remain in use unabated in British Columbia.

3.3 British Columbia: The Human Rights Act and the Human Rights Code

The Social Credit Party, which governed British Columbia between 1952 and 1972, introduced the *Fair Employment and Public Accommodation Practices Acts* in 1956 and 1961 respectively (Clément, 2014). The *Fair Employment Practices Act's* prohibited discrimination related to employment, advertisements concerning employment, and trade union membership (1956). It recognized discrimination based on the grounds of "race, religion, colour, nationality, ancestry, or place of origin" (British Columbia Fair Employment Practices Act, 1956). The *Public Accommodation Practices Act 1961* targeted discrimination related to the denial of "accommodation, services, or facilities available to the public in any place to which the public is customarily admitted" on the same grounds as the employment statute. Additionally, British Columbia's fair practices acts required civil servants to investigate human rights complaints (Tarnopolsky, 1968).

There was no education mandate. The Social Credit government also did little to advertise the statute. The Jewish Labour Committee (JLC), which had offices across Canada, was a group that raised awareness of racial discrimination in the country and was one of a few key groups that pressured Ontario's government to introduce the fair employment and accommodations acts (Walker, 2002). The JLC in Vancouver developed education programs about the legislation while the British Columbia Federation of Labour created and disseminated a Guide to Employers. The British Columbia Federation of Labour's Human Rights Committee advised the government, that only a limited number of employers were aware of the human rights legislation. Additionally, the government inadequately enforced human rights legislation. Only nine people filed complaints

under this legislation. Furthermore, many of the complaints were rejected because they were not covered by the statute. Although the statutes were narrow and education was lacking, British Columbia's early legislation, was not unlike many other early anti-discrimination statues in Canada (Clément, 2014).

The Social Credit government later introduced the *Human Rights Act* in 1969. It was the first human rights statue in the province (Clément, 2014). The statute made it illegal to deny someone access to rent or buy a house or refuse to employ someone based on specified grounds (British Columbia Human Rights Act, 1969). It was also the first statute in Canada to ban discrimination on the basis of sex (Clément, 2014). It contained prohibitions against discriminating against someone based on their age. However, the age prohibition only applied to people between the age of 45 and 65, and it did not apply to mandatory retirement. Additionally, the prohibition against sex discrimination and age discrimination only applied to employment and employment related concerns (British Columbia Human Rights Act, 1969).

Although the *Human Rights Act* 1969 included new grounds and provisions, it did not contain the same strengths as Ontario's *Human Rights Code*, which had been implemented seven years earlier. There was a Human Rights Commission, but it was an independent commission "in name only" (Black, 1997). Unlike other jurisdictions in Canada, which created a distinct commission to handle complaints, British Columbia utilized the Board of Industrial Relations. The Board of Industrial Relations was not a dedicated institution created solely to administer human rights claims. The Board of Industrial Relations was tasked with other duties already and was inadequately equipped to process complaints. Moreover, the investigation of cases was offloaded to Industrial Relations Officers (IRO) who were ill-equipped to handle discrimination complaints. Industrial Relations Officers had almost no prior knowledge of human rights

practices. Their primary occupation concerned mediation between labour unions (Clément, 2014).

There were 2,092 inquires or complaints from 1969 to 1973. However, only 208 fell within the scope of the *Human Rights Act*. Moreover, only 174 complaints were investigated and of those complaints, 92 were settled informally, six cases were withdrawn, 53 were assessed to be non-meritorious, and 23 were suggested for a hearing before a board of inquiry. By 1973, though, most of the 23 complaints were delayed or had not yet received a hearing (Clément, 2014). In the end, the commission only rendered two decisions in four years (Black, 1997). Furthermore, the government did not publicize the *Human Rights Act* and provided little to no funding for education (Clément, 2014).

The *Human Rights Act* was nonetheless significant for many reasons. It was the first human rights act in the province, it combined separate pieces of legislation into a single statute, and it was the first statute in Canada to prohibit discrimination on the basis of sex. However, the *Human Rights Act* had many flaws. The government did not properly promote the legislation, most complaints did not fall within the legislation's narrow scope, and many cases were delayed.

In 1974, the newly elected NDP government replaced British Columbia's *Human Rights Act* with the *Human Rights Code* (Clément, 2014). There were numerous innovations in this statute. It went further to eliminate discrimination on the basis of sex by outlawing sex discrimination in every area covered by the statute rather than only employment (Clément, 2014). A unique feature of this legislation was the reasonable cause section (Black, 1997). The reasonable cause provision banned all discrimination in any area except for tenancy (Black, 1997). Other jurisdictions required a specific ground of discrimination, however, with the reasonable cause section this was not the case in British Columbia.

The reasonable cause section provided potential complainants with an avenue to pursue claims that they would otherwise not be able to pursue without the provision. Successful cases set new precedents under this statute. The *Human Rights Code* made it possible for the complainant H.W. to file the first pregnancy related complaint in Canada. H.W. was employed in an office setting making reservations and responding to telephone calls. After H.W.'s boss realized that she was pregnant he terminated her employment. The Board of Inquiry that adjudicated her complaint found in favour of H.W. and rejected her boss' argument that she was terminated for ineptitude. The Board of Inquiry awarded lost wages in the sum of forty dollars. There was also the first sexual harassment case in British Columbia because of the reasonable cause section. Renee Carignan filed a sexual harassment claim because her employer was repeatedly harassing her: he placed his arms around her midsection; brushed his hand across her bottom; and made lewd comments among other behaviours. The Board of Inquiry found in favour of Carignan and she was awarded lost wages and recompense in the sum of $1,600 for humiliation that she had suffered. As Clément argues, "people were able to use the reasonable cause section to set new precedents in other areas such as physical appearance, disability, criminal record, age, language fluency, sexual orientation, and immigrant status" (2014, p. 118).

The *Human Rights Code* provided British Columbia with a system that resembled Ontario's commission system focused on conciliation and cooperation (Clément, 2014). The new system relied on both parties coming together to work towards solutions (Clément, 2014). The commission would appoint a board of inquiry if a complainant and a respondent could not solve their complaint via the process of conciliation (Brodsky & Day, 2014). The branch provided carriage of complaint to complainants, which gave people lacking sufficient resources support throughout the hearing process (Clément, 2014).

With the introduction of the Code, "The NDP dispensed with the Socred practice of using industrial Relation Officers, hiring full-time human rights investigators instead" (Clément, 2014, p. 114). Additionally, there were more complaints and hearings under the new legislation (Black, 1997). In fact, the law required that all complaints had to be investigated. Between 1969 and 1973, 2092 complaints were received under the *Human Rights Act* and, 208 were investigated. However, from 1974 to 1982, the branch received and investigated 4,630 cases. Unlike the previous system, cases were investigated by professional human rights officers who worked for the Human Rights Branch (Clément, 2014).

The *Human Rights Code* was also unique in that it created a Human Rights Branch and a Commission (Clément, 2014). The Branch oversaw investigations while the Commission focused on education (Clément, 2014; Brodsky & Day, 2014). Both the director and commission worked to raise public awareness about British Columbians' rights (Black, 1997). The result of increased education and public visibility of human rights was the sharp increase in the amount of complaints, and hearings (Black, 1997).

In sum, the NDP *Human Rights Code* increased the accessibility of human rights legislation for marginalized people. The reasonable cause section made British Columbia's human rights legislation accessible to anyone who could prove they were the target of discrimination. The Code also employed professionally trained officials to investigate cases. Furthermore, the carriage of complaint provisions provided legal representation while education helped to create a culture of human rights where everyone respects and understands the importance of human rights legislation.

The New Democratic Party and the Social Credit Party differed in how they viewed the purpose of human rights legislation. The New Democratic Party envisioned human rights legislation and the administrative machinery used to enforce it as important in assisting

marginalized people. The NDP thought that the law should be accessible for those who would otherwise struggle to utilize the court system. The New Democratic Party viewed discriminatory behaviour as something hidden, embedded in routine behaviours. Furthermore, the NDP envisioned a human rights legal system that was overarching and without gaps. The NDP's goal was to implement legislation with proper coordination so that it was autonomous; they envisioned a system that ultimately focused on "prevention rather than punishment" (Clément, 2014, p. 199). The Social Credit government's underlying ideology behind their legislation was diametrically opposed to the ideology of the NDP.

3.4 The Human Rights Act, 1984

The Social Credit Party had different ideas about the role of human rights law. The Social Credit Party embraced a neo-liberal economic outlook whereby they possessed a general distrust of regulations that restricted the freedom of business owners and employers. This outlook influenced how they viewed human rights legislation. Within the frame of neoliberalism, the Social Credit Party viewed human rights legislation as a problem for employers. They felt that human rights legislation placed inappropriate restrictions on the ability for employers to operate effectively. The Social Credit party were in favour of more restrictive anti-discrimination laws similar to early laws from the 1940s and 50s. Moreover, the Social Credit Party, unlike the NDP, viewed discriminatory behaviour as overt rather than hidden. The Social Credit Party wanted a system focused more on complaints. Overall "it is likely, given the predominance of complaints directed at employers, that the Socred's saw human rights legislation as simply another form of labour law" (Clément, 2014, p. 199). This vision of human rights legislation would be reflected in the Socred's decision to reformulate human rights legislation through the *Human Rights Act*.

The Social Credit government introduced a *Human Rights Act* to replace the *Human Rights Code* in 1983 (Black, 1997). It replaced the Human Rights Commission with the Human Rights Council (Howe, 1992). The Human Rights Council was responsible for processing complaints and rendering judgements (Black, 1997; Clément, 2014). The statute added two new grounds of discrimination: physical and mental disability (Clément, 2014). The reasonable cause section was removed (Black, 1997; Clément, 2014).

A strength of the new statute was that members of the council would decide numerous cases and develop human rights expertise over time (Clément, 2014). This was unlike the old system which involved the appointment of boards of inquiry, when they were required, that did not always employ the same people to preside over cases (Clément, 2014). The Council was responsible for the entire complaint process including intake and conducting hearings (Black, 1997). In other words, it was an early iteration of the direct-access system. However, the Employment Standards Branch was tasked with investigating claims (Black, 1997). By eliminating professional human rights investigators, staff – who had no particular expertise in human rights law – had to balance their regular duties while also working with human rights complaints (Black, 1997). This resulted in extensive delays and evidence was not as dependable (Black, 1997). The new statute did not provide carriage of complaint to complainants (Black, 1994). They had to gather witnesses, assemble files, and attain legal representation or represent themselves before the council (Clément, 2014).

The Human Rights Council did not try to educate the public or distribute educational resources (Black, 1994). Under the new legislation, the number of staff was reduced. The ability to "carry out research into patters of inequality [while] education programs were sharply curtailed" (Black, 1997, p. 15). Proponents of the new system argued that it would be susceptible to arguments of bias, such that people would conflate the work the council is doing as

predetermining in favour of the complainants, which left B.C. with a system for case adjudication only (Howe & Johnson, 2000; Black, 1997).

The council was unequipped to properly affect broader patterns of discrimination. Compared to other human rights institutions in Canada, B.C.'s council lacked the ability to initiate legal proceedings because, in theory, it would interfere with its ability to adjudicate discrimination cases. Moreover, the council "could not appear at the hearing to represent the public interest because it would be appearing in front of itself" (Black, 1997, p. 15). Access to the human rights process was low because only the person that happened to be a target of discrimination or another person on their behalf could file a complaint at the time. Third parties could not file claims (Black, 1997).

3.5 The Human Rights Code, 1996

Soon after the NDP's election in 1991, the government introduced some minor modifications to the *Human Rights Act* in 1992 and 1993 (Black, 1994). The 1992 amendment introduced family status and sexual orientation as prohibited grounds of discrimination (Black, 1997). The 1993 amendment banned hate speech, and it allowed people or groups to file complaints with the commission on behalf of others (Black, 1997).

The NDP eventually replaced the *Human Rights Act 1983*, which confirmed the practice of new governments imposing their own vision for a human rights statute (Howe & Johnson, 2000). The *Human Rights Code 1996* re-established British Columbia's Human Rights Commission (British Columbia Human Rights Code, 1996). The Code split the British Columbia Council into two separate agencies: the Human Rights Commission and the Human Rights Tribunal. There was no change to grounds of discrimination. Once again, there was a commission that had the option of appearing before hearings to represent the public interest. The commission

could also initiate complaints. Additionally, there were three permanent commissioners, which allowed them to gain experience over time.

The major change from the Human Rights Council was that commission workers were now employed to investigate cases as opposed to workers from other departments. This allowed for easier supervision of cases and for the investigator to adjust the investigation of the claim based on the requirements of that case and to develop expertise in human rights investigation and mediation. The new legislation also included a mandate to create 'public educational programs' (Black, 1997).

3.6 Direct-Access System: 2003 to 2017

In 2003, the newly elected Liberal government eliminated the Human Rights Commission for the second time in twenty years (Eliadis, 2014a). The Liberals added gender identity and expression to the list of grounds, providing much needed protections to transgender Canadians (British Columbia Human Rights Code Amendment Act 2016). Once again, all complaints were to be processed exclusively by the British Columbia Human Rights Tribunal (Eliadis, 2014a). The Attorney General claimed that removing the commission provided people with better access to human rights adjudication (Eliadis, 2014a). They stated that "complaints will no longer be lost in the dark void of endless and inconclusive investigations. Instead, victims of discrimination will have direct access to a tribunal that can resolve their complaints" (Eliadis, 2014a, p. 91-92). In practise, the revised legislation did little to improve the accessibility for marginalized populations.

The direct-access system implemented in 2003, remains in place in British Columbia. The system does not provide professional investigators to investigate claims and does not provide carriage of complaint. Additionally, assistance from the tribunal is limited because the tribunal

must remain impartial (B.C. Human Rights Tribunal Role, 2020). Participants can contact the Human Rights Clinic for help with their cases and for legal representation, but the Clinic does not provide legal representation to everyone (B.C. Human Rights Clinic More About Us, 2020). This results in complainants often representing themselves before the tribunal (Clément, 2017). Representation is important as those who represent themselves often lose their cases (LaForest et al, 2000). This effectively denies access to human rights redress for those who cannot attain lawyers.

Dismantling the commission also disrupted the promotion and protection of human rights. There was no longer an institution to promote education and research (Brodsky & Day, 2014). From 2002 (until it was recently reintroduced in 2018), British Columbia, did not have a system for the education and promotion of human rights (Eliadis, 2014a). Human rights education became the jurisdiction of the B.C. Human Rights Clinic and B.C.'s Ministry of the Attorney General, which largely disregarded education (MacNaughton, 2011 as cited in Brodsky, & Day, 2014). Supporters of this system insisted that the tribunal should not engage in education or research because it makes legal decisions, must remain neutral, and should not stray from its specific function of carrying out hearings and producing decisions (Eliadis, 2014a).

In 2017, the New Democratic Party was once again elected to form British Columbia's government. The government announced that they intended to bring back British Columbia's Human Rights Commission (Hernandez, 2017). The NDP introduced legislative amendments to the *Human Rights Code* in 2018 that established the Office of the Human Rights Commissioner (Human Rights Code Amendment Act, 2018). The Office of the Human Rights Commissioner does not assist with human rights complaints or offer legal advice (British Columbia's Office of the Human Rights Commissioner Human Rights Complaints, 2020). However, the commission can "intervene" in a complaint (Human Rights Code Amendment Act, 2018). Someone who

intervenes according to the British Columbia Human Rights Tribunal, assists the tribunal by advising it regarding important contextual information about the complaint; it can provide another viewpoint on a complaint; it can provide an argument concerning different interpretations of the *Human Rights Code*; and it can specify a specific remedy that may impact other people (British Columbia Human Rights Tribunal Intervening, 2020).

The Office of the Human Rights Commissioner can coordinate, implement, and support research and education in the area of human rights. Additionally, the Office of the Human Rights Commissioner can implement procedures, rules, and recommendations to disrupt discrimination and make sure that any new plans or laws are not infringing against British Columbia's Human Rights Code. The Office of the Human Rights Commissioner can also carry out inquires related to human rights and produce reports and plans to adjust where needed (British Columbia's Office of the Human Rights Commissioner Mandate and Vision, 2020).[8]

Introducing the Office of the Human Rights Commissioner was designed to facilitate the promotion and protection of human rights while improving the accessibility of human rights legislation in the province. This is partially accomplished by introducing education, research, and inquires related to human rights back to the province. However, the current system in British Columbia continues to lack proper support for complainants. Without carriage of complaint complainants are less likely to be properly supported during hearings and are more likely to lose their cases. Furthermore, without the proper investigation of claims, complainants will struggle with assembling their cases. The Office of the Human Rights Commissioner improves

[8] The Office of the Human Rights Commissioner also helps to endorse acquiescence to international human rights standards, it helps locate and raise awareness about disrupting any acts, procedures, or programs that are discriminatory, it also approves unique endeavours to create better conditions, for individuals and groups who are disadvantaged.

accessibility, however without carriage of complaint and investigation of claims by human rights professionals British Columbian's will continue to lack accessible institutions.

3.7 Conclusion

The accessibility of human rights institutions has fluctuated over time in British Columbia. The New Democratic Party has implemented legislation that ensures greater accessibility of human rights legislation and institutions for marginalized people. Their statutes prioritized education and promotion of human rights which informed people of their rights and how to obtain them. They have also been more supportive of carriage of complaint and the formal investigation of cases in the province, which provided guaranteed representation and trained professionals to assemble complaints for those who may struggle to do so without such assistance. They have consistently implemented systems that have focused on the creation of a human rights culture. The Liberal and Social Credit governments have instead focused more on the adjudication of human rights claims. Although the Liberal and Social Credit governments have added grounds of discrimination over time, they have largely opposed providing legal assistance or promoting education. Removing carriage of complaint and the formal investigation of cases has resulted in less accessible institutions as unrepresented complainants are more likely to lose their claims.

Chapter 4: Improving Accessibility by Improving the Commission System

4.1 Introduction

Since the late 1970s, human rights commissions and other state institutions have sponsored numerous expert reports. In addition to identifying common challenges facing institutions over time, these reports contain recommendations on how to improve the accessibility of human rights institutions. Although some authors have suggested a complete overhaul to these institutions, such as creating a direct-access system, the authors in a majority of the reports support the commission model in Canada.

This chapter is based on a detailed analysis of every government or commission-sponsored report in Canada since the 1970s on reforming human rights law. These investigations were established to offer recommendations on ways to improve human rights institutions and the administration of human rights legislation. There were 14 reports produced between 1977 and 2017 as seen on Table – 1. They cover multiple jurisdictions including British Columbia, Saskatchewan, Ontario, New Brunswick, Nova Scotia, and the federal government. Each investigation included input from multiple sectors of the public such as community groups, business leaders, and individuals who had worked with the human rights system (Kahlon, 2017; O'Neill et al., 1994; Black, 1994; La Forest et al., 2000; Paris et al., 1983a; Paris et al., 1983b; Greschner et al., 1996; Cornish et al., 1992; Symons et al., 1977; Strongitharm, 1979; Sims, 1998; NSHRC, 2002; NBHRC, 2004; NBHRC, 2008).

Table 1: Reference Information Concerning the 14 Government-Sponsored Reports

Name of Report	Year	Area	Committee Chair or Organization Name*
A Human Rights Commission for the 21st Century.	2017	B. C.	Kahlon
Future Directions: Recommendations to Government	2008	N. B.	(NBHRC)
Position Paper on Human Rights Renewal in the Province of New Brunswick	2004	N. B.	(NBHRC)
Moving Forward with Human Rights in Nova Scotia: The Path for the Future	2002	N.S.	(NSHRC)
Report of the Canadian Human Rights Act Review Panel	2000	F. G.	La Forest
Human Rights for the Next Millennium: Recommended BC Human Rights Code Amendments for British Columbians by British Columbians	1998	B. C.	Sims
Renewing the Vision: Human Rights in Saskatchewan	1996	S. K	Greschner
Equal in Dignity and Rights: A Review of Human Rights in Alberta	1994	A. B.	O'Neill
B.C. Human Rights Review: Report on Human Rights in British Columbia	1994	B. C.	Black
Achieving Equality: A Report on Human Rights Reform	1992	O. N.	Cornish
I'm Okay; We're Not so Sure About You: A Report of the B.C. Human Rights Commission on Extensions to the Code	1983	B. C.	Paris
How to Make it Work: A Report of the B.C. Human Rights Commission on Strengthening the Statutory Protection of Human Rights	1983	B. C.	Paris
Proceedings of the Conference on Human Rights for British Columbians	1979	B.C.	Strongitharm
Life Together: A Report on Human Rights in Ontario	1977	O. N.	Symons
*The reports are referred to in the paper by the lead author of the report or by the Institutions where individual authors are not named NBHRC =New Brunswick Human Rights Commission NSHRC =Nova Scotia Human Rights Commission F. G. Federal Government			

These government-sponsored reports provide numerous insights into the role and function of human rights institutions in Canada. This chapter is the first study to provide a detailed analysis of the entirety of these reports and to identify common themes among these investigations. In analyzing these reports, this chapter provides a unique contribution to the study of human rights institutions in Canada.

I analyzed the government-sponsored reports in several steps (see Gross, 2018). I first read the reports to find areas of agreement on ways to improve the accessibility of human rights institutions for people from marginalized populations. I scanned the documents for relevant topics that were not too specific to a given jurisdiction or too outdated as to no longer be appropriate. For example, although grounds of discrimination are important to protecting the human rights of the marginalized, I did not include specific recommendations relating to new grounds or changes to grounds. The main reason for this being that the authors of the reports usually suggested grounds that had already been implemented by all Canadian jurisdictions. For example, the authors of many reports argued for the ground of sexual orientation to be included in human rights statutes, however, it is now included in every jurisdiction in Canada (Canadian Centre for Diversity and Inclusion, 2017) thus, the suggestion to include this ground is no longer relevant to this study. Any other outdated suggestions on how to improve accessibility were likewise not considered for further analysis.

In analyzing the reports, it was clear that there were a few central topics that many reports discussed concerning approaches to improve human rights institutions. The central topics were funding, increasing caseloads, delays, time limits, human rights education, community engagement, and ways to increase the independence of human rights institutions. Once I determined that these were the central themes, I created subsections. To illustrate, I found that the authors of many reports discussed the importance of human rights education. Once I determined

that this would be one of my main themes, I scanned the literature to assess what the reports specifically said about human rights education. The authors of these reports discussed why human rights education was important., they argued for more initiatives related to human rights education, they suggested ways to actually educate the public, and more. Once I had these subsections, I then scanned the literature for every mention of each subsection and organized them into their own paragraphs.

In this chapter, I find that despite claims that a direct-access model would solve many of the problems associated with the current human rights legal system, most studies have recommended retaining the commission system. Specifically, I find four key issues that have been consistently raised since the 1970s in expert reports that would significantly improve accessibility for human rights institutions in Canada. These issues are reducing backlogs and delays, increasing funding, promoting human rights education, and fostering more independence for human rights institutions from the state.

4.2 Context

While this chapter includes an analysis of every report produced since the 1970s, it focuses in particular on six major studies that have had a significant impact on human rights law in Canada. These reports are the Greschner (1996), Kahlon, (2017), Black, (1994), Symons (1977), Cornish (1992), and La Forest (2000) reports, titled based on the chair for each. The La Forest report was produced in 2000. It is the most detailed of these reports. The committee comprised four experts in the field of human rights. Gerard La Forest who chaired the committee,

was a retired Supreme Court of Canada judge, with expertise in constitutional, administrative, and human rights law. [9]

The La Forest (2000) committee was tasked with producing an appraisal of the *Canadian Human Rights Act*. It was created to study the

> purpose of the act and the grounds listed in it, to ensure that the act kept current with human rights and equality principles… [to] review the current complaints-based model and to make recommendations for enhancing or changing the model to improve protection from discrimination… to consider the powers (including the audit powers under the employment act) and procedures of the Canadian Human Rights Commission and the Human Rights Tribunal (6).

Because the purpose of the report was to study the federal commission, the report includes feedback from multiple provinces as well as commissions and tribunals across the country. They also received feedback from prior federal chief commissioners and the current (at the time) federal chief commissioner to provide information about how the commission has evolved since its inception. The committee was sent over 200 documents and heard from as many as 250 people that took part in the in-person meetings. It remains the most comprehensive study of human rights law in Canada (La Forest, 2000).

The 1992 Cornish report's committee was composed of three members: Mary Cornish, Rich Miles, and Ratna Omidvar. Mary Cornish, the chair of the committee had legal experience

[9] Bill Black was a law professor from British Columbia who taught one of the first human rights law courses in Canada. He was a director of the Human Rights Research and Education Centre at the University of Ottawa (1989 to 1993), served as a member of the British Columbia Human Rights Commission, and produced his own expert review of human rights law for the province of British Columbia in 1994. Renee Dupuis had experience as a lawyer specializing in administrative, Indigenous, and human rights law, and was a member of the Canadian Human Rights Commission (1989 to 1995); Harish Jain, was a professor at McMaster University had expertise in human rights and systemic discrimination; Jain was a member of the Canadian Human Rights Tribunal (1986 to 1992) and (1996 to 1998) (La Forest, 2000).

in human rights and labour relations; Rick Miles, a proponent for people with disabilities had experience in a senior administrative position with the Ontario government; and Ratna Omidvar who served as president on the Ontario Council of Agencies serving immigrants. The committee was commissioned to "provide an independent review of human rights enforcement procedures in order to make recommendations for a fair and practical system for the enforcement of human rights in Ontario" (Cornish, 1992, p. i). In addition to providing a detailed study of the largest and oldest human rights institution in Canada, the Cornish report stands out alongside the La Forest report in recommending the creation of a direct-access system.

The Black (1994) report reviewed British Columbia's *Human Rights Act*. British Columbia was a pioneer in human rights law in Canada including setting numerous precedents in expanding the law to cover new grounds of discrimination and experimenting with practices such as the "reasonable cause" provision discussed earlier (Clément, 2014). The purpose of the Black report was to "examine the *Human Rights Act* and to make recommendations for both statutory and administrative reforms" (Black, 1994, p. i). Black examined the direct-access system used in British Columbia in 1994 and ultimately recommended the re-introduction of a commission model (1994).

The Greschner (1996) report was produced by Donna Greschner, the chief commissioner of the Saskatchewan Human Rights Commission, as well as commission members Marjorie Hutchinson, Lynn Archdekin, and Christina Lwanga. The authors of this report discuss the advantages and disadvantages of the direct-access system and the commission system. Their focus was on improving the commission system rather than introducing a direct-access system (Greschner, 1996). In this way, the British Columbia and Saskatchewan reports provide an ideal comparison with the LaForest and Cornish reports because of their focus on improving, rather than replacing, the commission model.

Finally, the Symons 1977 report was produced by the members of the Ontario Human Rights Commission. This study provides useful historical context in comparing challenges facing human rights institutions over time. It was the first major review of a human rights institution in Canada. It was produced 15 years after the introduction of the country's first human rights statute (in Ontario). The review was deemed necessary because, according to the authors, "the legislation is now riddled with anomalies and hamstrung by limitations which render it increasingly unable to address the burgeoning human rights needs of the province" (1977, p. 8). The report provides valuable information on the difficulties that the commission encountered during this time and how these challenges remain a problem today.

4.3 Caseloads, Backlogs, and Delays

A common theme since the 1970s as evidenced by its discussion in six of the expert reports is that the number of human rights complaints has increased over time (Greschner, 1996; O'Neill, 1994; Black, 1994; Symons, 1977; OHRC, 2005; NSHRC, 2002). The ever-increasing caseloads have put pressure on human rights institutions, which has resulted in backlogs and delays. The resulting delays impact the accessibility of the system. One unfortunate consequence of delays is that they discourage people who experience discrimination from submitting complaints (Black, 1994; Greschner, 1996). Moreover, complainants often abandon their cases as a result of excessive delays (Greschner, 1996). Another consequence involves remedies. The La Forest report notes (2000) that delays make it difficult to reinstate an employee in cases where they were fired. Delays also make it difficult to force an employer to hire someone that they originally did not hire because of discriminatory hiring practices. In sum, the effect of exorbitant delays is that they leave both respondents and complainants justifiably displeased and unsatisfied with the system (Cornish, 1992; Greschner, 1996).

In two reports – Cornish (1992) and La Forest (2000) – the authors argued that switching to a direct-access system would reduce delays. Cornish and La Forest claimed that a direct-access system will be less beset by delays because a commission no longer handles or investigates complaints. Moreover, the direct-access system utilizes a hearing-driven system whereby all claims go to the tribunal (La Forest, 2000; Cornish, 1992). Overall, this would, according to both studies, reduce delays by enabling complainants to submit directly to a formal hearing. The tribunal system would rely on the use of disclosure, which entails both parties providing each other with the facts that they will use to support their claims. Disclosure also requires that each party provide the other with the appropriate materials that are specific to their group's argument (Cornish, 1992; La Forest, 2000). Both La Forest and Cornish argued that disclosure will correct delays associated with the investigation of complaints. Cornish suggested that the complainants (or their counsel) are the best equipped to investigate the cases. The complainant (and their advocate) could assemble the details of the case together arranging the facts to rely on and determining what evidence they require. Furthermore, those responding to cases (and their counsel) are those who are best suited to coordinate their version of events and assemble the evidence required for the first response (Cornish, 1992). According to La Forest, "the parties would be accountable for their own delays" (2000, p. 56).

In contrast, Greschner (1996) and Black (1994) supported retaining the commission system. Both Greschner and Black discuss the issues involved with switching to a system that forgoes investigation. The complaints process can be intricate and complicated. Demonstrating discrimination can often require evidence of a repeated set of actions over time. Often those in charge of investigating claims have to assemble cases without witnesses, which results in people needing to find "evidence of credibility or evidence showing whether there is a pattern of discriminatory behaviour" (Greschner, 1996, p. 38). Furthermore, marginalized populations often

lack proper resources, speak English as a second language, and/or are vulnerable in their places of work or neighbourhoods because of their race, sexual orientation, gender, and other factors. Hearings are more efficient only if those involved are properly prepared for the proceedings. Although some people may want to have a hearing, there are others who might instead want their cases investigated privately without a public forum (Greschner, 1996). Black argues that commissions must still investigate cases as "assigning responsibility for investigations to human rights agencies was an important step in making human rights protection accessible. It was also recognition that discrimination harms society in general and that eliminating discrimination is a public function" (1994, p. 103).

Both Black (1994) and Greschner (1996) recommended ways to retain the commission system and the investigation of most complaints without creating a direct-access system. Greschner and Black both suggested establishing a priority for cases whereby cases that are time sensitive get placed ahead of other complaints. However, Black argued that there should be detailed guidance to determine the specific cases that the commission choses to expedite ahead of others (1994). Black suggested that cases could be expedited: if claims might set a precedent in law, if a case could result in a large set of benefits for many people, or in situations where cases may be archetypes for other organizations in similar circumstances (1994). In the Greschner report, the authors present other approaches to improve investigations. One approach is that both respondents and complainants comply with requests for documents. Furthermore, Greschner suggested that "any records that may be relevant to a complaint" (p. 46) should be turned over to the commission during an investigation. This, Greschner contended, is necessary because it is not always obvious what records are appropriate or related to the case. Moreover, the new approach would reduce the chance that investigators will have incomplete information for a case. This is important because missing data can slow down investigations and is especially problematic for

investigating systemic discrimination. This is due to the fact that proving complaints of systemic discrimination is complicated and requires multiple instances of discrimination over time or proof of a policy that has systemic underpinnings (Greschner, 1996).

Black (1994) suggested that one way to reduce delays is to allow for the ability to skip the investigation process for complaints in some circumstances. He claimed that cases should proceed to a hearing without an investigation in those situations where all people involved in the case agree on the circumstances. An investigation may also prove unnecessary "if one party alleges certain events occurred and the other party denies they occurred…. [or] If both parties agree that there were no other witnesses to the event, again an investigation would often be fruitless. In the end, the issue will likely turn on the credibility of the two parties, and only the Tribunal can decide which version is correct" (p. 106). Black also argued for the use of disclosure in certain circumstances where investigation may prove less useful. According to Black, the use of disclosure to be employed in situations where the claim's "facts are relatively simple and can be gathered without difficulty through a discovery process" (p. 127). However, he contended that there should be rules to help stop disclosure from being used to encourage delay. There should also be protections in place to protect against invasive requests or requests for material that is irrelevant (Black, 1994).

In sum, while Cornish (1992) and La Forest (2000) argued for the implementation of a direct-access system. Black (1994) and Greschner (1996) provide evidence to suggest that people from marginalized populations benefit from the commission model. The investigation process should be retained, according to Black and Greschner because it ensures that trained professionals will assemble complaints for people who lack the appropriate skills. Although investigation could be retained, it should also be improved to reduce delays (Black, 1994; Greschner, 1996).

4.4 Funding and Time Limits

There has been no substantial increases in funding for human rights institutions in Canada in recent years despite the rise in caseloads. In four reports from multiple regions (Saskatchewan, Ontario, and Nova Scotia) the authors argue that funding has either decreased or remained unchanged amid rising complaint volumes (Greschner, 1996; Symons, 1977; NSHRC, 2002; OHRC, 2005). Moreover, in those few jurisdictions (British Columbia and Alberta) where budgets had increased, overall funding was still inadequate to meet demand (Black, 1994; O'Neill, 1994). Because of inadequate funding and staff, the large number of complaints overwhelm the available resources of human rights institutions, which renders them unable to process cases quickly enough. This, in turn contributes to delays and increased backlogs (Symons, 1977; Greschner, 1996; O'Neill, 1994; NSHRC, 2002; Black, 1994).

These studies call on various governments to increase funding to human rights institutions (Black, 1994; Symons, 1977; Greschner, 1996; OHRC, 2005; O'Neill, 1994; NSHRC, 2002). Proper funding has been shown to significantly reduce backlogs. For instance, when the Saskatchewan commission was provided additional funding in 1993 and 1994, they were able to hire more staff, which in turn allowed the commission to more quickly process incoming complaints (until funding was decreased again).[10] According to Greschner (1996) there is only so much that can be improved with changes to procedures. At some point, governments must increase funding. Moreover, "the protection of human rights cannot be treated as expendable when money is short" (Greschner, 1996, p. 5). Symons similarly argues that "legislation can only be as effective as the means provided to administer it" (1977, p. 9).

[10] The commission also stated that implementing early mediation and digitizing their records assisted with addressing the backlogs. However, they do stress how reducing the budget was the major factor that disrupted their ability to address complaints.

The authors of several reports discuss the implementation of time limits to improve the administration and adjudication of complaints (NSHRC, 2002; O'Neill, 1994; Greschner, 1996; Black, 1994; La Forest, 2000). They argue for a one-year time limit for the filing of discrimination complaints (O'Neill, 1994; Greschner, 1996, Black, 1994; La Forest, 2000). There is also a correlation between a late complaint and a lower chance of succeeding (La Forest, 2000). According to Greschner (1996), older cases are more difficult to process utilizing investigation because people may forget key details and witnesses may relocate. Furthermore, the investigation of these files draws resources and time away from other cases (Black, 1994; Greschner, 1996). At the same time, though, while these reports favoured time-limits, many also indicated that there should be discretion to accept complaints in special circumstances (Greschner, 1996; O'Neill, 1994; Black, 1994; La Forest, 2000).[11] Time limits help to ensure that old complaints are not draining valuable resources away from newer cases that are more likely to succeed (Black, 1994; Greschner, 1996).

In other words, although the two reports La Forest (2000) and Cornish (1992) argued for the introduction of a direct-access system to address backlogs and delays, a majority of reports focus on improving the commission system. The proposed changes would result in decreased backlogs. Increasing funding to human rights institutions and implementing other recommendations would significantly increase accessibility for marginalized populations. People from marginalized populations lack sufficient resources to pursue extremely delayed cases. Time limits would exclude older cases and allow human rights institutions to focus on new cases that are easier to investigate and process in general. Furthermore, implementing the requirement to

[11] For instance, the La Forest, report suggests a 1-year limit with extensions allowed in situations where there are repeated or ongoing acts of discrimination, when the person alleging discrimination is not able to put forth the complaints because they have a disability or where a person does not realize that they have been a victim of discrimination until the year is over.

expedite certain cases that do not require a complete investigation could also assist in addressing the problem of delays.

4.5 Human Rights Education

The authors of multiple reports argued for improved human rights education to ensure, among other things, that Canadians are better informed about their rights (Cornish, 1992; Black, 1994; Symons, 1977; Kahlon, 2017; Greschner, 1996). Members of multiple business groups and human rights organizations argued during these hearings that the public was not aware of the process for claiming their rights in accordance with human rights statutes (Black, 1994). Additionally, many argued for education in services in languages other than English as to deny services in other languages is to deny many of the most vulnerable access (Black, 1994). Moreover, Kahlon (2017) stated that "many individuals do not know their own basic human rights and, even if they do, they do not know what to do or where to go when those rights are violated" (p. 10). Thus, the production of education initiatives related to human rights is required to ensure greater access to redress for complainants (Greschner, 1996; Black, 1994; Cornish, 1992). Information is critical as it informs the public about human rights legislation – what grounds are included in the law, how the process works, who can submit complaints, options for redress, and more. Moreover, education provides the public with knowledge about the assistance available to them if they become targets of discriminatory behaviour (Symons, 1977). According to one of the participants interviewed for the Greschner, report, a person "cannot assert a right unless [they] know it exists" (1996, p. 84).

Failing to promote human rights education can produce serious issues for people who encounter discrimination in the workplace. One example of this relates to the complainants in the Presteve Foods Ltd. case (O.P.T. V. Presteve Foods Ltd., 2015). The complainants known as

O.P.T and M.P.T. (their real names were protected from publication), were both targets of repeated sexual harassment by their employer Jose Pratas the then owner of Presteve Foods Ltd. in Wheatley Ontario. Both women were migrant workers from Mexico, they spoke little English, could not read English, and were at risk of being sent back to Mexico at anytime if their employment was terminated by their employer. Neither O.P.T. or M.P.T. were aware of human rights legislation or know how to obtain their rights. They did not know that they could file a human rights complaint until 2009 a considerable time after they first encountered discrimination in 2007. This is of course a failing of the system to ensure that human rights legislation is accessible to the marginalized. There should be greater education provided in multiple languages to all businesses, so employees are aware of their rights if they are targets of discrimination. This would help complainants to file complaints right away when they encounter sexual harassment or discrimination (O.P.T V. Presteve Foods Ltd., 2015).

The authors of many of the reports discuss certain methods that can be implemented to better educate the public about human rights. In the La Forest (2000) report, the authors argued for a "national approach" whereby commissions across the country collaborate on educational initiatives. Symons (1977), Strongitharm, (1979), Greshcner (1996), and Kahlon (2017) specifically called for the increased use of technology to inform the public about human rights (Symons, 1977; Strongitharm, 1979; Greschner,1996; Kahlon, 2017). Kahlon (2017) called for improved "digital services that can reach audiences online" (p. 21). Kahlon stated that technology should be used in accordance with other services that people can locate in person. According to Kahlon,

> The application of technology within the human rights context should be done with a goal of expanding access to those who have the capability and capacity to use it, thereby freeing up person-to-person services for those who do not. It should include online-guided

> resources to legal information, self-help tools, early resolution tools, digital legal services, and the human supports required by disadvantaged persons to justify rights and to inform others of their human rights obligations (p.24).

According Greschner (1996) "members of the business community also recommended educational outreach targeted to their needs. For example, they suggested that the commission provide workshops and seminars to employers and employees and distribute printed materials to all businesses" (p. 85).

This last point relates directly to people like M.P.T. and O.P.T. in the Preseteve Foods Ltd. case who were targets of sexual harassment and discrimination by their employer. In their case, they were unaware of their rights and how to obtain them. If all businesses, employers, and employees were being provided with printed materials and outreach in services in multiple languages the system would better protect people like O.P.T. and M.P.T. With proper educational resources delivered to all businesses, it would at least provide more people with the knowledge of what to do when they encounter discrimination. The current system is failing marginalized people when they are not properly informed of their rights under the code (O.P.T. V. Presteve Foods Ltd., 2015).

A common refrain from the committees of multiple reports was that human rights institutions are not properly addressing systemic discrimination. The current systems focus too heavily on the complaint processing to the detriment of other activities that disrupt systemic discrimination (Kahlon, 2017; Black, 1994; Symons, 1977; Greschner, 1996; Cornish, 1992). When human rights institutions focus exclusively on individual complaints, it becomes more difficult to identify the negative effects of procedures or requirements that a business may implement that seem neutral (Black, 1994). Greschner (1996) argued that even though "complaints brought by individuals raise issues of systemic discrimination and lead to positive

change throughout the province…. relying only on individual complaints is an inefficient method of changing the underlying systems and practices that permeate institutions and organizations" (p. 10). Moreover, to properly address systemic discrimination human rights institutions must employ a broad and multi-faceted approach to education (Cornish, 1992).

The authors of many reports claimed that more human rights education is needed to better address systemic discrimination (Kahlon, 2017; Greschner, 1996; Black, 1994; Cornish, 1992). In the 2017 report from British Columbia produced by Kahlon, the author argued that the commission should have the ability to investigate and research issues in society that are contributing systemically to discrimination that impacts people and groups. Kahlon's (2017) report essentially echoed similar findings from Black's (1994) report more than two decades earlier: specifically, that a commission should be created to ensure that information is provided to businesses so they can work to eliminate policies and procedures that discriminate either directly or indirectly. Education concerning systemic discrimination can be essential in helping people to realize that even if something has always been done a certain way, it does not mean it should continue especially if it is contributing to discriminatory practices (La Forest, 2000).

Human rights education initiatives and materials are necessary in order to engender respect for human rights in society. This is accomplished, in part, by increasing awareness of human rights and preventing future instances of discriminatory behaviour (Symons, 1977; Cornish, 1992). Education related to human rights can limit infringements on other's rights, reducing discrimination complaints that then need to be adjudicated (Kahlon, 2017; Cornish, 1992). In this way, it increases accessibility by reducing backlogs through fewer cases. And as the authors of the Symons (1977) report insisted many years ago, properly educating the public is necessary to alter attitudes that lead to discriminatory actions. As La Forest (2000) notes: "One of the most important aspects of promoting equality is the need to educate those who must provide

equality and those who need equality about the meaning and intent of the Act with respect to how equality should be achieved" (p. 44).

In spite of the importance of human rights education, it is not, according to every report, a priority among commissions and governments. Moreover, although complaint processing is a necessary function of human rights institutions, it has increasingly become their sole focus. As a result, human rights education has been neglected as available resources are increasingly allocated to processing complaints (O'Neill, 1994; NSHRC, 2002; Symons, 1977; La Forest, 2000; Greschner, 1996). According to O'Neill (1994) and Greschner (1996) resources are siphoned from educational services towards processing complaints. This is alarming considering that there is a demand for educational resources from multiple groups: businesses, organizations that support the community, and the public (O'Neill, 1994). Many of the reports' authors argued for an increased focus on human rights education and proper resources to accommodate this important commission function (O'Neill, 1994; Cornish, 1992; Black, 1994; Greschner, 1996; Symons, 1977; La Forest, 2000; NSHRC, 2002).

The authors of multiple reports have argued not only for the necessity of a strong education mandate, but of the failure of governments and commissions to prioritize education (Black, 1994; Greschner, 1996; Symons, 1977; Kahlon, 2017). As Kahlon (2017) notes in his report, British Columbia was without an institution to carry out these initiatives from 1984 to 1996 and 2002 to 2019. From 2002 to 2019, the British Columbia Human Rights Tribunal administrated all complaints. Since the tribunal had to remain impartial the institution was unable to provide much more than basic information related to complaints. The Ministry of Attorney General was responsible for human rights education in the province; meanwhile, the B.C. Human Rights Clinic produced a select number of materials related to education. Kahlon – the author of the most recent report for British Columbia – argued that neither the Ministry of Attorney

General nor the B.C. Human Rights Clinic focused sufficient attention towards human rights education. Moreover, the primary focus during this time was on administering and adjudicating complaints (2017). The authors of numerous reports, including those that support the introduction of a direct-access system, emphasized the value of retaining or implementing a commission to produce educational materials (Cornish, 1992; Black, 1994; La Forest, 2000; Kahlon, 2017). Kahlon claimed that: "The absence of a Human Rights Commission means that critical work is not being done to promote and protect human rights. Existing organizations have limited capacity to promote a climate of understanding and mutual respect concerning human rights. They do not have the mandate or capacity to prevent discrimination, as their services are primarily responsive" (2017, p. 18).

In sum, human rights education has not been prioritized in jurisdictions across the country. It is even less of a priority in jurisdictions with a direct-access model. Resources have been increasingly concentrated on processing complaints. This is unfortunate as education is necessary to prevent discrimination and promote access to the redress process for anyone who becomes a target of discriminatory behaviour. If governments want to discourage discrimination and engender respect for rights, they should increase resources for education. In addition, if governments increase resources, commissions should employ those resources in support of education related to human rights. Even in a direct-access system, there must be education and the promotion of human rights to better mitigate systemic discrimination.

4.6 Engaging Communities

Several reports contain recommendations to increase accessibility through improvements to service delivery. The improvements include adding additional offices in multiple regions; providing materials in languages other than English; engaging with community organizations; and increasing confidence in human rights institutions such as ensuring greater independence from government. In many cases, the authors argue for these changes to improve accessibility regardless of whether they support the introduction of a direct-access system.

Currently, there is a lack of in-person services available at human rights institutions across the country. Thus, the authors of a significant number of reports argued in favour of additional regional offices to address this issue (Black, 1994; NSHRC, 2002). Existing offices should be updated so that they are less difficult to locate and more accessible to a larger number of people (Symons, 1977). In the O'Neill (1994) report, the authors emphasized that offices should be in locations that are accessible to people with physical disabilities. Regional offices are necessary as people often prefer or require in person services.

Similarly, human rights institutions would be more accessible to marginalized populations if they provided services in languages other than English (Kahlon 2017; Black, 1994; Symons, 1977; Cornish, 1992). British Columbia, for example, is home to a multitude of other languages spoken by an ethnically diverse population, (Kahlon, 2017). In the 1990s, Bill Black (1994) recommended that commission documents concerning basic procedures "should not be simply a translation of other material written in English. It should be designed for the community that will use it, taking account both of the goal of plain language and of the need to be sensitive to the culture of the community" (p. 75).

Another theme, discussed by the authors more generally, in the Kahlon, (2017), Black (1994), Cornish (1992), ORCH (2005), Symons (1977), Greschner (1996), and O'Neill (1994)

reports was the need for human rights institutions to support and engage with community groups that work with marginalized populations. Community organizations serve an important role in society. Complainants often seek these groups for assistance because they are apprehensive of government institutions. Black (1994) noted in his report that "sometimes there is fear of legal procedures. Sometimes there is distrust of government agencies. Sometimes a person needs moral support as well as technical assistance" (Black, 1994, p. 88). People can receive invaluable guidance from community groups. Moreover, these groups are often better able to help people because they are centrally located within the communities and regions they serve (Black, 1994). The groups "are sensitive to cultural considerations because they themselves are part of the culture" (Black, 1994 p. 88). Organizations that serve Indigenous people, people who are LBGTQ2S+, people who have a physical or mental disability, and so on could provide better support because they could liaise with the commission and provide assistance to the public based on their specific requirements. Human rights institutions should support community groups by providing additional training to workers to inform them about the Code. Furthermore, in order to more properly support these groups, funding should be provided so they can further assist marginalized populations with potential complaints (Black, 1994).

In several reports, the authors found that community engagement contained benefits for improving the accessibility of human rights institutions. The authors suggested that institutions connect with appropriate organizations to assist people through the claims process (La Forest, 2000; Black, 1994; Cornish, 1992). Non-governmental organizations could assist those putting forward claims by collecting the information, which would potentially save time and avoid delays (Black, 1994). Furthermore, community groups might also help to discourage the pursuit of unfounded discrimination claims in, for example, situations where someone mistakenly believes that there has been an infringement on their rights or they misunderstand the legislation (Black,

1994; Cornish, 1992). As Black (1994) noted, “the commission could provide short training sessions to acquaint staff or volunteers with the Code and its procedure… it could also provide manuals and informational material for use by staff, volunteers, and those thinking of filing a claim” (p. 88).

Finally, among the many recommendations contained in these studies for improving accessibility to human rights institutions, there was a shared desire to ensure greater independence from government as part of an effort to increase the public’s confidence in these institutions (Kahlon, 2017; O’Neill, 1994; Paris, 1983a; Symons, 1977; NBHRC, 2008; NBHRC, 2004; OHRC, 2005; Greschner, 1996; Cornish, 1992; Black, 1994). According to a report produced by members of the Ontario Human Rights Commission (2005) "commissions have been a cornerstone of a Canadian human rights system that has been lauded, envied, and modelled around the world” (p. 9). The authors of the OHRC report continue: "An effective human rights system requires the establishment of state institutions that are capable of acting independently of power brokers in society, particularly government. Otherwise, they are prone to being dominated by the interests of governments and powerful stakeholders” (2005, p. 21). Kahlon (2017) in his report for British Columbia argues that improved independence “will permit open and candid commentary on the human rights performance of the government and elected officials within B.C. (p. 19). Similarly, Greschner (1996) suggested that “human rights legislation is designed to protect the fundamental rights of individuals and disadvantaged groups, who are often not in the majority (p. 22). Moreover, marginalized populations who utilize these institutions are often people who have the least power in society. Respondents, in contrast, are often large companies or governments (La Forest, 2000). Symons (1977) noted that people are sometimes leery of filing complaints because of the incorrect assumption that commissions are a “creature” of the government. Thus, the commission needs to be perceived as neutral if it is to muster public

confidence (Symons, 1977). Independence can improve public confidence which in turn increases the chance that people will feel comfortable putting forth their complaints, in this manner independence indirectly improves accessibility of human rights institutions.

In British Columbia, for instance, the Ministry of Attorney General is responsible for the human rights tribunal (Kahlon, 2017). It is common in most jurisdictions for the chairperson of the commission to report to a ministry or deputy minister within the government (Eliadis, 2014a). However, multiple reports' authors have argued that human rights institutions should not be within the jurisdiction of a ministry or department because this arrangement does not allow enough separation between the government and human rights institutions (O'Neill, 1994; Kahlon, 2017; Symons, 1977; NBHRC, 2004). According to O'Neill (1994), it is not appropriate for the commission to be beholden to the ruling political party as it is in many areas in Canada.

Kahlon (2017) argued that this is true even more so for British Columbia given its history with commissions. In the 1970s and 1980s, for instance, the Social Credit government was notorious for delaying appointments to the commission, appointing people who had no expertise in human rights issues, and interfering in investigations (Clément, 2014). Kathleen Ruff (1992), an expert on human rights law in Canada, has identified a history of similar findings with the Saskatchewan and federal human rights commissions. In order to create a system that is freer from government interference, multiple studies suggest that commissions should report directly to the legislature (O'Neill, 1994; Kahlon, 2017; Paris, 1983a; NBHRC, 2014). The authors of the NBHRC (2008) report further state that in order for an institution to "fulfil its statutory mandate, it not only has to be free from interference by government, it also has to be seen to be independent" (p. 2). Currently, only three commissions report directly to the legislative assembly – Quebec, Yukon, and the Northwest Territories (Kahlon, 2017). Many other human rights institutions in various jurisdictions are currently insufficiently independent of the government as

many reports to a minister. In British Columbia the tribunal reports to the lieutenant governor in council (BCHRT, 2016); meanwhile, the commissions in Alberta, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Saskatchewan, Prince Edward Island, and the federal government all report to a minister.

In sum, there are several ways that human rights institutions can improve service delivery for people from marginalized populations. Physically accessible offices should be available in more locations, and materials should be produced in more languages for those who do not speak English. Commissions should engage further with community groups to better support people from marginalized populations and avoid any duplication of effort between community groups and human rights institutions. Human rights institutions are not accessible if people do not trust them to fulfil their mandates. Everyone who utilizes the services of human rights institutions should have confidence that these organizations are free from government interference.

4.7 Conclusion

The fourteen government reports produced in Canada between 1977 and 2017 provide unique insights into the evolution and development of human rights law in Canada. They contain detailed recommendations to improve human rights institutions based on extensive consultations with experts and community organizations. Among other things, these reports demonstrate, for the most part, that the commission model is more accessible to marginalized populations than the direct-access system. Although two reports favoured a direct-access model, most of these studies emphasize the benefits of the commission model. The direct-access model places too much pressure on complainants because the system relies on discovery. Professional investigations lead by a commission ensure that human rights professionals will continue to review complaints for people from marginalized populations who would otherwise struggle to collect information on

their cases. Carriage of complaint, which is a feature of the commission model, also ensures that marginalized populations are properly represented before tribunals.

In addition, these studies offer recommendations to enhance the commission system and improve its service delivery. The authors suggest greater funding and imposing time limits to properly process cases and reduce delays. They also suggest that commissions should exist to support education because it is imperative for the promotion of human rights and for the prevention of discrimination in society. Moreover, governments and human rights institutions should prioritize education more as jurisdictions have consistently received inadequate funding for human rights education. Finally, many reports' authors argue for a few simple approaches to improve accessibility that should be implemented. These approaches include more offices, materials in additional languages, improved community engagement, and proper institutional independence. For human rights institutions to properly address discrimination in society they must be properly funded with a strong mandate towards promotion and prevention.

Chapter 5: Case Processing Efficiency and Representation Before the Tribunal

5.1 Introduction

There has been a long-standing debate amongst human rights scholars regarding which system is more effective at addressing human rights violations: the direct-access system or the commission system (Eliadis, 2014a). In particular, no study has yet to determine which system is more accessible to people from marginalized populations. This study addresses this deficiency by comparing the accessibility of both models with a particular focus on British Columbia. The province is an excellent choice for this research because it has employed both models multiple times since the 1970s. This chapter examines annual reports produced by the British Columbia Human Rights Commission (BC HRC) from 1996 to 2002 and the Human Rights Tribunal (BCHRT) from 2006 to 2016. There is no study to date that has analyzed the data in both sets of annual reports or provides this type of comparison between the two models of human rights institutions in Canada.

I find, based on the information in the annual reports, that the commission model is more accessible to marginalized populations. The commission model processed cases more efficiently than the direct-access system. The commission model also closed more cases and processed more cases over the years than the direct-access model. The exception is that, during this period, the direct-access model was more likely to settle cases as opposed to screening them as does the commission. On this metric, the direct-access system is more accessible as complainants will more likely receive restitution in the direct-access model compared to the commission model. Nonetheless, the commission model provides greater access for complainants to win their case at a hearing. One reason posited for this is that complainants are guaranteed representation in the commission model compared to the direct-access model. The information in the reports supports

this conclusion. Complainants with representation won their cases more often on average than complainants without support.

The information contained in the BC HRC and BCHRT's annual reports provides unique insights into the operations and effectiveness of both models. The annual reports for the years 1996 to 2002 contain statistical information for the BC HRC whereas the reports for the years 2006 to 2016 contain statistical information on the operations of the BCHRT.[12] The information analyzed in these reports account for 18,932 cases (BC HRC, 1996 to 2002; BCHRT, 2006 to 2016).[13]

These statistics include the number of cases closed, cases opened, cases screened and settled each year, cases resolved by a hearing, and (for the direct-access system) cases where the respondent is represented by counsel. During the years British Columbia employed a direct-access system, there is information in the annual reports concerning decisions rendered by the tribunal at a hearing. However, during the years the province employed a commission system, there is only one year (1996 to 1997) with information on cases resolved with a formal hearing. To supplement this data, this chapter draws on information in the Canlii website (Canlii, 1997 to 2002). Canlii is a legal database which contains a record of cases that have been adjudicated by the tribunal in British Columbia from 1997 to 2002. The database has information on both preliminary rulings and final decisions. Final decisions are rendered by adjudicators at the conclusion of a hearing. Adjudicators can either dismiss a case or find a case justified. If the case is dismissed, then the adjudicator has ruled that there was no discrimination found under the

[12] Although the direct-access system has been in operation from 2002 to 2019, these ten years offer the most comprehensive data compared to other years. Information was missing in the annual reports for the years 2003 to 2005 and the reports after 2016.

[13] Unless otherwise cited the information within this chapter is based on the statistical data in the annual reports from the British Columbia Human Rights Commission (BCHRC 1996 to 2002) or the British Columbia Human Rights Tribunal (BCHRT 2006 to 2016).

Code. If the adjudicator finds the case justified, then they rule that discrimination was found under the Code. Including this Canlii data allows for direct comparisons of decisions rendered by tribunal adjudicators each year during the BC HRC period and the BCHRT period (Canlii, 1997 to 2002).

5.2 Screening and Settling Cases

When a case was filed with the BC HRC or the BCHRT, it was first screened by the institution to determine if the case should be accepted or rejected for further processing. Screening is a necessary function of human rights institutions to ensure that a case has merit. Cases are screened to ensure that they are within the mandate of the legislation, and that they are filed within the statutory time limit. During the commission period there was a one-year time limit for complaints (*Human Rights Code*, 1996). During the direct-access period, there was a six-month time limit for filing cases (BCHRT, 2016). While cases can be screened out during the initial intake, they can also be screened later in the process.[14]

Cases may be settled at the BC HRC or BCHRT instead of being screened or adjudicated. The settlement process involves both the complainant and respondent coming together with an impartial mediator to try and resolve the case without a hearing. If both parties agree to the settlement, the case is closed and the respondent typically provides the complainant with a monetary sum (Eliadis, 2014a). During the operation of the BC HRC, a case could be settled before investigation or once a case was sent to the tribunal. In the BCHRT a case may be settled at anytime before a case is found justified or dismissed at a hearing.

[14] The statistics concerning screened cases do not include cases that are closed as a result of a hearing, whether that case is dismissed or justified

Both the BC HRC and the BCHRT screened out cases at a higher rate over time (Table – 2 presents cases screened out by the BC HRC from 1996 to 2002 and Table – 3 presents cases screened out by the BCHRT from 2006 to 2016). During the years the government of British Columbia had instituted the BC HRC, the number of cases screened out almost doubled over the six-year period. There were 341 cases closed through screening at the BC HRC in the first year, compared to the final year (2001/02) when the BC HRC screened out 606 cases (Table – 2). There was a similar trend with the BCHRT. Cases closed by screening almost doubled from 222 cases in 2006/07 to 417 in 2015/16 (Table – 3).[15]

Table 2: Cases Screened out by the BC Human Rights Commission (BC HRC) Over Time, 1996 to 2002

	1996/97	1997/98	1998/99	1999/2000	2000/01	2001/02	Total
Cases Opened	1439	1047	760	719	766	814	5545
Cases Closed Any Reason	1577	1566	1636	1220	736	903	7638
Cases Screened out Before Investigation	165	114	92	106	142	239	858
Cases Screened out After Investigation	176	365	556	506	359	367	2329
Cases Screened Out Total	341	479	648	612	501	606	3187

Source: Compiled BCHRC
Cases from 1996 to 2002
Notes: Cases Opened: Cases newly accepted for filing each year. Cases Closed Any Reason: Includes cases that are settled, screened, etc. Screened out before investigation: Refers to cases that are screened out before they are investigated at the commission. Screened out after investigation refers to cases that are closed by screening after they are investigated at the commission.

[15] Cases Screened by the BCHRT include those rejected for being late at screening and those rejected during screening.

Table 3: Cases Screened out by the BC Human Rights Tribunal (BCHRT) Over Time, 2006 to 2016

	2006/07	2007/08	2008/09	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16	Total
Cases Opened	1018	1053	1141	1123	1163	1092	1028	1102	1184	1227	11,131
Cases Closed Any Reason	1109	1030	1196	1181	1010	1112	1232	1108	1136	1180	11,294
Cases Screened Out Total	222	316	413	443	366	387	448	301	303	417	3616

Source: Compiled BCHRT
Cases from 2006 to 2017
Notes: Cases Opened: Cases newly accepted for filing each year. Cases Closed Any Reason includes case closed by settlement, screening, etc. Cases Screened Out: Includes cases screened out at any stage and those rejected for being late filed

Although both systems screened out a larger number of cases over time, the BC HRC screened out proportionately more cases than the BCHRT. Moreover, the BC HRC closed the majority of its cases by screening whereas the BCHRT closed a majority of their cases through settlement. Under the BC HRC, for every year except 1996/97, cases were closed more by screening than any other method (Table – 4 has information concerning how cases are closed by the BC HRC by outcome). Additionally, the total number of cases screened out from 1996 to 2002 amounts to 3187 total cases or 42 per cent of all cases closed during this period. At the BCHRT (Table – 5) the tribunal closed 11,294 cases – 32 per cent of those cases were screened out before proceeding to the tribunal (screened includes late filed). However, the number of cases the BCHRT settled mirrored the number dismissed as a result of being screened out at the BC HRC. During the years the government of British Columbia employed a direct-access system, 42 per cent of all cases closed were closed by way of a settlement over the period studied (Table – 5 has information concerning the number of cases closed by outcome at the BCHRT).[16] In sum, screening out cases was a common strategy for closing cases for both the BC HRC and the BCHRT. But it was more common with the former and cases were more likely to be mediated (settled) under the later.

[16] There are only approximate values for the settlement numbers for years 2006/07 to 2009/10 as these years only gave percentages for number of cases settled each year. Unfortunately, it is impossible to compare settlement rates between BC HRC and the BCHRT. This is due to the fact that settlement rates are not available for every year the commission was in operation. There is partial information related to the cases settled at the BC HRC prior to a case being sent to the tribunal, but there is no information on the number of cases settled by the tribunal each year.

Table 4: Cases Closed by the British Columbia Human Rights Commission (BC HRC) 1996 to 2002 Organized by Outcome

	1996/97	1997/98	1998/99	1999/2000	2000/2001	2001/2002	Totals	Percentage of Total Cases Closed
Closed Cases by Outcome								
Settlements	358	220	258	188	115	173	1312	17.18%
Dismissals - Before Investigation	165	114	92	106	142	239	858	11.23%
Dismissals - After Investigation	176	365	556	506	359	367	2329	30.49%
Referred to Tribunal	N/A	310	220	184	120	124	958	12.54%
Withdrawn	307	267	273	126	N/A	N/A	973	12.74%
Not Pursued	520	290	237	110	N/A	N/A	1157	15.15%
Upheld After Hearing	28	N/A	N/A	N/A	N/A	N/A	28	0.37%
Dismissed After Hearing	23	N/A	N/A	N/A	N/A	N/A	23	0.30%
Open Cases End of Year	N/A	N/A	N/A	N/A	647	569	-	-
Cases Closed	1577	1566	1636	1220	736	903	7638	

Source: Compiled BC HRC Cases from 1996-2002

Notes: Settlements: Cases Closed by mediation. Dismissals Before Investigation: Cases screened out before investigation. Dismissals After Investigation: Cases screened out after investigation. Referred to Tribunal: Number of cases sent to Tribunal for processing that year 1996/97 has information from the tribunal for how complaints are processed every other year does not. Withdrawn: Cases withdrawn. Not Pursued: Cases not pursued by complainants. Upheld After Hearing: Complaints found in favour of complainants (justified). Dismissed After Hearing: Complaints found in favour of respondent (dismissed). Open Cases End of Year: Cases awaiting processing at the end of the year (backlogged cases). Cases Closed: Cases closed for any of the above reasons. N/A: Information was not available in that category for that year.

Table 5: Cases Closed by the British Columbia Human Rights Tribunal (BCHRT) 2006 to 2016 Organized by Outcome

	2006 /07	2007 /08	2008 /09	2009 /10	2010 /11	2011 /12	2012 /13	2013 /14	2014 /15	2015 /16	Total	Percentage of Total Cases Closed
Cases Rejected During Screening	222	276	366	395	335	336	409	251	245	354	3189	28.2%
Late Filed Complaints Rejected	N/A	40	47	48	31	51	39	50	58	63	427	3.8%
Application to Dismiss Granted	111	94	105	125	80	127	131	114	104	80	1071	9.5%
Cases Settled	513	432	416	425	396	408	479	555	564	557	4745	42.0%
Cases Withdrawn or Abandoned	187	143	190	140	130	145	123	102	137	106	1403	12.4%
Decisions Rendered After Hearing	76	45	72	48	38	45	51	36	28	20	459	4.1%
Active Complaints Year End	691	765	706	829	N/A	N/A	880	820	868	915	-	-
Cases Closed	1109	1030	1196	1181	1010	1112	1232	1108	1136	1180	11,294	

Source: Compiled BCHRT Cases from 2006-2016

Notes: Cases Rejected During Screening: Cases dismissed before a hearing. Late Filed Complaints Rejected: Complaints screened out for being late. Application to Dismiss Granted: Complaints dismissed by the tribunal prior to a hearing. Cases Settled: Cases closed by settlement. Cases Withdrawn or Abandoned: Cases that were withdrawn or not pursued. Decisions Rendered After Hearing: Decisions rendered by the tribunal after a hearing. Active Complaints Year End: Complaints that are still awaiting processing (backlogged cases). Cases Closed: Cases closed for any reason including settlement, screening, etc. N/A: Cases that are not available.

In acting as a gatekeeper – screening out more cases and offering fewer opportunities for mediation – critics of the commission system have argued that it is inaccessible to marginalized populations (Eliadis, 2014a). In this way, according to advocates such as Eliadis, the direct-access system provides more avenues for restitution by offering additional opportunities for mediation and formal hearings.

5.3 Opened and Closed Cases

The BC HRC closed more cases than it opened compared to the BCHRT. The BC HRC opened 5545 cases and closed 7638 as shown on Table – 2. The BC HRC was able to close more cases than it opened, in part, because it inherited a backlog of cases from the BC Human Rights Council, which was the organization that was responsible for cases before the BC HRC was reinstated in 1996. In contrast, the BCHRT opened 11,131 cases and closed 11,294 (Table – 3). As seen in Table – 2, over six-years, the BC HRC closed 2093 cases more than it opened and as seen on Table – 3 the BCHRT in the direct-access system closed 163 more cases than it opened. However, the total number of cases that were closed in the direct-access system changes when backlogged cases are included in the calculation. The backlog for the BCHRT increased over the period despite the 163 decrease in cases. There were 691 active cases in 2006/07 and 915 active cases in 2015/16 (Table – 5).[17]

The commission was therefore, more effective at reducing its backlog of cases compared to the direct-access system. Including cases closed by being screened out, the BC HRC closed more cases than it opened in five of the six years of its operation. Moreover, the BC HRC became

[17] Cases closed at the commission from 1997 to 2002 include a category cases referred to the tribunal. During these years it is unclear how many of these cases were closed by the tribunal each year whether they were backlogged, settled, or closed after a decision.

more efficient over time based on the average days it took to process cases (Table – 6). On average, the BC HRC took roughly 775 days after intake to process cases from 1996/97, whereas the BC HRC only took 281 days (after intake) to process cases during 2001/02. Considering the backlog at the BCHRT, it is evident that the BCHRT was taking over a year to process cases. Overall, the commission system showed improving case administration over time. Although case backlogs still existed by the end of each sample period, the case backlogs decreased overall at the BC HRC as case processing time decreased.

Table 6: Case Processing Averages in Days at the British Columbia Human Rights Commission (BC HRC) 1996 to 2002

	1996/97	1997/98	1998/99	1999/2000	2000/01	2001/02	Total
Intake	90*	26	18	22	32	56	244
Investigation	575*	625	193	259	258	234	2144
Decision	200*	190	98	80	64	47	679

Source: Compiled BC HRC Cases from 1996 to 2002

Notes: 1996/97 is an approximation.* Intake refers to the days prior to the investigation when the commissioner decided whether to investigate a case (or dismiss it). Investigation: The days it took to investigate a case. Decision: Days it took for the commissioner to decide whether to forward the case to a hearing or screen it out (dismiss).

In other words, the commission model was more efficient at processing cases. A system that produces fewer delays and closes cases more quickly is more accessible to those who cannot afford to wait years for resolutions to their cases.

5.4 Tribunal Adjudication

If cases are not settled or dismissed during the screening process, the BC HRC or BCHRT forwards the case to a hearing for adjudication. However, both systems have decreased the number of cases sent to adjudication. Between 1996 and 2016, the number of formal hearings rendered by both systems decreased, with 51 decisions rendered in 1996/97 to 20 decisions rendered in 2015/16 as seen on Table – 7.

Table 7: Total Tribunal Decisions Rendered Over Both Systems, British Columbia Human Rights Commission (BC HRC) 1996 to 2002 and Tribunal (BCHRT) 2006 to 2016

Year	Total Cases	Cases Closed	Percentage	Year	Total Cases	Cases Closed	Percentage
1996/97	51	1577	3.2%	2008/09	72	1196	6.0%
1997/98	26	1566	1.7%	2009/10	48	1181	4.1%
1998/99	49	1636	3.0%	2010/11	38	1010	3.8%
1999/2000	54	1220	4.4%	2011/12	45	1112	4.0%
2000/01	38	736	5.2%	2012/13	51	1232	4.1%
2001/02	21	903	2.3%	2013/14	36	1108	3.2%
2006/07	76	1109	6.9%	2014/15	28	1136	2.5%
2007/08	45	1030	4.4%	2015/16	20	1180	1.7%

Source: Compiled Cases BC HRC 1996-1997, Canlii 1997-2002, Compiled Cases BCHRT 2006-2016

Notes: Decisions: The number of Decisions rendered that year by the Tribunal at hearings. Cases Closed: All cases closed that year. Percentage: Percentage of total complaints closed that year

The number of cases opened at the BCHRT increased from 1018 in 2006/07 to 1227 in 2015/16 (Table – 3). However, as seen on Table – 7, decisions rendered after a hearing have decreased over time – from 76 decisions in 2006/07 to only 20 decisions in 2015/16. There is a brief period from 2010/11 to 2012/13 where cases increase from 38 to 51, but the numbers decrease again to 20 decisions in 2015/16. In 2006/07, the 76 decisions rendered equaled 6.9 per cent of cases closed during the year, compared to 2015/16 when 20 decisions were rendered equalling 1.7 per cent of total cases closed during this period. In other words, complainants were less likely to reach a hearing under the BCHRT.

One of the main justifications by scholars who argue in favour of a direct-access system is that it offers an improved access to a hearing (Eliadis, 2014a; Flaherty, 2014). According to Flaherty, cases in Ontario were processed more by hearing after the province switched from the commission system to a direct-access system (2014). However, this was not the case in British Columbia. Although more cases go forward beyond the screening phase in the direct-access model, most of those cases were mediated rather than determined at a formal hearing.

In British Columbia there were proportionately fewer cases going to the hearing stage under the direct-access system compared to the commission system. On the one hand, fewer cases appeared before a formal hearing over time under the commission system (Table – 7). The tribunal rendered 51 decisions in 1996/97 but only 21 in 2001/02. However, the highest number of decisions rendered during the employment of the commission system is not the first year was in operation in 1996/97 but in 1999/2000 when the total number of decisions rendered was 54. It is worth noting that cases decreased from 1439 in 1996/97 to 814 in 2001/02. However, hearings accounted for 3.2 per cent of closed cases in 1996/97 compared to 2.3 per cent of closed cases in 2001/02. The number of the hearings remain a low percentage of cases closed each year. Overall, these data demonstrate that complainants do not attain the same level of access to hearings each

year, regardless of the system. Instead, their cases are increasingly screened, settled, or backlogged (Canlii, 1997 to 2002).

Although settling a case can benefit both parties, there are issues with increasingly relying on, for example, mediation rather than a formal hearing. Complainants can sometimes feel pressured into settling their cases or accepting unsatisfactory offers for fear of further delays (Eliadis, 2014a). Moreover, when cases are mediated, the settlement results are kept hidden. This reduces the likelihood that a case will influence human rights law or create future legal standards. It also diminishes the educational potential of cases. According to Leslie, "Decisions in many human rights cases – such as those involving the duty to accommodate – depend upon all the circumstances of a case. People need information about the specific facts of real cases" (2014, p. 164). However, if cases are never adjudicated, the informational value of intricate problems related to human rights will be lost. Also, the remedies offered as a result of a hearing help mediators as they use these judgements to help determine their settlements (Leslie, 2014).

5.5 Complaints Justified Versus Dismissed

The likelihood for a case to be found in favour of complainants or respondents differs based on the model for human rights adjudication. Under the commission system, from 1996 to 2002, complainants had a greater chance of attaining a ruling in their favour than respondents. As shown in Table – 8, out of 239 decisions rendered during this period, 143 were decided in favour of the complainant and 96 decisions were in favour of the respondents. In other words, 60 per cent of cases were found in favour of complainants compared to 40 per cent of cases in favour of respondents.[18] In 1999/2000, a hearing found 80 per cent of the hearings in favour of

[18] In contrast, 1998/99 and 1999/2000 are anomalous periods. In 1998/99 hearings found in favour of respondents 55 per cent of the time whereas 45 per cent of hearings were found in favour of the complainants.

complainants and only 20 per cent of the total hearings in favour of respondents. This was the highest number of decisions rendered in favour of complainants in the six-years that the commission system was operating in British Columbia. During this year, eight out of ten cases were found in favour of complainants compared to respondents (Canlii, 1997 to 2002).

Table 8: Tribunal Decisions Rendered at the British Columbia Human Rights Commission (BC HRC) 1996 to 2002

	Dismissed		Justified		
	Frequency	Percentage	Frequency	Percentage	Total
1996/97	23	45.10%	28	54.90%	51
1997/98	11	42.31%	15	57.69%	26
1998/99	27	55.10%	22	44.90%	49
1999/2000	11	20.37%	43	79.63%	54
2000/2001	15	39.47%	23	60.53%	38
2001/2002	9	43.90%	12	57.14%	21
Total	96	41.04%	143	59.13%	239

Source: Compiled cases 1996, Canlii 1997-2002
Notes: Dismissed: Cases that are found at hearings in favour of respondents and are dismissed, Justified: Cases that are found at hearings in favour of complainants and are justified

During the years that British Columbia employed a direct-access model, it was more likely for a respondent to have a decision rendered in their favour (or dismissed) than a complainant. As illustrated in Table – 9, out of 459 decisions rendered under the direct-access system 276 were decided in favour of the respondent (dismissed) compared to 183 decisions decided in favour of the complainant (justified). Therefore, 60 per cent of all cases were decided in favour of the respondent in the direct-access system, whereas only 40 per cent were found in

favour of the complainant during this period.[19] Moreover, 2014/15 had the worst rates for complainants as only 25 per cent of all complainants won their cases during this time compared to 75 per cent of respondents. During this year, in almost a complete reverse of the commission system, cases are decided in favour of respondents in almost eight out of ten cases.

Table 9: Tribunal Decisions Rendered at the British Columbia Human Rights Tribunal (BCHRT) 2006 to 2016

	Dismissed		Justified		
	Frequency	Percentage	Frequency	Percentage	Total
2006/07	48	63.16%	28	36.84%	76
2007/08	30	67.67%	15	33.33%	45
2008/09	46	63.89%	26	36.11%	72
2009/10	28	58.33%	20	41.67%	48
2010/11	20	52.63%	18	47.37%	38
2011/12	26	57.78%	19	42.22%	45
2012/13	26	50.98%	25	49.02%	51
2013/14	21	58.33%	15	41.67%	36
2014/15	21	75.00%	7	25.00%	28
2015/16	10	50.00%	10	50.00%	20
Total	276	60.13%	183	39.87%	459
Source: Compiled Cases BCHRT 2006 to 2016 Notes: Dismissed: Cases that are found at hearings in favour of respondents and are dismissed, Justified: Cases that are found at hearings in favour of complainants and are justified.					

5.6 Representation Before the Tribunal

One possible explanation for complainants' higher rates of success before the BC HRC is that the commission system screens out the cases that are likely to fail before they go to a hearing. Another possible explanation for this finding relates to complainant's representation at a

[19] There were also anomalous years during this time. In 2015/16, there was no discernable difference in decisions rendered when comparing complainants and respondents as 50 per cent of cases were dismissed and 50 per cent of cases were found justified.

hearing. Under the commission system, the commission supports cases that appear before a formal hearing by sending legal counsel to argue the case on behalf of the commission.[20] In contrast, complainants are not assured legal representation for their case in the direct-access system.

Complainants were more likely to go unrepresented before hearings than respondents before the BCHRT. As shown on Figure – 1, complainants had representation in 37 per cent of their hearings. Respondents had counsel for 67 per cent of the hearings as seen on Figure – 2. As illustrated in Figure – 1 in 2007/08 and 2012/13, complainants were unrepresented for 68 per cent of cases and, in 2010/11, they were unrepresented for 73 per cent of cases that appeared before a hearing.

[20] Carriage of complaint is common to commission models. As discussed in Chapter Two, Carriage of complaint ensures that someone from the commission will present the details of a case during the hearing. This member however, is not specifically there on behalf of the complainant. However, the lawyer is there to "lead evidence and make representations in support of the case" (La Forest, 2000, p. 77), and thus complainants do not need their own lawyers.

Figure 1: Percentage of Complainants with Representation at the British Columbia Human Rights Tribunal (BCHRT) 2006 to 2016

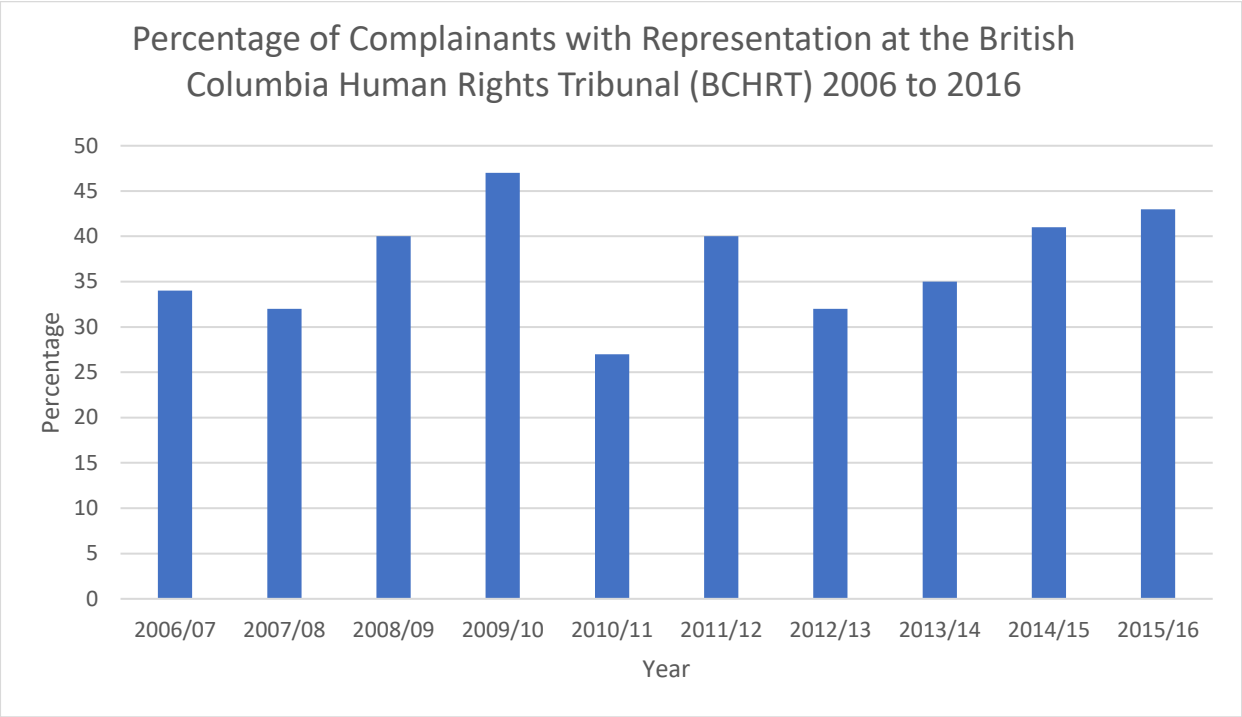
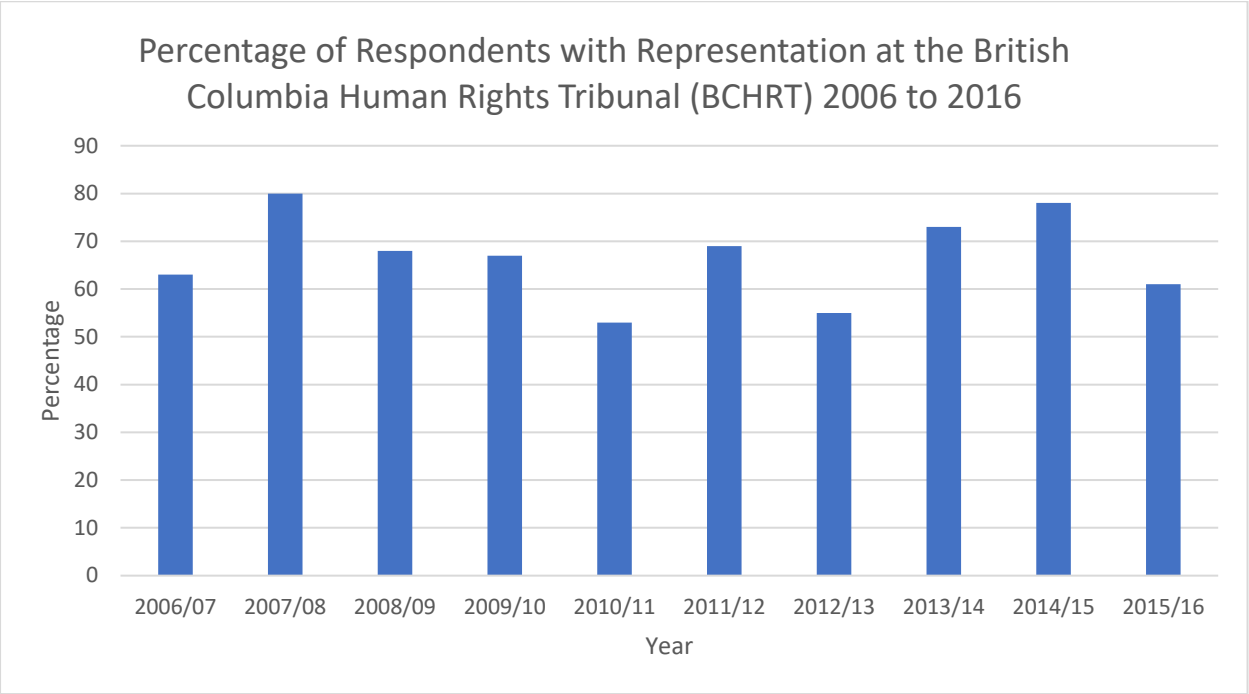


Figure 2: Percentage of Respondents with Representation at the British Columbia Human Rights Tribunal (BCHRT) 2006 to 2016



Representation at a hearing helps to improve a complainant's access to redress (La Forest et al., 2000; Cornish et al., 1992). Thus, proper legal assistance can mean that a complainant either wins or loses their cases as mentioned earlier in this thesis. According to the La Forest report, complainants in areas where people are self-represented fair far worse at hearings than those with representation. The tribunal process is complex. Having legal expertise can have a significant impact on the resolution of the case. And, of course, without legal representation provided by a human rights commission to argue in the public interest, people from marginalized populations are less likely to have legal representation before a formal hearing under the direct-access system (La Forest et al., 2000).

Based on the statistical data in the annual reports, not having representation could be leading to disparate outcomes for complainants and respondents in the direct-access system. Complainants with representation at a hearing are more likely to find their cases justified than

those complainants who do not. Over the ten-year period (Table – 10), 49 per cent of complainants with representation had cases found in their favour. This number decreased substantially when the complainants were without representation. When complainants were without representation 34 per cent of their cases were found to be justified by the BCHRT. In almost 70 per cent of the cases over the ten-year period analyzed, complainants without lawyers found their cases rejected by the BCHRT. Moreover, a complainant's chance to win their compliant when properly represented has increased significantly since 2006/07 when it was 24 per cent.

To deny access to proper representation is to effectively arrange a system where respondents, who are often governments or wealthy employers, have material advantages over complainants.

Table 10: Cases Justified when Complainants Represented and Unrepresented before the British Columbia Human Rights Tribunal (BCHRT) 2006 to 2016

	Represented Complainant	Unrepresented Complainant
Year	Percentage of Cases Justified	
2006/07	24	16
2007/08	55	39
2008/09	52	28
2009/10	50	43
2010/11	50	48
2011/12	56	31
2012/13	75	38
2013/14	33	50
2014/15	36	19
2015/16	60	30
Ten-year Average	49%	34%

Source: Compiled Cases BCHRT 2006-2016
Notes: Represented Complainant: Complainants who had a lawyer. Unrepresented Complainant: Complainants who did not have a lawyer. Percentage of Cases Justified: Percentage of cases where the complainant won their case.

5.7 Conclusion

The annual reports provide valuable information on how each system has administered thousands of cases. The data in the annual reports and Canlii has allowed for comparisons directly between the commission system and the direct-access system in British Columbia. Based on the data in the reports, the BC HRC closed more cases relative to how many cases it opened. The BC HRC also became more efficient at processing cases over time. However, the BC HRC closed more cases by screening them out rather than reaching a formal hearing. But the BCHRT closed more cases by settling them more than a formal hearing despite the focus on providing people with more direct access to a tribunal. Moreover, under the BC HRC, complainants were more likely to win their cases than in the BCHRT.

It is clear that although marginalized populations may find their cases screened out by the BC HRC, they still have better opportunities for restitution under the commission system. There is a greater likelihood under the commission system, for a case to be processed quickly. Additionally, when cases are adjudicated under the commission system, people from marginalized populations receive proper representation, which ensures access to a fair hearing. People from marginalized populations already face difficulties in society as they often struggle to secure the same access to goods and services. Marginalized populations should not also struggle to attain quick justice or a fair hearing.

Chapter 6: Conclusion

Marginalized people rely on human rights institutions to provide them with restitution when they encounter discrimination. However, these institutions are plagued by caseloads and underfunding in addition to delays and backlogs. As the research has shown, the system itself impacts the accessibility of human rights for the marginalized; however, human rights institutions must also be properly supported in order to be impactful in society. Unless these institutions are supported with sufficient funding and appropriate staffing cases will not be heard and decisions will not be made.

As is evident by this research, marginalized populations require a human rights redress process that is well funded and accessible. Moreover, the marginalized need a system that processes complaints efficiently and one that supports people throughout the complaints process effectively. Additionally, the system should achieve these benchmarks without neglecting proactive education that reduces the need for redress in the first place. As I find, the commission system meets these requirements. The commission model is more accessible overall compared to the direct-access model.

A common complaint against human rights institutions is that they process complaints slowly resulting in delays and backlogs (Howe & Johnson, 2000; Day, 2014). Some scholars have argued, based on research from Ontario, that the direct-access system is more efficient at closing cases and reducing backlogs than the commission system (Flaherty, 2014; Eliadis, 2014a). However, this study has shown that this is not the case in British Columbia. The commission closed more complaints than the direct-access system. Moreover, the commission system processed cases more quickly over time resulting in fewer backlogged cases. Delays are unacceptable, as people from marginalized populations (and respondents) should not have to wait

years to attain resolution for their cases. An accessible system for people from marginalized populations is one that does not force people to wait for years for resolution.

According to the statistical information contained in the annual reports and the findings from expert reports from across Canada, the commission system supports people from marginalized populations more effectively than the direct-access system. The commission system supports complainants through the investigation of complaints and by guaranteeing representation before a formal hearing. The investigation of complaints ensures that professionals assemble complaints for people from marginalized populations. People from marginalized populations are often the least equipped to understand the information required for a complaint. As people on the margins of society they are often more likely to speak English as their second language; often lack the needed funds; and are often vulnerable where they work or where they live (Greschner, 1996). Thus, providing investigations in many circumstances ensures effective access to the complaints process for people from marginalized populations.

The commission system ensures that complainants are offered legal assistance before hearings. Prior research has determined that not providing guaranteed assistance leaves many without representation. Moreover, people without representation often lose their cases (La Forest, 2000). According to the data, this phenomenon was evident during the years British Columbia employed a direct-access system. Complainants who did not receive representation did not win their cases as often compared to when they did have representation. Providing representation is essential as complainants are often bringing complaints against large companies and governments. Human rights redress at a hearing is not accessible to people from marginalized groups if representation is not provided. It is not enough for a complaints process to exist. It must ensure that the most vulnerable, are provided with the required assistance throughout the complaints process.

British Columbia has been without a dedicated institution to produce education related to human rights since the introduction of the direct-access system in 2002. Multiple scholars have stated that this is unacceptable as education is a fundamental aspect of human rights institutions in Canada (Day, 2002a; Clément, 2017; Eliadis, 2014a). Experts agree with these scholars and argue that, regardless of the system implemented, human rights education should be made a priority (Cornish, 1992; Black, 1994; Symons 1977, Kahlon, 2017; Greschner, 1996). Education is necessary to improve access to complainants as many are unaware of their rights and how to claim them. Moreover, education is necessary for businesses and employers as it helps them to realize what behaviours to avoid. Ultimately, education helps to increase the public awareness of human rights and helps to create a culture where everyone's rights are respected.

Unfortunately, in spite of the importance of education, governments and commissions have been underprioritizing education in multiple jurisdictions. As the government-sponsored reports have revealed, education should no longer be neglected. Increased funding should be provided to human rights institutions in general, but specifically to produce more educational resources related to human rights. Commissions and governments should start taking education more seriously. Education is important for people from marginalized populations as proper education helps to reduce complaints and the need for redress.

If a commission system is reintroduced in British Columbia, the government should ensure that it is an independent institution. According to several studies and the authors of many of the governments-sponsored reports, human rights institutions should increase their independence from the government by reporting directly to the legislature (Eliadis, 2014a; Hucker, 1997; Flanagan et al., 1988; O'Neill, 1994; Kahlon, 2017; Paris, 1983a; NBHRC, 2014). The commission should not be viewed as beholden to the government in any way and this is one approach to improve the public's faith in human rights institutions. As the backlash against

human rights institutions has demonstrated, faith in commissions and tribunals have been weakened through comparisons to the criminal justice system and through comments from politicians and the media. Human rights institutions can improve the lives of the marginalized if they trust these institutions to fulfil their mandates; however, if they do not have faith in them, they will not bring forth complaints.

British Columbia has repeatedly employed both the commission system and the direct-access system. This research provides evidence for the permanent adoption of the commission system over the direct-access system because it is more accessible to people from marginalized populations. People who belong to marginalized populations should not have to encounter discrimination in society. However, in the cases where they are victims of discriminatory behaviour, they should be aware of their rights and how to claim them while also being able to attain effective redress in a timely manner.

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