Caught in the Act

Human rights commissions are supposed to deliver us from discrimination. But, mired as they are in bureaucracy, backlogs, and refinements, how can they possibly work?
BY EDWARD HORE

In early 1989, Ken Johnson, a black high-school teacher of Jamaican origin, testified before a board of inquiry set up at the request of the Ontario Human Rights Commission (OHRC) that from 1975 to 1984 he had been subjected to racial harassment by his department head, Douglas Groom, at the East York Collegiate Institute in Toronto, where he had taught for nine years. Johnson also complained that he was the victim of systemic discrimination.

At the hearing, the OHRC acted as prosecutor of the case against Groom before the board, an independent tribunal. Johnson's testimony went through his career chronologically, starting in 1975 when he had been hired. On one occasion, Johnson testified, Groom had not said "good morning." On another, Groom had corrected Johnson's grammar. No, Groom had never called Johnson a racist name; indeed he had done no more than give Johnson some mildly critical reviews over the years. Johnson's complaint, in short, seemed to be based on nothing but trivialities; never the less Groom's reputation had been dragged through the mud in the newspapers since Johnson first made his complaint in 1984.

Peter Waldmann, the lawyer acting for Groom and another board of education employee named in the complaint, objected to some of Johnson's testimony. On the sixteenth day of the hearing and only halfway through his story, Johnson lashed out at Waldmann, calling him a "disease-infected whore." Johnson then refused to apologize or to undertake to refrain from further disrupting the hearing. Fed up, the board ordered him off the stand, and his testimony thrown out. Since the OHRC put forward no other evidence, the complaint was dismissed.

The Johnson case illustrates a number of problems in the way we deal with human rights disputes. First, the legal bills of the respondent — the person alleged to have discriminated — can be sky-high. Johnson's testimony, had he not been ousted, might easily have gone on for forty or fifty days, followed by many days of cross-examination and perhaps testimony from other witnesses. Luckily for Groom, his union helped him with his legal bills. But the fact remains that not many respondents can afford to pay a lawyer at $1,000 a day to sit through a hearing that may drag on for months. Johnson's complaint, on the other hand, was handled by the OHRC for free.

Second, the winner of a human rights case almost never gets costs from the other side, unlike the winner of an ordinary lawsuit. Out of the many hundreds of human rights boards of inquiry called in Canada to date, costs have been awarded to a successful respondent only once. Since

the complainant's costs are paid by the taxpayer, a respondent may be completely vindicated at the end of the day and still face legal costs running to thousands of dollars this is not a problem for him or her. But a respondent may be completely vindicated at the end of the day and still face legal costs running to many thousands of dollars. (Groom is currently bringing proceedings to recover his legal costs and damages from the OHRC. The commission has already paid some legal costs to another respondent in the hearing, the East York Board of Education.)

Third, it's not easy for a respondent to defend himself, for the complainant is not required to go into detail about his allegations prior to the hearing. In the Johnson case, Groom was given only the sketchiest specifics of the harassment he was alleged to have committed over a period of nine years. Johnson himself had refused to cooperate with an inquiry set up by the board of education to look into his charges.

Finally, the OHRC decided to go ahead and prosecute the case against Groom and the board of education, despite the flimsiness of its evidence. Human rights commissions are supposed to investigate the complaints brought to them, to determine whether or not they merit a hearing before a board of inquiry. All too often, they do an inadequate investigation, pushing forward invalid complaints at taxpayers' expense. Groom, for example, has a twenty-three year-old black brother-in-law (his wife's adopted brother), and they have been close for many years. The brother-in-law was never interviewed by the OHRC.

Something has gone badly wrong with our human rights systems. Respondents, even those who know a complaint is without foundation, often find it cheaper to pay a settlement at the start than to spend tens of thousands of dollars seeking vindication. Complainants are unhappy too: last spring human rights activist groups called for the abolition of the OHRC at a demonstration outside its Toronto offices. Meanwhile the commissions are becoming more expensive every year. Since 1982, the annual budget of the Ontario commission, for example, has more than tripled. It now stands at $11-million — about the same as that of its federal counterpart.

No wonder the commissions themselves are becoming uneasy and introspective. In 1985 and 1987, the OHRC hired the Coopers & Lybrand Consulting Group to evaluate its efficiency. In 1988 the Canadian Human Rights Commission (CHRC) prepared its own internal appraisal. In both cases, red tape was identified as a major problem. The federal commission described itself as bogged down in "a proliferation of forms and reports." So many forms were required in order to do anything that the result was "duplications and redundancies whose removal would not only reduce the volume of paper but probably make it easier to understand the nature and progress of the case." In Ontario, the consultants reported a "chorus of concern regarding the commission's efficiency," and added, "There is a general feeling that the humanity has gone out of it..."

Both reports described long delays for dealing with complaints and huge case backlogs. In 1987, twenty-six per cent of the OHRC's cases had been outstanding for two years or more. The same

was true of the federal commission. On average, the respondent was not notified by the CHRC of a complaint until five or six months — and sometimes several years — after it was made. (Even the Prince Edward Island Human Rights Commission takes two or more years to resolve a case.)

Lawyers who deal with human rights commissions told the consultants that one reason for this, in the case of the Ontario commission, is that the OHRC rarely throws out frivolous complaints. The federal commission's report admitted that many of the complaints it handles are "going nowhere." Russell Juriansz, who worked for ten years as an in-house lawyer at the federal commission, points out that the commissions have no incentive to throw out groundless complaints. "The commissions' interest is to maximize the number of complaints that they deal with statistically. Then they can say they get lots of complaints, and thus need more funding."

In most provinces, when a person thinks he has been the victim of discrimination he must take his complaint to the human rights commission. He cannot start his own lawsuit. If the commission thinks the complaint worth an investigation, the human rights officer contacts the party who was said to have been discriminatory, investigates what happened, and then is expected to mediate a settlement. In practice, the human rights officer confronts the respondent with whatever evidence of discrimination is found, and requests compensation of some sort for the complainant, rather than actually mediating. The settlement may involve reinstating the complainant in a job, or perhaps giving the complainant an award of damages.

If the commission is not successful in "mediating" a settlement, it can call a board of inquiry. This is a tribunal before which the case is argued, as in court, and the merits determined. Once things get to this stage, the commission becomes an advocate representing the complainant's interests, and abandons all pretence of impartiality.

The fundamental premise of the human rights commission system is that complainants should not have to hire a lawyer or spend any money in order to make a complaint. Human rights complainants are thought to be different from other people with legal grievances and therefore in need of representation by a government body such as a commission. "Complainants are often from the most disadvantaged and often least sophisticated sectors of the society," argues Raj Anand, who was chief commissioner of the OHRC until he resigned in June. "They feel alienated from the justice system." Maxwell Yalden, chief commissioner of the CHRC, agrees: "The sort of person who feels discriminated against is often not in a position to defend himself. He or she may not know any lawyers, or how the legal system works."

But many complainants are white-collar workers or professionals, often with considerable education. Ken Johnson, for example, had a master's degree in education. A well-publicized complaint has been launched on behalf of Mary Jane Mossman, claiming that Mossman, a law professor, was not chosen as dean of Osgoode Hall Law School in Toronto because she was a woman. Neither Mossman nor Johnson would ordinarily qualify for legal aid and neither lacks

education.

The real reason we've set up human rights commissions is that we feel an idealistic urge to purge ourselves of guilt. As Ian Hunter, a University of Western Ontario professor, pointed out in an article entitled "Human Rights Legislation in Canada." minorities in both Canada and the United States had little legal protection against discrimination until a few years ago. In a 1940 case, Christie v. York Corporation, for example, the Supreme Court of Canada ruled that a black man who had been refused service in a tavern in the Montreal Forum because of his color was not entitled to damages. The court held that "any merchant is free to deal as he may choose with an individual member of the public."

The first statute in Canada expressly to prohibit some form of discrimination was the Ontario Racial Discrimination Act of 1944 which seems to have been a legislative response to voters' repugnance at Hitler's race policies in Germany. The act made it dear for the first time that to discriminate on the basis of race was against public policy. The following year an Ontario court, citing the act, struck down a property covenant in a deed which purported to prohibit the sale of land to "Jews or persons of objectionable nationality." Shortly thereafter, statutes were passed in various provinces which proclaimed human rights or prohibited discrimination.

In 1962, at the time of the civil rights movement in the U.S., the province of Ontario consolidated various anti-discrimination provisions into a comprehensive Human Rights Code, the first in Canada, which prohibited discrimination on the grounds of race, creed, colour, nationality, ancestry, or place of origin. At the same time, Ontario created Canada's first human rights commission, whose mandate was "to promote an understanding of, acceptance of and compliance with this Act." The other provinces followed suit, enacting codes and creating commissions to enforce them. There are now human rights codes or acts in all ten provinces.

Human rights commissions were originally intended only to conciliate human rights disputes, and to raise consciousness of racial issues through public relations and seminars. However, in response to perceptions that commissions were "toothless," legislatures gradually granted them more powers, including the power to prosecute for infringements of the Human Rights Code.

The scope of Canada's various human rights statutes has become ever wider as new grounds prohibiting discriminations such as age, disability, or sexual orientation have been added. The definition of discrimination has also been broadened to include systemic discrimination or unconscious discrimination on a large, statistical scale. Pay equity legislation aimed at enforcing equal pay for work of equal value as between men and women promises to take this statutory revolution even further. In short, in the space of a generation, we have idealistically enshrined government activism against discrimination in our law and customs on a massive scale.

All kinds of seemingly innocent behaviour could violate human rights codes. An advertisement saying ‘Wanted — Recent graduate, young thinking, aggressive self-starter for sales representative position” could suggest an intention to discriminate based on age. In some provinces it is illegal to discriminate on the basis of handicap. Alcohol dependency, it seems, may be such a handicap in certain circumstances. Employers must therefore “reasonably accommodate” employees who are alcoholics. The burden is on the employer to prove that his efforts to accommodate have been reasonable.

Some of Canada’s human rights commissions are embarking on new employment-equity programs, designed to tackle systemic discrimination. Systemic discrimination occurs when a company employs a statistically inequitable number of handicapped persons, visible minorities, or women. Bureaucrats at the commissions decide whether any particular proportion of disadvantaged groups among a company’s employees is evidence of systemic discrimination or not.

The OHRC itself recently got into trouble for systemically discriminating against minorities when chief commissioner Raj Anand hired only whites for a number of top management jobs. The storm of controversy this caused led to Anand’s resignation.

In 1986 the federal government passed the Employment Equity Act, which requires all federal employers with more than 100 employees to submit statistical information to the government on how many women, minorities, disabled, and native people they employ and in what positions those people are employed. The CHRC is now embarking on a “joint review” with certain targeted employers to set up employment-equity programs. As CHRC’s Maxwell Yalden explains, “We’re saying don’t just sit on your bum and not hire minorities, women, natives, and disabled people, hire these people if they are qualified. If you’re hiring astrophysicists and there are no native Indian astrophysicists that will be a defense.”

It is, of course, possible that human rights commissions will be scrupulously fair when deciding what is and what is not systemic discrimination. But the record indicates otherwise.

Last year the OHRC brought misleading graphs before a board of inquiry in an attempt to show that systemic discrimination existed at the Bata shoe company. The hearing had been set up to investigate a complaint by Robert Adams that he had been discriminated against on the basis of age when he was fired for poor job performance. The graphs were supposed to demonstrate that many of the people whose jobs at Bata had been terminated as part of the general staff reduction were old, and that most employees hired since were young, so as to make a case that Bata “systemically” discriminated against old people. But at the hearing it became clear that many of the old people in one graph had not been fired but had simply retired.

When cross-examined about these errors, the OHRC's investigator, Neil Edwards, said that he was "not a statistician." The one-man board of inquiry, Peter Mercer, held that the commission's evidence skewed the facts. Mercer dismissed Adams's complaint and reprimanded the commission for ignoring key evidence in its investigation, such as the fact that many of Adams's fellow employees said that he performed his job poorly.

Human rights commissions permit politicians to portray themselves as sensitive to minorities, regardless of whether the commissions actually do any good. The Peterson government in Ontario, for example, committed an extra million dollars annually to the OHRC in 1987, making possible an immediate expansion in staff from eighty to about 120. (Currently this number is 140.) Despite the doubts about the OHRC's effectiveness in the Coopers & Lybrand studies, the Throne Speech in the Ontario legislature on April 28, 1987, said, "The Ontario Human Rights Commission has made a major contribution to equality and harmony in our province. As we commemorate the 25th anniversary of the founding of the Commission, my government will dedicate additional resources and strengthen its mandate."

Appointments to human rights commissions are valuable patronage plums. As a result, the Coopers & Lybrand consultants found that some commissioners were "neither particularly committed nor well informed about their duties and responsibilities" and made the apparently new recommendation that commissioners be appointed "strictly on the basis of merit." In view of the fact that our new employment-equity programs place such wide discretion in the commissions to decide what quotas of minority members and handicapped persons are equitable, what constitutes systemic discrimination, and which employers will be targeted by the commission for a systemic discrimination joint review, we should keep in mind that the persons upon whom this great discretionary power is bestowed may not have any particular qualification for the job other than their faithful service to some particular political party.

At least one province in Canada has managed to get along without a human rights commission. In July, 1983, the Social Credit government of Premier Bill Bennett of British Columbia fired twenty-one human rights bureaucrats and disbanded the B.C. Human Rights Commission. Branch offices were shut down without warning, and the locks changed. A skeleton staff was kept on while the B.C. government decided what, if anything, should replace the old commission. After a great deal of controversy a new Council of Human Rights was set up to enforce a new statute, the Human Rights Act, enacted in 1984 in place of the old Human Rights Code.

Today in British Columbia when a complaint is made, the council does not investigate or attempt to conciliate the matter itself. Instead, after an initial screening, it sends out an industrial relations officer from the Ministry of Labour who attempts to conciliate the matter. If this is unsuccessful a report is prepared. The council then decides whether to dismiss the claim or appoint a councilor (whose role is somewhat like that of a judge) to hold a hearing. If there is a hearing, the complainant either gets a lawyer or appears on his or her own behalf. In recognition of the fact

that some complainants, and some respondents, will not have enough money to hire a lawyer, there is a rule that both the complainant and the respondent are entitled to legal aid.

By adopting a harder-headed attitude to human rights complaints, the B.C. system has become less clogged with bureaucracy, more effective, and easier on the taxpayer. The council employs five councilors and twelve staff with an annual budget of $1.25-million — a lot less than the OHRC's present budget.

Most people would probably agree that having a human rights code that prohibits discrimination is a good thing, but it doesn't necessarily follow that you need a commission as well. The Charter of Rights and Freedoms, for example, grants equality rights to all Canadians, and has had a profound effect on our society without a "Charter commission" to publicize and enforce it.

Whatever one may think of the draconian methods used to terminate the old B.C. human rights commission, the province has taken a step in the right direction. More responsibility should be put on complainants to push their complaints forward. Complainants, like parties in any dispute, should hire a lawyer if necessary and settle the matter or appear before a board of inquiry or perhaps an ordinary court. If complainants or respondents genuinely require legal aid they should get it. If they don't, they should pay their way and pay the other side's costs if they lose.

The millions of dollars that are spent every year by Canadian taxpayers on human rights commissions would be better spent improving legal aid for deserving people with any sort of legal problem, not just human rights complaints. No human rights complainant or respondent is well served by paternalistic government bureaucracy that may take years to move the matter forward.

Another way to make the system better might be to require that the commissions do no more than prepare a report on discrimination complaints. These reports could be turned over to the Crown attorney's office, which would decide whether or not to prosecute the matter, as is done with ordinary law violations. The commissions could then be trimmed down and made less expensive, and the decision whether or not to prosecute would rest in less zealous and perhaps more competent hands.

We will not make any real progress towards genuine fairness in our society until we recognize that creating gigantic bureaucracies under the banner of human rights does no-one much good.