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Human Rights Dispute Resolution: Protecting the "Public Interest"

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Introduction

Overwhelming evidence in the past few years has shown that human rights agency caseloads are increasing while their budgets remain relatively stagnant or shrink. According to John Dunlop and Arnold Zack, "the painful reality is that many of these cases are not being resolved, and that the growing backlog means years of uncertainty and, at best, delayed justice." In response to concerns about cost, delay and accessibility, provincial and federal human rights agencies have begun to take an interest in expanding their dispute resolution mechanisms.² In BC, and elsewhere, Human Rights Commissions are particularly keen to promote "interest-based" mediation.³ However this shift in focus has provoked substantial disagreements about the value of informal dispute resolution options over more formal ones when the public interest is at stake. Professor Owen Fiss, for example, has launched an attack on one of the fundamental premises of ADR -- that settlement, as a general rule is a social good. He claims that "settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised."⁴

In this essay we will see that the assumption that the public interest would be better protected through an adjudicative, or, the Tribunal⁵ process is open to question. While it is possible that the Deputy Chief Commissioner (DCC)⁶ could initiate a complaint - or an individual case could create a precedent, the vast preponderance of complaints that go before the Human Rights Tribunal are settled without addressing any broader systemic problem that may be involved. When the public interest is argued it seems to be invoked for emphasis rather than clarity: it is tacked on the side of a private dispute without much understanding of why or what it is. Hence, this paper attempts to clarify what the "public interest" means and how it can best be protected in the human rights dispute resolution system. Although this essay focuses on the public interest as it relates to the BC Human Rights Commission and its processes, it should be noted that the analysis is intended to apply to other provincial and federal human rights agencies as well. This paper suggests that the best way for the Commission to serve justice and the public interest is to make better use of its current legislative scheme. The BC *Human Rights Code* has provided a framework in which redress of individual complaints through informal processes like mediation - may be effectively blended with aggregate relief through adjudication for "systemic discrimination" or "public interest" problems.

1 John T. Dunlop and Arnold M. Zack, *Mediation and Arbitration of Employment Disputes*, (San Francisco: Jossey-Bass Publishers, 1997) at 135.

2 It is worth noting that the BC Commission, in reevaluating its current system is not looking to

"alternative" dispute resolution, as the Commission system is *already* an alternative to the courts. This paper makes use the term "Dispute Resolution" because "Alternative Dispute Resolution (ADR)" has come to mean different things to different people. In this paper "dispute resolution" is broadly defined and refers to any dispute resolution mechanism outside of the courts. In the human rights context this usually means mediation but also includes the tribunal hearing process, for example.

The extent to which mediation is acknowledged as an important part of the human rights system is reflected in s. 29 of the *Human Rights Code*, which specifically authorizes mediation.

Owen M. Fiss, "Against Settlement" Vol. 93 Yale Law Journal 1073-1090 (1984) at 1075.

Throughout this paper, "Tribunal" refers to the BC Human Rights Tribunal established under section 31 of the BC Human Rights Code.

6 Throughout this paper "Deputy Chief Commissioner" refers to the deputy chief commissioner appointed under section 15 of the BC Human Rights Code.

This paper begins by first examining the notion of "public interest" and how it applies within the context of human rights disputes. Second, the paper examines the dispute resolution goals of the BC Human Rights Commission's and the ambiguity inherent in them.⁷ The essay then considers how the process problems of power, mediator neutrality and confidentiality may interfere with the adequate protection of the public interest. The third section of the paper looks at a typical human rights dispute - between Jack and Jane - in order to analyze when a dispute should involve the "public interest". Finally, the paper concludes with an analysis of how the articulated goals of the Commission are reflected in its public policy initiatives and whether these approaches are effective or adequate.⁸

Due to space constraints, important issues, such as the multiple roles of human rights officers, coercion and voluntariness, mediator selection and training, and public education all have been intentionally omitted from this paper. Other topics such as mediator neutrality, power, and confidentiality, are discussed only briefly. Of particular note, however, is the absence, in this paper, of a discussion on "culture." Although beyond the scope of this essay, an in-depth and comprehensive study of "culture" is clearly required since the Commission's success in meeting its public interest goals will depend, in part, upon its treatment and understanding of "culture."

The cross-cultural appropriateness of mediation needs to be investigated and, in particular, insight is needed into how culture operates in a human rights setting. This is important because different perceptions of culture will affect the definitions, approaches, and processes used to resolve human rights disputes. Classical approaches to culture should be contrasted with newer perspectives on the subject. So, for example, emphasis on "behavioural" aspects of culture, focusing on things like worldview, language, beliefs and values, can be found in writers like Michelle Le Baron, and Stella Ting-Toomey. (See Michelle Le Baron, "Mediation, Conflict Resolution, and Multicultural Reality: Culturally Competent Practice," in Edward Kruk, ed., *Mediation and Conflict Resolution in Social Work*, Chicago: Nelson-Hall, 1997; and Stella Ting-Toomey, et al, "Ethnic Identity Salience and Conflict Styles in Four Ethnic Groups: African Americans, Asian Americans, European Americans, and Latino Americans", paper presented at the Annual Conference of the Speech Communication Association, New Orleans, La., November, 1994.)

The classical approach should be contrasted with newer perspectives on culture found in writers like A. Swidler. In Swidler's view, for instance, culture is not regarded as a static or passive entity, but rather it offers: a wide range of choices to individuals -- these choices allow shared values to be translated into individual "strategies of action". (See A. Swidler, "Culture in Action: Symbols and Strategies" (1986) 51 *Amer. Sociological Review* 273-86)

What does "public interest" mean?

The theoretical foundations of the public interest in Canada rest on the idea that when people commit an offence they commit an offence against the Crown. In historical terms, the troops of the sovereign were entitled to intervene in disputes between subjects when their conflict threatened to violate the "King's Peace." In modern times, it is citizens, not subjects, who enjoy the rule of law and who themselves call upon the law to restrain institutions and practices, public and private, that threaten their sense of security

and justice.⁹ In Canada, the Crown represents the public interest whereas in the United States, the source of sovereignty is "the people." In Canada, exclusive authority to act as guardian of the public interest is traditionally vested in the office of the Attorney General:¹⁰

The Attorney General is by law the representative of the public interest. The reason is, that he is the officer of the Crown, and that, according to the principles of our law, the interest of the public is vested in the Crown.¹¹

Generally speaking, the Attorney General's role is limited to the protection of public rights or public interests.¹² Although the Attorney General has no standing in respect of matters that are essentially private in character, intervention between private parties is allowed where the interests of the Crown are affected either directly or indirectly.¹³ In addition, the Attorney General of British Columbia may also intervene in any private suit where the constitutionality of legislation is challenged.¹⁴

Alternatively, a "contextual" approach to culture may also yield valuable insights into human rights dispute resolution. Because everyone is a member of a variety of different cultures and may have different approaches to issues depending on context, emphasis on "context" or the *where, who, what, why* and *when* of a dispute may help to branch out from limiting behavioural approaches. (See chapter 1 "The Meaning of Alternative Dispute Resolution" at 7 in Andrew Pire's forthcoming book.)

Eugene Bardach and Robert A. Kagan, "Mixing Public and Private Regulation" in *Reforming Social Regulation*, cd. by LeRoy Graymer and Frederick Thompson (Beverly Hills, C.A.: Sage Publications, 1982) at 171.

¹⁰ Philip L. Bryden, "Public Interest Intervention in the Courts" (1987) *Canadian Bar Review* at 492. "F. Calbert on Parties at 26 (2nd ed. 1847) cited in The Law Reform Commission, *Civil Litigation in The Public Interest* (Victoria: Ministry of the Attorney General, 1980) at 7.

¹² *Ibid.*

¹³ *Esquimalt and Nanaimo Ry. Co. v. Wilson*, :1920 A.C. 358; *R. v. Starkey*, (1891) 7 Man. R. 489

¹⁴ Section 8, *Constitutional Question Act*, R.S.B.C. 1979 and Bryden, *supra* note 10 at 511.

In much the same way that the courts have developed a role for the Attorney General in public interest litigation, the BC legislature has created the Human Rights Commission, empowering it to fight discrimination by enforcing the *Human Rights Code*. Presumably, the Commission's anti-discrimination enforcement activities are seen by the legislature as a "public good" that both requires and deserves governmental attention. According to Richard Schick, the concept of the "public good" has both theoretical and operational or functional dimensions:

Theoretically, it refers to an abstract social value that transcends the individual interests of the members of the society (the whole is thus greater than the sum of its parts). At the practical level, the notion of the public interest is value laden --it becomes a standard for judging social actions.¹⁵

If the public interest manifests itself through the *Human Rights Code* which becomes the standard for judging social actions, at the practical level, the Commission's public interest objective is to provide a means of redress for individual complaints of discrimination.¹⁶ Providing a remedy usually becomes a process of weighing a complainant's desire to be free from discrimination against a respondent's freedom to discriminate. Yet, the theoretical dimension of the public good may require a balancing of interests that is more complex than it may at first appear. While it is a simple matter to say that the interests of

individuals are to be balanced against one another in light of those of the general public, it is far more difficult to say where exactly this "public interest" may lie. In balancing the competing interests of the disputants, the Commission must also consider the competing purposes of the Code as well as the justice of the individual case -which may or may not be in harmony with the public interest.

Dispute Resolution Goals: efficiency vs. social justice

Most ADR scholars agree that the success of any dispute resolution system depends, in part, upon how its goals are articulated. At this point the paper examines the various goals of the Commission and the ambiguity inherent in them. This is important because the relationship between these goals and how the public interest is characterized will affect how we might view an otherwise "private" dispute between two individuals. For example, if efficiency goals take precedence over social justice goals, there may be no or very little "public interest" in an ordinary human rights dispute between two individuals. However, if social justice goals are prioritized, a legitimate "public interest" may be located within the same dispute. Upon a review of the Commission's Annual Reports, policy statements, as well as Bill Black's, "Report on Human Rights in BC", the Human Rights Facilitator's Training Manual, and Code itself, ten major dispute resolution goals emerge:

15 Richard P. Schick and Jean J. Couturier, *The Public Interest In Government Labour Relations* (Cambridge, Mass.: Ballinger Publishing Co., 1977) at 2.

16 See section 3 (e) *Human Rights Code* R.S.B.C. c. 210, 1997.

1. to increase public accessibility
2. to promote social justice
3. to promote restorative rather than punitive remedies
4. to encourage resolution of underlying "interests" rather than settlement
5. to give parties control over process and outcome; flexibility and choice
6. to create a fair system for all
7. to encourage party satisfaction, and ensure privacy and confidentiality
8. to provide educational opportunities to parties and encourage social transformation
9. to increase efficiency - to save time and money by processing cases quickly
10. to encourage early resolution, and final resolutions

Although these goals often overlap and converge, two general categories are apparent: those primarily concerned with efficiency and those primarily concerned with the quality of justice. This is not a unique split.¹⁸ As has been frequently pointed out in the literature, "alternative dispute resolution (ADR) historically has presented several ambiguities that complicate our understanding of what ADR is or what ADR can be."⁹ Professor Andrew Pine states that this ambiguity often arises in two situations: (1) when it is not clear which goal is being pursued and (2) when ADR's efficiency goals seem incompatible with its qualitative-justice goals.²⁰ This ambiguity is clearly apparent in the human rights context.

Within human rights agencies in Canada, ambiguous or seemingly incompatible goals often reflect a clash in cultures: between the old rights-based model and the new interest-based one. Even more compelling, is the evidence to suggest that efficiency and social control might be the overriding motivation behind the spread of ADR.²¹ This is in spite of the fact that, for example, goals 1 through 8 above could arguably be characterized as "quality of justice" goals whereas only goals 9 and 10 have to do with "efficiency." Similarly, if one looks closely at the BC Commission's purposes as set out in section 3 of the Code, one finds that all of them relate to the public interest and quality of justice. Nowhere in the section is there any reference to administrative concerns such as efficiency, reducing backlog, or delay:

17 Bill Black, *Human Rights Review: Report on Human Rights in British Columbia* (Vancouver, B.C., 1994) at 83. *Human Rights Commission Facilitator's Training Manual*, (July 1997), Human Rights Code s. 3, 1997/1998 and 1996/1997 BC Human Rights Commission Annual Reports.

18 Black, *ibid* at 114.

19 Andrew Pine, "The Meaning of Alternative Dispute Resolution" Chapter I, unpublished draft at 22.

20 *Ibid*.

21 Richard Abel, "The Contradictions of Informal Justice" in Richard Abel, cd., *The Politics of Informal Justice*, Vol. 1 (London, UK: Academic Press, Inc., 1982) and see Larry R. Spain, "Alternative Dispute Resolution for the Poor: Is It an Alternative?" *North Dakota Law Review* (1994 Vol. 70 No.4), 269-280.

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

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

(c) to prevent discrimination prohibited by this Code;

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

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

(f) to monitor progress in achieving equality in British Columbia;

(g) to create mechanisms for providing the information, education and advice necessary to achieve the purposes set out in paragraphs (a) to (f).

Subsection (e) reveals that resolving individual disputes is just one of the purposes of the *Human Rights Code*. Other purposes in the Code include correcting persistent patterns of inequality, preventing discrimination before it occurs and monitoring large patterns of inequality. Because these goals explicitly acknowledge that "discrimination causes harm to the entire community, not simply to those directly affected,"²² the public interest therefore requires that system provide for consideration of these larger objectives as well as for the concerns of the private parties to the dispute.²³

Unfortunately the larger public interest objectives are sometimes obscured by the expectation that mediation will save time and therefore make the process of providing justice more efficient. According to Professor Bill Black's analysis of the old BC Human Rights Council:

As time progressed, the emphasis shifted from a goal of reconciliation to a goal of processing cases quickly in the interests of efficiency. The enforcement process is dependent on settlements because it would be hopelessly overloaded *if* all cases that are now settled went to hearing. Therefore, case management sometimes is the primary goal of the settlement process. This objective can create undue pressure on the parties to settle, as well as undermining true efforts at reconciliation.²⁴

22 Black, *supra* note 17 at 84.

23 *Ibid.*

Efficiency proponents argue that mediation promotes efficiency because it saves time. In other words, disputants may be engaged in a some form of dispute resolution from the moment a complaint is filed, as opposed to waiting as long as 2 years to get before a tribunal. It has been pointed out that this wait could seriously inconvenience complainants who have been fired, discriminated against or refused accommodation because of their race, gender, or sexual orientation, for example. Those who emphasize efficiency claim that it is in the public interest to promote mediation since *it* will save resources and help to reduce the backlog of complaints by making way for new ones.

On the other hand, there is sound basis for believing that mediation will not save staff time nor will it necessarily reduce the backlog of complaints. According to human rights officers, the regular investigation process takes about 15 hours. Mediation requires phone calls, setting up appointments, preparation meetings, explaining mediation, defining interests, brainstorming about settlement options and drawing up the settlement itself. The more complex the problem, the longer it takes to mediate. In mediation, more might be accomplished within the timeline but it may take more total hours to complete the mediation process. Professor Bill Black has suggested that any system of mediation should recognize that the quality of treatment (of parties to a human rights complaint) is as important as the outcome. 25

Yet, both in BC, and across the country, human rights commissions are still struggling to strike an appropriate balance in service delivery by providing both efficient individual remedies and broader-based systemic remedies. The challenge is to develop a dispute resolution system that is both cost-efficient and justice-enhancing. Ideally, mediation should accommodate the public interest by both improving the quality of justice for individual disputants as well as protecting the larger community indirectly affected by discrimination. Whereas the Code only has a narrow jurisdiction to deal with discrimination, mediation has the unique advantage of being able to deal with the byproducts of discrimination such as hurt feelings and other kinds of unfairness. Mediation has the capacity to encourage personal transformation while simultaneously tackling socially important issues by challenging discriminatory policies and practices that have a profound impact on the community at large.

One way to understand the ambiguity inherent in the Commission's dispute resolution goals, is to rethink our notion of what alternative dispute resolution means. Professor Andrew Pine recommends that we think of it as "ideology." He suggests that,

There are opportunities to question the meanings of such concepts as consensus, mediation, personal transformation and cheaper, when juxtaposed with the severe reality of many disputes which are part of serious and systemic economic, political and social inequalities. ADR as ideology would, as a matter of course, seek to understand the impact of dispute resolution initiatives and processes on existing power structures. 26

If we take Professor Pine's cue and consider how the BC Human Rights Commission operates, as an existing power structure, it may help to understand the impact of informal approaches to human rights dispute resolution.

The Human Rights Commission "Culture in Transition"

According to the BC Human Rights Commission's Deputy Chief Commissioner, Harinder Mahil, "human rights are constantly evolving.. .old techniques of dealing with complaints are no longer effective."²⁷ Until very recently, the public interest was represented by the Commission who had custody of

complaints throughout the investigation and the tribunal process. However, when the new Code came into force on January 1, 1997, it separated the investigation and adjudication functions of the old BC Human Rights Council.²⁸ Now the BC Human Rights Commission is different from other commissions in Canada: it no longer has any role at the tribunal stage. The newly created Human Rights Commission is now responsible for the intake of complaints, investigation, mediation, education and research. The new Human Rights Tribunal is solely responsible for the adjudication of human rights disputes. The two entities are now completely separate.²⁹ This transition from a focus on the traditional tribunal Human rights officers do not investigate to present a case of discrimination to a tribunal, they investigate to determine whether a hearing will take place at all. In other words, quasi-judicial decisions are now being made by human rights officers at the investigation stage. Moreover, the Commission does not have, at present, separate investigative and mediation or settlement units. Complaints are usually investigated and mediated by the same human rights officer who eventually decides whether there is enough evidence for hearing process to greater emphasis on informal processes like mediation, has been characterized by John Burton and Frank Dukes, as "a transition from a system of traditional institutional power to a system driven by the power of human needs."³⁰

²⁶ Pirie, *supra* note 19 at 28.

²⁷ BC Human Rights Commission 1997/98 Annual Report at 5.

²⁸ This restructuring came as a result of Bill Black's recommendations in his report *supra* note 17.

²⁹ Because of the separated functions, the Commission now has a different way of investigating complaints.

A cultural shift can also be seen in the way the Commission practices mediation. Historically, human rights officers offered standard solutions (precedents from prior decisions) to guide disputants in reaching settlement. Increasingly, however, the Commission has tried to move away from this formalized and standardized approach and towards an approach that transfers more control and responsibility to parties to develop their own solutions. According to John Burton and Frank Dukes, this kind of transition can be a confused and difficult one as it raises questions of ethics, relevance, justice, rights, needs and a host of others.³¹

While this confusion may help to explain the significant resistance to process changes in the human rights community,³² others have simply asserted that "the process of changing the long-time procedures of well-established government agencies and their staffs has always been slow and difficult."³³ But characterizing this resistance as typical "restraint on innovation in government agencies"³⁴ fails to seek a deeper explanation for what lies behind the inertia and reluctance to embrace new methods. In BC, one obvious source of resistance may be the fact that the Commission is still recovering from its near total erasure in the mid-1980s.³⁵ With this in mind, it is not surprising that some feel the Commission needs time to develop more jurisprudence. They fear that "without prejudice" settlement discussions will become the prominent way the complaint to go to the hearing stage (this raises obvious concerns about administrative fairness --although Commission decisions are always subject to judicial review). The Commission tries to compensate for this by advising the parties of the officer's dual role. If one side objects, another officer may be appointed to act as mediator. The parties usually sign an "agreement to mediate" prior to the mediation. This agreement explains the mediation process and sets out the ground rules. The terms of each settlement agreement must be provided to the Commission and the Commission can not disclose any information about the settlement which would identify the parties to the agreement, except with the parties' consent. See ss. 29(2) and (3) of the Code.

John Burton and Frank Dukes, eds., "Conflict: Practices in Management & Resolution" (New York: St.

Martin Press, 1990) at 178-9.

31 *Ibid.*

32 Resistance is also prevalent at the Equal Employment Opportunity Commission (EEOC). In early 1997, Chairman Casellas of the EEOC stated that he was "frustrated by some resistance, although not widespread or prevalent," among EEOC staff and commissioners. "There remains this culture of litigation that believes the only way to be effective is to litigate." See Dunlop *supra* note 1 at 132.

Ibid at 127.

34 *Ibid* at 128.

Prior to the 1984 *Human Rights Act*, by virtue of the 1973 *Human Rights Code*, the Human Rights Commission that had been responsible for administering the Code had been dismantled, and the staff had been dismissed. See P. Chotalia, *Human Rights Law in Canada*, (Carswell, 1995) at BC-i.

At a more fundamental level, critics of the legal system, like Richard Abel, have argued against mediating disputes of the disadvantaged since he sees the ADR movement as another form of social control aimed at the economically, socially and politically oppressed.³⁶ Abel's perspective suggests that underlying this change of focus is a far deeper and more significant transition: John Burton and Frank Dukes reinforce this view by defining this transition as a shift in focus from an ideal of a Tribunal seeking to further the purposes of the Code, with an authority assumed to have a legitimized monopoly of power by which to enforce its decisions, to the political reality of a society in which complainants and respondents are fundamentally unequal in power.³⁷

Here, Burton and Dukes have identified two key features of the cultural shift that lie at the heart of the critique about informal dispute resolution and its inability to protect the public interest. Both have to do with power. The first deals with the transfer of authority to resolve human rights disputes from a publicly controlled institution to private parties. The second, acknowledges the sharp power disparity between disputants in human rights conflicts. Each of these will be discussed briefly in turn.

Power

Professor Owen Fiss has elaborated on the significance of the move away from reliance on institutional authority to resolve disputes. His perspective encourages a broader understanding of the purpose and value of adjudication:

Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.³⁸

36 For factual support, Abel points out that the three neighbourhood justice centers that were set up by the United States Department of Justice in the late seventies were located in neighbourhoods that contain disproportionate numbers of the oppressed. Abel *supra* note 21 at 268.

37 Burton and Dukes, *supra* note 30.

Rather than see adjudication in essentially private terms as a manifestation of our society built on "individualism, competition, and success," Fiss sees adjudication in clearly public terms. This is evident when he explains his outlook and understanding of the purpose of the civil law suit and its place in society:

Civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals. We turn to the courts because we need to, not because of some quirk in our personalities. We train our students in the tougher arts so that they may help to secure all that the law promises, not because we want them to become gladiators or because we take a special pleasure in combat. To conceive of the civil lawsuit in public terms as America does might be unique. I am willing to assume that no other country... has a case like *Brown v. Board of Education* in which judicial power is used to eradicate the caste structure...

In accord with Fiss' view of the public character of adjudication, individual complaint-settlement approaches have been criticized for implicitly accepting the institutional status quo. Fiss' view sees this individual approach as aimed primarily at identifying isolated, anti-social, instances of discrimination. It focuses on discrimination as an aberrant individual act, rather than as a systemic problem. Others have noted how this approach provides isolated remedies retroactively to individual complainants, but does not remedy the structural domination that allows for discrimination with impunity in the first place.⁴⁰

Connected to the critique on the shift away from the ideal of a Code-enforcing tribunal is the political reality, acknowledged by Burton and Dukes, of a society where there is a sharp power disparity between the disputing individuals. The imbalance of power in the human rights context cannot be overstated. This is perhaps the main reason why power needs to be given special consideration in the context of protecting the public interest in human rights disputes. Most ADR scholars claim that for mediation to work, the parties should be of relatively equal power. Yet, human rights conflicts are uniquely characterized by power imbalance.⁴¹ Typical situations of unequal bargaining power in human rights disputes occur where:

38 Fiss, *supra* note 4 at 1085.

39 *Ibid* at 1089-90.

40 Colleen Sheppard, "Systemic Inequality and Workplace Culture: Challenging the Institutionalization of Sexual Harassment" 3 *Canadian Labour & Employment Law Journal* at 266.

41 Catherine Morris, "Alternative Dispute Resolution and Human Rights Disputes: Resolving Harassment Problems - Literature Review" (December, 1997) unpublished at 5.

- (a) one party has a lawyer,
- (b) one party is more emotionally vulnerable,
- (c) one party is more anxious to settle,
- (d) the mediator fails to recognize gender or culture-specific socialization patterns.

The concept of power imbalance is not new. Employment law, historically, has struggled with this problem when trying to fit employment relationships into contract ideology. One writer states the problem in the following way:

Such was the inequality of power between the employer and the individual employee that to describe 'agreements' between them as 'freely bargained promises' obscured the high probability that for much of the time the latter felt virtually coerced by the former into settling for whatever he could get.⁴²

The inequality of bargaining power that typically exists between employer and employee also typically exists between complainants and respondents in the human rights context.⁴³

If we consider the typical characteristics of complainants and respondents in human rights disputes, the power disparity and some of the serious drawbacks of mediation are highlighted. Generally, complainants want the discrimination to stop. They fear rejection, violence, and/or retaliation, and worry about their loss of privacy if they decide to pursue their complaint. Complainants also generally lack the skills to change their situation effectively, and are often concerned to protect others from same problem. Most importantly, complainants often blame themselves or at least feel that they share responsibility for the situation.⁴⁴ For respondents, Howard Gadlin has described the characteristics of people accused of harassment. These characteristics may be analogous to respondent interests more generally: they want things to go back to normal, they are afraid of punishment, they are concerned about their reputation, about confidentiality, and they do not want to lose control of the complaint. Perhaps most importantly, *they often blame the accuser, not themselves.* ⁴⁵

42 A. Fox, "Beyond Contract: Work Power and Trust Relations" (London: Faber and Faber, 1974) at 184. In employment law, there have been typically two kinds of legislative responses to redress the power disparity between employers and employees. The first of these is procedural in nature, namely, legislation designed to permit collective bargaining such as the *BC Labour Relations Code*. The second is the "substantive" response of providing employees with statutory rights which many would not be able to secure through the exercise of their individual bargaining power. The *Employment Standards Act* and *Pension Benefits Standards Act*, for example, provide for "floor rights" or minimum terms that are statutorily imposed into the employment contract. Similarly, the *Human Rights Code* provides employees and others with statutory protection against discriminatory treatment.

This list primarily combines the characteristics referred to in Howard Gadlin, "Careful Manoeuvres: Mediating Sexual Harassment" (April 1991) *Negotiation Journal* at 143-4 and Mary P. Rowe, "People Who Feel Harassed Need a Complaint System with both Formal and Informal Options" (April, 1990) *Negotiation Journal* at 164-169. "Howard Gadlin, "Careful Manoeuvres: Mediating Sexual Harassment" (April 1991) *Negotiation Journal* at 143-4 and Mary P. Rowe, "People Who Feel Harassed Need a Complaint System with both Formal and Informal Options" (April, 1990) *Negotiation Journal* at 164-169.

These characteristics illustrate, firstly, the conflict between some of the goals of mediation and the goals of human rights legislation and secondly, the significant power imbalance in human rights disputes. For example, it has been argued that some of the goals of mediation, namely, reconciliation, agreement, and mutual responsibility are fundamentally contradictory to the Code's preferred goal of ending discrimination. In particular, the goal of recognizing mutual responsibility implies that the complainant who has suffered discrimination has somehow contributed to the illegal behaviour. It seems unfair that the complainant must give up something in order to get the discrimination to stop when s/he has done nothing to warrant the behaviour in the first place.⁴⁶ One of the goals of the Code is to shift attitudes and stereotypical perceptions. Unfortunately, mediation's effort to achieve a compromise suggests to some that both parties are somewhat at fault, an assumption which critic, Barbara Whittington, claims stems from discredited victim-blaming theories.⁴⁷

Many writers have pointed out that the effects of disparities in power influence the dynamics of conflict and conflict resolution. In human rights disputes a power difference may originate in (any combination

of) inequality of experience, of ability, of age, of race or class, sexual orientation or gender -- but sex discrimination is most common (cited in more than 40% of complaints brought to the Commission in 1997/8.)⁴⁸ For example, in cases of sex discrimination alleged by women, where the respondent is typically male, it has been argued that a severe power imbalance may occur in mediation because within a larger social, economic and political context women are socialized to be "other-oriented" and cooperative whereas men, conversely, are taught to be autonomous and competitive.⁴⁹ The research is not clear on whether women shy away from negotiations because they have less confidence. Some studies claim that there is no reason to mistrust women's negotiating abilities: they are capable of negotiating as competitively and successfully as men.⁵⁰

Gadlin, *ibid* at 145 and Dr. Arjun P. Aggarwal, "Dispute Resolution Processes For Sexual Harassment Complaints" 3 *Canadian Labour & Employment Law Journal* at 92.

⁴⁶ Barbara Whittington, *Mediation, Power & Gender: A Critical Review of Selected Readings* (Victoria: University of Victoria Institute for Dispute Resolution, 1992) at 32.

⁴⁷ *Ibid.* at 15 and 36.

⁴⁸ BC Human Rights Commission Annual Report, 1997/1 998 at 6.

⁴⁹ Whittington, *supra* note 46 at 23.

In addition, the result of mediation may be to reinforce a complainant's psychological distress by making her feel that this is simply her problem. She may blame herself without realizing the systemic nature of her problem.⁵¹ The self-blaming phenomenon among harassment victims, for example, seems intimately linked with the so-called advantage of mediation in not allowing emotions "to get stronger with the length of time that has passed."⁵² In other words, it may not be in the best interests of women who have merely "named" their dispute to not develop an opportunity to "blame" or "claim" the dispute in the mediation process." Becoming "more emotional" may involve recognition of the public character of the harm a complainant has experienced and perhaps be accompanied by a demand for a more "public" remedy that addresses the broader, systemic impact of discrimination in society.

The above comments seem to suggest that it will be difficult to protect the public interest in light of mediation's inability to effectively deal with power imbalance. Others, however, maintain that the public interest is adequately protected by mediation since it is the best vehicle for dealing with power imbalance in resolving disputes because mediation is itself an empowering process.⁵⁴ Impartiality, voluntariness, behaviour guidelines, and the power to end mediation, are all empowering aspects of the process.

Other strategies to deal with power imbalance and protect the public interest include:

ensuring fairness and voluntariness in the process, providing legal representation, providing information to the parties, mediator training, mediator partiality, and providing parties with a "cooling off" period. Howard Gadlin has developed four major adaptations of mediation that he considers essential in mediating instances of harassment: (1) the availability of male-female comediation teams, (2) extensive use of pre-mediation meetings and negotiations with each party, (3) active encouragement of the use of advisors by both parties, and (4) the availability of shuttle diplomacy as an alternative to face-to-face meetings.⁵⁵ Techniques such as setting ground rules are absolutely essential. Even the relatively simple practices of "reaffirming" and allowing equal time to both sides may also help to balance power and protect the public interest in ensuring that settlements are not only efficient, but substantively fair.

⁵⁰ Carol Watson, "Gender versus Power as a Predictor of Negotiation Behavior and Outcomes" (April,

1994) *Negotiation Journal* at 117-127.

51 John Kilcoyne, "The 'Politics of Policies': Responding to Sexual Harassment on Campus" (1995) 3 *Canadian Labour & Employment Law Journal* at 49-52.

52 Sean Fine, "Sexual-Harassment Policies Softening" *CAASHHE Newsletter* (1997) 9:2 at 3.

53 See William L.F. Felstiner, Richard L. Abel and Austin Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming" (1980-1) 15: 3-4 *Law & Society Review* at 63 1-654. Tina Grillo and other feminist critics have pointed out that emotion in mediation is not treated as normative. Anger, for example, is often discouraged even when it may be empowering or cathartic for the party expressing it. Instead of integrating anger into the process, mediators often prevent conflict from escalating by controlling the emotional climate. See Tina Grub, "The Mediation Alternative: Process Dangers for Women" *The Yale Law Journal* (April) 1991 Vol. 100, No. 6: 1545-1610. Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, 2nd' Edition. (New York: Penguin, 1989) at 177.

Mediator neutrality

Connected to the problem of balancing power in a mediation setting, is what Michael McCormick has described the "ethic of impartiality" that permeates the practice of mediation. He points out that neutrality, impartiality or lack of bias or intervention -- needs to be considered both in terms of the mediation process and the substantive fairness of mediated agreements. Mediator neutrality is most appropriate where voluntariness, roughly equal power and a spirit of cooperation are all present. Because these elements are rarely all present in the majority of human rights conflicts, neutrality in process-only may result in a disregard for the public interest in the substantive fairness of an agreement. He warns that "singular reliance on the principal of impartiality too often leaves existing power imbalances unchallenged and thus provides nothing better than second-class justice for the less powerful"⁵⁶ The problem is that mediator is the "servant of both parties but accountable to no one."⁵⁷

Janet Rifkin, Jonathan Millen and Sara Cobb have also pointed out that it is impossible to correct power imbalance without violating neutrality. Their research demonstrates how the mediation practice of asking questions and reframing responses inevitably influence and structure the understanding of the conflict and its possible resolutions:⁵⁸

Story facilitation recognizes the mediator as an active participant in the construction of the narrative. Although the mediators can attempt to monitor their influence, it must be recognized that mediators, as do the rest of us, legitimize certain stories over others.

⁵⁵ Howard Gadlin, "Mediating Sexual Harassment" in Robert Shoop et al. Eds. *Sexual Harassment on Campus* (Toronto: Simon and Schuster, 1997) at 191.

⁵⁶ Michael A. McCormick, "Confronting Social Injustice as a Mediator" *Mediation Quarterly* Vol. 14, No. 4, 1997, 293-307 at 293.

⁵⁷ *Ibid.*

⁵⁸ Janet Rifkin, Jonathan Millen and Sara Cobb, "Toward a New Discourse for Mediation: A Critique of Neutrality" (1991) 9 *Mediation Quarterly* at 161.

Thus once the "magic" of mediation is critically examined, it must be understood as a political process

that privileges certain speakers or disputants over others.⁵⁹

Neutrality is generally considered to have two different aspects: impartiality and equidistance. Equidistance at times requires a mediator to align with or support one side's position creating an informal relationship. Then the mediator must draw back, create a formal relationship again and deny assistance to one side or the other. Rifkin, Miller and Cobb show that "as the mediators use the tactical interventions associated with the practices of equidistance (turntaking, caucusing, private sessions), the inevitable result is that people will talk of their "side" and mediators engage in side-taking."⁶⁰

Hence, one of the greatest challenges facing the Commission is determining how mediation and advocacy can work together to meet the needs of the Code, which aims to protect the public interest.⁶¹ The current Commission guidelines seem to suggest that human rights officers have a duty to advocate on behalf of the Commission's interest in upholding the Code. On the other hand, the policy frequently states that "at all times the investigator must be impartial and objective." What the Commission needs is a clear statement that will delimit what is appropriate and inappropriate "coercion" in settlement discussions. The policy statement should

59Thid

60 Ibid. at 157.

⁶¹ The current Commission policy states that "the investigator must also ensure both parties are aware of the legal framework of the *Human Rights Code*, and endeavor to advance the public interest in nondiscrimination."

Human Rights Officers are also required to inform both parties about the types of remedies that are potentially appropriate in the particular complaint: "this should be done as a matter of course in each investigation." The Human Rights Commission Facilitator's training manual (July, 1997) also states that: the investigator can take an active part in crafting the parameters of the settlement. This is more than carrying proposals back and forth between the parties. It requires urging the parties to modify their positions to achieve a settlement which is satisfactory to he parties and which ensures that the principles of the *Human Rights Code* are advanced.

This would require, for example, pressing the respondent to include in the terms of settlement education seminars for staff even if the complainant did not care about that. It may require suggesting the complainant hold out for more appropriate terms of settlement if the complainant is willing to settle for much less than the complainant calls for in terms of a remedy. However, if the complainant is satisfied with a less than complete individual remedy the investigator is not entitled to refuse to close the file on the basis that the settlement is insufficient.

The investigator should try to ensure that the broader interests of the community are achieved. It becomes a fine balancing act to determine when the respondent has offered all it is going to offer to meet the public interest. If the parties to the complaint settle then there is no complaint left to investigate and the investigator has no authority to require more.

In response to this problem Michael McCormick suggests that "to foster just and therefore more durable resolutions, mediation must aim also to transform the disputants and their relationship."⁶² He and others have suggested that mediators abandon impartiality and pursue "activist" mediation whereby the mediator works "to ensure the representation of the interests of all affected parties on the way to a mutually accepted outcome."⁶³ In a system that allows for mediator impartiality, the mediator may become "an advocate for the law while remaining impartial to the parties."⁶⁴

The problem with mediator partiality, however, is that it creates a perception of bias in favour of the complainant. On the other hand strategies to address power imbalance include giving "information" to the parties without advising them. This again raises the question: what is appropriate and inappropriate "coercion" in settlement discussions? Professor Waldman has outlined different degrees of neutrality in settlement discussions depending on the context. In particular her "norm-educating" and "norm-advocating" models could be considered by the Commission to ensure that the Code's public interest mandate is maintained in settlement discussions.⁶⁵ Making use of Waldman's model, there may be various levels of third party intervention depending on what one is trying to achieve. Levels of intervention may increase (from neutral, to evaluative, to Code-upholding, to interventionist) depending on the extent of the power imbalance between the parties.

Another way to ensure that all the interests or needs of the parties get addressed is to offer a culturally sensitive mediation process. Different cultures and subcultures often have different goals for dispute resolution and so it follows that other cultures make different choices about the "activism" of their mediators. For example, in both Navajo Peacemaker Court and the Filipino Katarungang Pambarangay system, traditional methods of non-adversarial dispute resolution are kept alive which involve "mediators," called peacemakers or barangay captains, who intervene much more actively than their North American counterparts - even though they too are not decision-makers for the parties:

62 McCormick, *supra* note 56 at 294.

63 *Ibid.*

64 "David Bryson, "Mediator and Advocate: Conciliating Human Rights Complaints"" *Australian Dispute Resolution Journal* Vol. 1(1990): 137.

65 E.A. Waldman, "Identifying the Role of Social Norms in Mediation: A Multiple Model Approach" (1997) 48(4) *Hastings Law Journal* 703-770.

In both these kinds of mediations, the mediators have confidence in their own knowledge of the community values, which all participants are assumed to share. Two aspects of these mediations mark them especially: 1) the mediators openly inject concerns larger than the participants themselves; for example, community harmony and even spiritual guidance which they understand the parties share; and 2) the mediators are rarely ever strangers or unknown volunteers or professionals even though they are not to be biased toward one side or the other.⁶⁶

This example encourages us to consider the cross-cultural appropriateness of the Commission's dispute resolution system. According to Professor Andrew Pine, the perceived need to do this has become an ethical obligation. Pine, for one, has begun this investigation by posing the following questions: what role does culture play in understanding and shaping disputing behaviour, theories and institutions? Are disputing concepts transferable across clear cultural divides? Are there disputing practices that transcend culture, that are just common sense?"⁶⁷ The Commission has recently begun to address such concerns, primarily in the form of supplementary cultural-awareness training for mediators offered through the Justice Institute. However, further research on culture and mediation in the human rights context is strongly recommended.

Privacy and Confidentiality

Another public interest concern raised in mediating human rights complaints is that the requirement of confidentiality prevents the greater systemic problem of discrimination from being addressed. It is argued that since mediation has no effect on outside parties, it cannot change the underlying societal attitudes

which perpetuate discrimination.⁶⁸ Here, it is important to distinguish between a "confidential" process⁶⁹ and "confidentiality" in terms of keeping the settlement agreement itself immune from public scrutiny. The "culture of ADR" assumes that confidentiality is essential for mediation to work, otherwise parties would have no incentive to make potentially harmful disclosures that could be used against them in a subsequent proceeding.

Gunning, Isabelle R. "Diversity Issues in Mediation: Controlling Negative Cultural Myths" *Journal of Dispute Resolution* Vol. 1995 No. 1: 84.

⁶⁷ Andrew J. Pirie, "Alternative Dispute Resolution in Thailand and Cambodia: Making Common Sense on (Un)Common Ground" in *Asia PacVic Legal Development*, ed. by Douglas M. Johnston and Gerry Ferguson, (Vancouver: UBC Press, 1998) at 502.

⁶⁸ Whittington, *supra* note 46 at 13.

When the respondent is worried about publicity then it has more incentive to negotiate a settlement and keep it confidential. However, the confidential nature of settlement discussions may be in direct conflict with the public interest. Names of complainants and the amounts of compensation or any apology they may receive are kept out of the public eye. Confidentiality removes the process from public scrutiny. Critics of the Commission's "without prejudice" settlement discussions charge that mediation precludes group empowerment; public scrutiny and frustrates the goal of public education.

In cases where the Deputy Chief Commissioner is involved, the Commission tries to make at least part of the settlement public, for example, the part about the implementation of a new policy could be publicized. If a respondent was not willing to do this it is unclear whether the DCC would allow the settlement to go ahead anyway. Could the mediator raise the question of publicizing a systemic remedy such as a new policy? After all, a "confidential" policy is really no policy at all. Raising this question could be part of what Waldman might describe as a "Code-advocating" mediation model which avoids advocating for (the value-laden) status quo and instead aims to "further the purposes of the Code".

Proponents of mediation also point out that confidentiality is indispensable to maintain mediator neutrality, to ensure the candour necessary to successfully mediate, and to encourage reporting.⁷⁰ Also, without confidentiality, one party may use the process to gather information that they could use against the other side in a subsequent proceeding. Confidentiality is also supposed to prevent smear campaigns, either by the complainant or the respondent, "because innocent people can have their reputations or their careers ruined."⁷¹ Confidentiality, in short, is necessary to ensure fairness to both sides.

To protect the public interest, human rights commissions should establish clear guidelines as to what information remains confidential and what information will become part of the record. Both the human rights commission staff and the public should understand the limits of confidentiality in the various stages of the complaint process. This becomes complex as is demonstrated by the BC Commission's current system of combining investigation and mediation roles. Human rights agencies should also consider how mediation can work hand in hand with its other public interest objectives - to deal with systemic discrimination - and educate the public about human rights law. In particular, commissions should decide whether and how to publicize settlement agreements.⁷² The BC Commission currently tries to balance individual confidentiality concerns with approaches that emphasize public policy through: research, systemic investigations, publication and public reporting, representative complaints, education and the office of the Deputy Chief Commissioner.

⁶⁹ Mediation can be either "closed" or "open". Where the mediation is "closed" the parties cannot disclose communications made during mediation in a subsequent court dispute. Where the mediation is

"open" it is non-confidential and the parties may inform the court about what transpired during the mediation.

70 There are many reasons for not filing a complaint. See Patricia A. Gwartney-Gibbs and Denise H. Lach, "Sociological Explanations for Failure to Seek Sexual Harassment Remedies" (1992) 9 *Mediation Quarterly* at 365-373. In cases of harassment, women's socialization, often associated with avoidance of conflict and confrontation with authority, lack of self-confidence, support, and workplace legends all conspire to dispel desire to pursue complaints.

71 "SFU's Draft Harassment Policy: On the Road to Consensus" *Simon Fraser News*, June 19, 1997, at 3.

When does a dispute involve the "public interest"?

Now we turn to an analysis of how to interpret the public interest in the context of a typical human rights complaint scenario. Consider the following dispute between Jack and Jane:

"Jane" is employed as a waitress in a restaurant. During the course of her employment, "Jack"- who is employed as a cook in the same restaurant - sexually harasses her. Jack repeatedly makes leering comments and sexual advances toward Jane while they are working. Jack has control over hiring and firing of employees. Despite Jane's objections the unwanted behaviour persists. The owner of the restaurant is made aware of the problem and yet does nothing. Jane eventually quits her job at the restaurant.⁷³

In the above example, is there such a thing as a 'public' interest that is distinct from the 'private' interests of Jack and Jane? The reason for the question is that historically this dispute would be characterized as a private dispute.⁷⁴ However, the current view is that the dispute between Jack and Jane does involve the public interest. This is because Jane is trying to promote or defend the fundamental values of the Code which have been given quasi-constitutional status by the Supreme Court of Canada.⁷⁵ Human rights law is quasi-constitutional because it is "public and fundamental law" that "no one, unless clearly authorized by law to do so, may contractually agree to suspend its operation and thereby put oneself beyond the reach of its protection."⁷⁶ The dispute between Jack and Jane therefore involves fundamental values of the state that the legislature has chosen to buttress and protect through the Code. For this reason, tribunals also operate within the public interest because they are responsible for promoting the values of the Code.⁷⁷

72 A possible model is the U.S. *Administrative Dispute Resolution Act* which creates a balance between disclosure and confidentiality. The *Act* permits disclosure, if necessary to prevent a manifest injustice, help establish a violation of law or prevent harm to public health or safety, of sufficient magnitude in the particular case to outweigh the need for confidentiality in the integrity of the ADR proceedings.

73 These facts are based on *Janzen y. Platy Enterprises Ltd.* 1989 I S.C.R. 1252.

Comprehensive anti-discrimination legislation was not enacted in Canada until after the second World War. See Chotalia, *supra* note 35.

In *Ontario (Human Rights Commission) v. Simpson Sears Ltd.* 1985 2 S.C.R. 536 the Supreme Court held that human rights legislation is quasi-constitutional legislation; it is a fundamental law. Also see Chotalia, *ibid.* at vi.

In the above scenario the server, Jane who complains of sexual harassment may be referred to mediation by the BC Human Rights Commission, where her complaint may be "successfully" settled by having the

restaurant owner make some modest payment to Jane. This settlement could potentially occur without Jane ever being apprised of her right to get higher compensation under the *Human Rights Code*. Also, a settlement process may not take into account the need for a sexual harassment policy to be put in place, nor may it acknowledge any previous complaints received by the Commission about Jack's behaviour in the past. One could argue that the harassing behaviour would not be effectively redressed if the employer/restaurant owner were allowed to "buy off" individual complainants like Jane through settlements that do not directly address the illegal, discriminatory nature of the underlying practice.

If we characterize this dispute as "private" then Jack's sexual innuendoes, verbal badgering, and not-so-subtle hints that Jane's continued employment may be at risk -- leaves Jane in an unenviable position. She can submit to the offensive behaviour or quit her job and lose financial security. If, on the other hand, Jack's behaviour is captured by the legal notion of "sexual harassment," for example, the individual, "private" struggle becomes a community concern, and a systemic resolution at least becomes possible. The issue is defined no longer as one woman's objection to offensive behaviour but now as a community assessment, embodied in the Code's prohibition of sexual harassment in the workplace. Providing a remedy for sexual harassment becomes part of the public good, which the community is willing to advocate and enforce.⁷⁸

76 *Insurance Corp. of BC v. Heerspink* 1982 2 S.C.R. 158

77 Yet in spite of this view, Human Rights Tribunals very rarely order systemic remedies. Instead, tribunals traditionally issue "cease and desist" orders and personal remedies. Bill Black's Report on Human Rights in British Columbia recognized this problem and that is why he recommended the creation of a systemic watchdog. As a result of Bill Black's recommendation the Code now provides for the Deputy Chief Commissioner who is responsible for issues of systemic discrimination and who may initiate or add himself as a party to a complaint to represent the public interest.

78 This analysis follows the reasoning of Francis Kane in "Neither Beasts nor Gods: Civic Life and the Public Good" Dallas, Southern Methodist University Press, 1998 at 47.

An important rationale for having the government involved in human rights enforcement is the sense that the prohibition of discrimination is a public good that both requires and deserves governmental attention (there is unquestionably an important governmental interest in eradicating discrimination of all kinds). As for the consequences of treating this as a "public" dispute: if Jane gets compensation then Jack, presumably, will understand that Jane is entitled to her remedy. The hope is that Jack will adjust his behaviour accordingly. The restaurant owner may also be encouraged to adjust his business practices and perhaps warn his/her friends that they discriminate at their peril. In the end, even the personal remedy of compensation may go a long way toward changing minds and the Commission's ultimate goal of ending discrimination. On the other hand, reality requires that we recognize that with the relatively low amounts of compensation awarded to victims of discrimination, there may not be an adequate disincentive for Jack or the owner to adjust their behaviour or change their minds. Historically, most Canadian jurisdictions focus on remedial compensation only and not punitive damages, although this may be changing.⁷⁹

On the other hand, even if we accept that there is an important public interest in eradicating discrimination of all kinds, this does not mean that the Commission must be involved in *all* complaints of discrimination. Nor should this mean that involvement of a Deputy Chief Commissioner will necessarily provide any greater level of deterrence. One could argue that there is no public interest in this dispute between Jane and Jack because it only involves two private individuals. It could be argued that there should be no more interference or regulation here than there would be in other disputes recognized by the legislature and the courts as "private." This view would hold that where there is no systemic remedy - there is no public interest being served (except in the smaller system, perhaps). The consequences of this

view for dispute resolution are clear: there is no need for public interest watchdogs in cases where a "cease and desist order" and personal remedy will resolve the problem to the parties' mutual satisfaction. This means that the confidentiality, power and neutrality problems are not really problems at all and parties should be allowed to bargain freely for a mutual resolution to their dispute. According to Michael Selmi, the history of the U.S. government's enforcement of civil rights in housing and employment discrimination bears this out:

claims of discrimination continue to increase, and rather than actively combating discrimination, the government spends the vast majority of its time and resources labeling claims as lacking merit and thereafter dismissing them. The government's high dismissal rate leads to the perception that most discrimination claims are frivolous, which can only have a negative effect on our nation's efforts to eradicate discrimination. 80

One can see parallels in the BC Human Rights Commission system where dismissals comprised 30.59% of all complaints in 1997/1998.⁸¹ In the alternative, one could argue that the public interest here is minimal, not meriting DCC involvement because it simply does not involve systemic discrimination. Simply providing a process where one may make a complaint, and engage the Human Rights Commission process may be enough to protect the public interest.

Although one could argue that there is "public interest" in Jane's individual efforts to defend the fundamental values of society (as manifested in the Code), the argument in favour of the public interest would be even more persuasive were we to argue that Jane's personal interest -plus her concern for "other people like her"- creates a greater public interest. This view seems to be reinforced by two purposes of the BC Code expressly set out *in s. 3*: to correct persistent patterns of inequality and to monitor progress in achieving equality in BC.

Where Jane desires to protect "others like her" this may provide a good reason for a Tribunal to make a conscious effort to direct the law along lines which will achieve a desirable social result, both for the present and for the future. When this occurs when the "public interest" is thrown on to the scale and allowed to swing the balance for or against a complainant like Jane the result is a form of 'social engineering' that "deliberately seeks to use the law as an instrument to promote that 'greatest happiness of the greatest number' which by common consent is the object of society."⁸²

Should there be a distinction between public interest on a smaller scale and "broader public interest" of the kind that interests the DCC? Some argue that all discrimination is systemic. This view seems to be supported by the BC Human Rights Commission 1997/8 Annual Report, which states: "each complaint that the BC Human Rights Commission resolves now has the potential to ripple through society leading to legislative revisions or other changes that will reduce or eliminate systemic patterns of discrimination."⁸³ This optimistic statement suggests that the recent changes to the Code allowing the DCC to become involved in individual disputes will enable the Commission to address human rights abuses on a broader scale rather than on an individual case-by-case basis. The statement suggests that where there is a pattern of discrimination within a small setting, such as a restaurant, as in the Jane and Jack case, for example, the DCC should still, arguably, be involved. Where the impact of discrimination affects a broader group, the rule should always be attacked and a precedent should be set.

80 Michael Selmi, "Public Vs. Private Enforcement of Civil Rights: The Case of Housing and Employment" 45 *UCLA Law Review* 1410 (1998) at 1457.

81 BC Human Rights Commission Annual Report 1997/1998 at 6.

82 A. M. Linden and L.N. Kiar, "Canadian Tort Law: Cases, Notes & Materials" 10th ed., (Toronto:

Butterworths, 1994) at 6.

Arguments for DCC intervention

By making an analogy to public interest intervention in the courts, the DCC may be seen to participate as a stakeholder to ensure both the public interest and government interests are reflected in settlement agreements.⁸⁴ The DCC may also participate so that the legitimate authority of government remains intact. Another reason why the DCC may participate is so that the information brought to the table is more balanced and of a higher quality, leading to better quality decisions. Finally, a high level of consensus fosters less public conflict and the DCC's participation shows that the government is committed to the process.

In spite of the danger that the court's impartiality and objectivity could potentially be compromised by allowing public interest intervention, generally speaking, "the opportunity to develop a sense of the public interest and urge it on those who wield governmental power is regarded as one of the most important, and most desirable, features of life in a democracy."⁸⁵ According to Phillip Bryden, "the distinguishing feature of public interest intervention is pursuing the establishment of a particular legal principle for its own sake rather than as a collateral means of achieving other litigation objectives."⁸⁶ Whereas party intervenors are interested in outcomes, public interest intervenors are content to make submissions on legal issues. Although the DCC is not designed to interfere in the private disputes of others, "nobody, however, is entitled to preserve as a matter purely of private interest the legal rules and principles by which we are governed"⁸⁷ This is as true of human rights law as it is of criminal or civil law.

⁸³ BC Human Rights Commission 1997/1998 Annual Report at 5.

⁸⁴ Bryden, *supra* note 10 at 490-528.

⁸⁵ *Ibid* at 491.

⁸⁶ *Ibid* at 499.

⁸⁷ *Ibid*.

Again, analogizing Bryden's discussion of public interest intervention in the courts, with the DCC participation in the human rights disputes, it is arguable that the DCC serves three important functions.⁸⁸ The first of these is that a variety of inputs are likely to make for more informed and, one hopes, better decision-making. Secondly, the DCC may be able to bring to attention of tribunal background information or "legislative facts" that has revealed the impact that discriminatory behaviour has on the complainant or a particular group of complainants. Thirdly, intervention by the DCC may help to legitimize tribunal decisions in two ways:

1. willingness of the tribunal to listen to DCC is a reflection of the value Tribunal attaches to Commission's advocacy role and
2. if tribunals are to succeed in playing the difficult role we have assigned them, they will have to be sensitive to the interests and points of view of all whom are likely to be affected by their decisions, not merely those that happen to be parties to the dispute.

On the other hand, if the ideal situation were to have the DCC involved in *all* disputes to represent the public interest or, if *all* cases went to hearing what would be the result? As has already been stated, it is

very rare for tribunals to actually award systemic remedies. The case, *Zecchel v. British Columbia Packers Ltd*,⁸⁹ for example, is lauded as a great victory for human rights but when one looks at the actual remedy one discovers that the public interest remedy is extremely narrow. This was a case that involved systemic discrimination at a BC Fish Packing Plant. The complainant, Joan Zecchel was barred from certain jobs due to sex-segregated lists for seniority and sex-segregated job classifications that divided duties into "women's work" and "men's work". Although the BC Council found that Ms. Zecchel was discriminated against, the Council also found that it had insufficient evidence to determine whether there was systemic discrimination at BC Packer's. Consequently although Ms. Zecchel was awarded a sum for the injury to her dignity as well as compensation for lost wages, the only response to the systemic problem was an order that BC Packers provide every employee at the plant with a notice containing a summary of the decision.

According to Tom Beasley, senior legal counsel at the Commission in Vancouver, "few systemic cases are filed. Even fewer make it to Tribunal. The Commission and the Tribunal have their heads mired in individual complaints and have not been able to tackle systemic ones." A review of P. Chotalia's summary of remedies awarded under the old section 17 of the *Human Rights Act* bears this out. I could only find 3 instances where a systemic remedy had been awarded and these were clearly the most egregious cases of discrimination.⁹⁰ In one case the Girl Guides of Canada was "strongly urged" to develop policies and programs to reach out to visible minority women and to include them in the organization as guiders.⁹¹ In another case a one-day workshop on racial and sexual harassment was ordered in the case of workplace discrimination.

⁸⁸ *Ibid* at 507-9.

⁸⁹ C.H.R.R. Vol. 27 D/163

Ironically, the (so far, anecdotal) success of systemic remedies in mediation is promising:

in sexual harassment cases, for example, anti-harassment policies are often put in place pursuant to a settlement agreements.⁹²

Arguments against DCC intervention

Is the purpose of DCC intervention the resolution of disputes or the development of law? If the goal is to develop the law, it could be argued that it is inappropriate to expand the range of issues if the dispute between the parties could be resolved on a narrow ground.⁹³ Another problem is the perception of unfairness if one party has greater resources than the other does. It also may be argued that it is unfair to deprive the parties of control over their own process. On the other hand, we should not discount the possibility that intervention might tend to redress an existing imbalance between the resources of the parties rather than create problems for an impecunious litigant.⁹⁴ An obvious solution would be to give financial aid to both parties but this is not likely given BC's economic climate.

There is also the argument of practicality. It may be considered an unproductive use of the tribunal's time and energy to hear from the DCC. The response to this, as with public interest litigation, is that the number of those who will want to appear in court is generally quite small in proportion to those who might be affected.⁹⁵

⁹⁰ Chotalia, *supra* note 35 at BC 121-161.

⁹¹ *Thambfajah y. Girl Guides of Canada (1995)*, 26 C.H.R.R. D/1 cited in Chotalia, *ibid* at 124.

92 For example, in a mediation where the respondent was a police department, informal discussion resulted in a Practice Advisory on "Questioning Members of the Transgender and Transsexual Communities". Also, the BC Human Rights Commission Annual Reports contain numerous examples of systemic remedies as part of mediated settlements.

Bryden, *supra* note 10 at 514.

Ibid at 516.

Ibid at 517.

Finally, it could be argued that the DCC is unrepresentative of the public whose interests it claims to be protecting. 96 However, as Bryden suggests:

It is difficult to see how the alternative, which would be to make no attempt to allow for the representation of the public interest would allow a more accurate or representative picture of society. Our society is justifiably concerned that some of its members find themselves systematically under-represented in our political institutions, and the desire to give minorities a more effective means of making their voice heard in the formulation of our laws was one of the things that prompted the introduction of the Charter.⁹⁷

In the end, a realistic way of assessing when the public interest should enter a dispute could be to apply a model using escalating degrees of intervention for increasing levels of public interest. In other words, where the dispute involves Jack and Jane, and Jane will be satisfied with a personal remedy, maybe providing a Commission process and perhaps legal counsel to an unrepresented party is enough. At this level, efficiency goals probably outweigh social justice goals. However, if the dispute involves Jack and Jane but Jane is concerned about "others like her" then perhaps the DCC should be involved to ensure that some preventative measures are put in place. Here, social justice goals begin to compete with efficiency goals. Finally, if a complainant indicates that there may be a pattern of systemic discrimination, the DCC should launch an investigation and prepare a case to present to a tribunal whether the complainant is interested in adducing this evidence or not. At this level social justice is the overriding concern as the DCC makes a conscious effort to direct the law along lines which will achieve a desirable social result, both for the present and for the future.

The BC Commission's Public Policy Initiatives

This final section of the paper examines how the public interest goals of the Commission are reflected in its public policy initiatives. The Commission tries to balance concerns about informal dispute resolution with a number of approaches that emphasize public policy including research and education campaigns and public consultation, publishing summaries of case abstracts, representative complaints, approval of employment equity programs and intervention by the DCC. However, the Commission could improve upon its public policy mandate by providing a mechanism for settlement approval, publishing statistical summaries and through making better use of the DCC's ability to initiate investigations and intervene in systemic cases.

96 *Ibid* at 520.

Ibid.

Under section 6 of the Code, the Commission has a mandate to conduct public hearings, research and consultations that will advance the purposes of the Code.⁹⁸ Connected to this is the Chief

Commissioner's general mission to increase public awareness and understanding of human rights protection in BC through education and prevention campaigns to inform service providers, employers and communities about their human rights and their responsibility not to discriminate.⁹⁹ Also, the DCC has a mandate to look for systemic aspects of complaints and make sure there is a remedy provided for them. As has already been discussed, this is not really done in a systematic way at present. Although the DCC receives notice of any disposition of a complaint before it goes to Tribunal, the Commission's current policy is that human rights officers only need to determine whether there is a reasonable basis to go to a hearing -- they will not investigate and obtain disclosure on systemic issues if the complainant has not raised them in their complaint. Hence, there may be little evidence on which the DCC can base a systemic investigation.

Another way the Commission attempts to promote the public interest is by publishing summaries of case abstracts and outcomes in the BC Human Rights Commission Annual Report. At present settlements between parties are confidential, and therefore may not be disclosed. However, the Commission could do more for the public interest by finding a way to publicize these settlement agreements even anonymously they have educational value. Still, the Commission manages to report to the public on particular systemic issues or social problems through press releases.

Another way to educate the public about their legal entitlements would be for the Commission to publish statistical summaries indicating the number of respondents who changed or actually instituted a new policy as a result of a settlement as well as the number of respondents provided an apology or letter of reference to the complainant. If this information was provided to parties before mediation it would make them better informed about possible outcomes and might help to balance power.

For example, in 1994, Professor Bill Black of UBC was commissioned by the Government to undertake a thorough review of human rights in B.C. He consulted with many groups and individuals and made numerous recommendations, some of which were responsible for transforming the BC Council of Human Rights into two independent agencies the BC Human Rights Commission and the BC Human Rights Tribunal.

The Code also allows for "representative complaints" (s. 2 1(4) of the Code) where an individual may file a complaint on behalf of another person or class of persons who have experienced substantially similar discrimination. This representative complaint (analogous to a class action) benefits not only the person filing, but also the whole group named in the complaint. For example, in 1994 David Morrison filed a complaint on behalf of his young daughter and other girls living in Coquitlam who participate in gymnastics. Mr. Morrison alleged that the city's allocation of sport subsidies discriminates on the basis of sex, specifically, that sports typically dominated by males (i.e. hockey) receive more subsidies than those typically dominated by females (i.e. gymnastics). Any remedies ordered in a representative complaint include systemic remedies that have broader social implications.¹⁰⁰

Finally, under s. 42 of the Code, the Commission carries out its public interest mandate through its power to approve employment equity programs or any other program or activity that tries to improve the conditions of disadvantaged individuals or groups. The Commission also helps employers to develop and implement employment equity plans in their workplace.

Approval of settlement agreements

The Canadian Human Rights Tribunal approves settlements, but in contrast, the BC Commission does not have the power to reject a settlement. The BC Code has no guidelines for settlement that ensures that public mandates are met and parties have not sacrificed their rights. The literature reveals a clear concern that mediation has "no teeth"; that mediation is a lesser forum, the true nature of which, is a system of

"second-class justice."¹⁰¹ In light of these misgivings, it seems clear that especially in cases where there is a significant power imbalance (in resources, influence, knowledge, or presence of counsel at mediation), there should be some mechanism to ensure that proposed solution does not violate any law or policy. At present, both parties to a human rights complaint sign a Release in resolution of the complaint but there is no mechanism to ensure that legal rights are reflected in mediation agreements or even fully considered by the parties. It is questionable whether the practice of the BC Human Rights Commission of simply registering settlements with the Commission is a sufficient safeguard against settlements that violate the public mandate of the Code. ¹⁰²

99 1997/98 BC Human Rights Commission Annual Report at 1.

100 *Ibid* at 4.

101 Morris, *supra* note 41 at 17.

On the other hand, some argue that party autonomy is paramount and individuals should be free to make an agreement even if it is contrary to the Code. Monitoring settlements is frowned upon because it removes power from the parties to determine their own outcome and this is contrary to the whole purpose behind ADR. Moreover, section 29 of the Code has broad language, so the Commission should be able to accept almost any settlement that is agreeable to the parties so long as it is not discriminatory in nature. Further, it is argued that the system could become bogged down when multiple approvals are sought and agreements are sent back to be renegotiated or mediated. Another consideration is that even if the Commission were to reject a settlement, what would prevent a respondent from circumventing the Commission's watchdog role, "writing a cheque" and simply persuading the complainant to withdraw the complaint altogether?

Also, in jurisdictions where settlements are approved: how often are settlements actually rejected? Another reason for resistance to settlement approval could be that this process might reflect a lack of trust in the work of human rights officers who are mediating complaints. Perhaps if mediator/human rights officers were given clear guidelines about how to mediate and what would be an appropriate settlement, then critics could "trust" them. Also, as discussed earlier, if a Code-advocating mediation model were to be put in place, then perhaps there would be no need for further approval of settlements. On the other hand, if a settlement-approval process were in place, human rights officer/mediators might then be better able to maintain a position of true "neutrality" knowing that the another Commission representative will evaluate the outcome. Finally, the demand this would put on Commission resources is another important factor to consider. This is important because of the political reality that human rights agencies generally lack the resources to adequately fulfill their public interest mandates.

102 An example of an approval policy designed to protect the public interest can be found in *the*

Massachusetts Commission Against Discrimination Policy on ADR: the grounds upon which the assigned Commissioner may decline to recognize a settlement agreement and keep a case open include:

(1) where only one of the parties was represented by counsel,

(2) the terms of the settlement agreement are at substantial variance with the outcome of other cases with similar fact patterns and a reasonable explanation is lacking,

(3) the public interest requires the Commission to keep the case open. See Dunlop, *supra* note 1 at 190.

Role of the Deputy Chief Commissioner

In important precedent cases to promote a broad, purposive application of human rights law, or where a complaint raises critical or central questions in the development of human rights law or policy, the Deputy Chief Commissioner (DCC) has the power to initiate complaints or become a party to complaints at either the investigation or the hearing stage.¹⁰³ Like public interest intervenors, the DCC may appeal "to some more or less clearly defined sense of the public interest or common good and seek to impress upon the governmental decision maker the desirability of giving effect to whatever their conception of the public interest may be."¹⁰⁴

The office of the DCC is deliberately separated from the Commissioner of Investigation and Mediation because of a perceived conflict of interest. Whereas mediators are encouraged to be "neutral," the DCC is specifically authorized to be an advocate. For this reason there is a specific procedure for human rights officers to refer cases to the DCC. Investigation officers provide the DCC's office with a minimum of complainant information about the systemic complaint and none of the investigation officer's notes on the file.

Once the DCC has been added as a party it has all the rights and responsibilities of any other party. This means the DCC can be represented by legal counsel, introduce evidence, and make submissions on any matter in issue. It also means the DCC can participate in any mediation and settlement negotiations that may take place. The policy to support this intervention has only been implemented within the last year. The Commission now has a "Public Interest Program" designed to act on behalf of the community at large to promote the purposes of the *BC Human Rights Code* (s. 3). According to the "Public Interest Program Fact Sheet":

The Public Interest Program strives to promote the equality interests and strengthen the human rights of disadvantaged individuals and groups in BC By promoting the values reflected in the *Code*, the Public Interest Program contributes to the creation of a society in which we all take responsibility to prevent and eliminate discrimination and in which all people are treated with dignity and respect."¹⁰⁵

¹⁰³ To date, the DCC has joined as a party to about 11 complaints at the investigation stage. See ss. 21(2)(3) and 36(1). For example in May 1997, the DCC became a party to the complaint of the Canadian Jewish Congress against Doug Collins and the North Shore Free Press Ltd. The complaint alleged that an article Collins wrote, "Hollywood Propaganda" discriminates and exposes Jewish persons to hatred, contrary to section 7 of the *Code*. Because the newspaper argued that its freedom of speech was being restricted and therefore s. 7 of the *Code* was unconstitutional, the DCC became a party to argue the constitutional validity of the section. See BC Human Rights Commission Annual Report 1997/1 998 at 4.

¹⁰⁴ Bryden, *supra* note 10 at 490.

According to the DCC's assistant in Victoria, complaints usually come to the DCC's attention either through the complainant directly or through community groups who are aware of the DCC's function. The Commission now has specific guidelines on factors for the DCC to consider whether to participate in the dispute as a party at (1) the investigation stage and (2) the hearing stage. In both cases the DCC will take into account the purposes of the Code and following factors when deciding whether to exercise its discretion to become a party: ¹⁰⁶

(a) Does the complaint involve an allegation of systemic discrimination? Does the complaint identify a systemic cause, a systemic impact and/or the potential for a systemic remedy?

(b) Could the complaint lead to a resolution, either through adjudication or mediation, that will have a significant social impact? Could the resolution impact upon a significant number of people in the province who have membership in the protected group?

(c) Does the complaint raise legal issues that are of significant importance to the Commission? (Clarify the law? Precedent value?)

(d) Could the potential resolution of the complaint include a special program that could be promoted throughout the province as a remedy to address similar issues in future complaints against similar respondent communities?

The policy clearly states that because scarce resources do not permit the DCC to become a party to all complaints that fall within the above criteria, instead, the DCC's objective is to focus on complaints that are systemic, would help clarify the law in a significant way or raise legal issues that are important to the Commission.¹⁰⁷

One thing that would add to the comprehensiveness and clarity of the policy would be a clear statement that if the DCC has a reasonable concern with a matter to which a complaint or hearing relates, he should be added as a party to the complaint and even when the DCC's contribution is doubtful, the Commission should err on the side of allowing participation. The policy might also benefit from a clear statement about whether the DCC interested in outcome of dispute or mainly in development of broader principles of law. For example, should the DCC have the right to appeal a decision or prevent settlement?

Presumably, the right to appeal or prevent a settlement would be within the DCC's power since it does have all the same rights and responsibilities as parties. The Commission's policy statement provides that:

105 The Public Interest Program Fact Sheet for Complainants and Respondents. Obtained from Website: bchrc.gov.bc.ca.

106 "Interim Criteria for The Deputy Chief Commissioner's Participation in Proceedings Before the Human Rights Tribunal" Revised September 2, 1998. Policy obtained from Website: bchrc.gov.bc.ca.

If the DCC becomes involved and the parties agree to a settlement which reflects an individual remedy only and no systemic remedy: the Commission may choose to accept the settlement

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