Human Rights Commissions in Canada: A Case of Counter-Intuitive Controversies

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Human Rights Commissions in Canada have recently been at the centre of free speech controversies. For those who have followed the creation and the evolution of such commissions since the sixties, this is rather surprising. We note, for example, that complaints or inquiries registered because of "communications susceptible of exposing a person or a group of persons to hate or contempt" represents a very small percentage of all discrimination complaints received by Human Rights Commissions, even though they have jurisdiction over such complaints.

In June 2009, in Montreal, at the Annual meeting of the Canadian Association of Statutory Human Rights Agencies, Jennifer Lynch, QC, Chief Commissioner of the Canadian Human Rights Commission, noted that the free speech controversies have, in fact, become a debate about the legitimacy of Human Rights Commissions themselves and that they bring into question Human Rights Commissions processes. Broadly speaking, it seems that some vocal Canadians, some notably linked to media such as The National Post, consider the time has come to put an end entirely to the model of Human Rights Commissions in Canada. They claim there exists a hierarchy of human rights whereby freedom of speech and of expression supersede all other human rights which makes them immune from all Human Rights Commissions interventions or inquiries or judicial examination by Human Rights Tribunals.

The day-to-day reality of Human Rights Commissions does not have a lot to do with vocal media representatives or with the protection of a free press in Canada. In fact, the main source of human rights complaints is the management of disabilities in the workplace. On average, such complaints represent forty percent of the annual case load of Human Rights Commissions in Canada. This amounts on average (for the larger provinces and for the federal Human Rights Commission), to an annual caseload of three-hundred to four-hundred complaints. In contrast, "hate speech/free speech" complaints number fewer than a dozen.

While dispositions related to discriminatory speech in Human Rights Acts and regulations may now have reached a stage of political maturity where legislative revision is required[1], that is beyond the scope of this short article. The debate concerning hate speech, whether it should be treated as a discriminatory practice or a crime, now belongs to the political sphere. What we wish to accomplish briefly here is to introduce the reader to the broader issue of the legitimacy of human rights institutions in the twenty-first century, and then propose in conclusion some reasons why such institutions should be not only preserved, but also reinforced.

Where have we come from?

Human rights legislations in Canada are clearly the result of the Keynesian, welfare state consensus that followed the end of WW II. Canada had become an increasingly multicultural society and women were joining the labour force in ever greater numbers. Significantly, human rights legislations mark an evolution from a liberal laissez faire society into a society driv-

en more by human rights considerations. This shift largely preceded the era of judicial rulings based on the fundamental value of equality. It predates the passing of the Canadian Charter of Rights and Freedoms with its equality standard provided by Section 15. As a function of this evolution, there remains a close connection between equality, the prohibition of discrimination, Canadian values and Human Rights Commissions.

The Post WW II era witnessed a debate within the legal community: In this more social state context, what would be the role of "ordinary" courts of justice? Could they, and should they, deliver justice for the poor and the excluded? Or was their first duty to protect political rights such as freedom of expression? Human rights and social justice activists tended to view judges with suspicion, considering them at best as conservative if not outright autocratic. In addition, courts were, and still are, expensive, intimidating and hard to access.

Because the simple act of prohibition or criminalisation of discrimination in and of itself has no transformative social effect, it became logical and necessary for the modern State to create an agency that would be capable both of representing victims of discriminatory practices or decisions, and of promoting equality. This it could do by providing information, education and training, through public inquiries and by providing expertise to political authorities. The Human Rights Commission model was then born. Independent from political influence and staffed with proper expertise, such commissions were subsequently reinforced by the creation of administrative courts named Human Rights Boards or Tribunals.

Interestingly, then, the current debate about the very relevance of Human Rights Commissions and Tribunals brings us back to the pre WW II debate. In addition, the National Post claims that no human right is more basic than the freedom of expression (June 19, 2008), and some campaigns describe specialised Human Rights Tribunals as pseudo courts and worse, as police state kangaroo courts. In sum, the current system of human rights in Canada is under pressure primarily from an ultra neo-liberal lobby organised around powerful media.

Where are we now?

Since the creation of provincial, federal and territorial Human Rights Commissions and Tribunals, no substantial changes have been noted until quite recently. What has evolved is the in-depth understanding of discrimination. In this regard the Supreme Court of Canada brought a significant contribution, especially since the proclamation of the Canadian Charter of Rights and Freedoms. When a victim or a group of victims of discrimination file a complaint to a Human Rights Commission, the Commission determines the legitimacy of the complaint, then investigates and works at reaching a negotiated settlement based on a broad spectrum of possible remedies. If all else fails, the Commission can bring the case to a Human Rights Court or Board or Tribunal on behalf of the victim. This administrative tribunal then delivers a final and binding decision.

Undeniably, such a system carries its load of frustrations. It is time-consuming and it raises many issues related to due process for all parties involved. Victims often say that they have to convince the Commission of the value of their complaint and that they have to wait forever to see results. Many defendants complain that they don't feel they benefit from a fair hearing nor can they easily gain access to the information on which a complaint is based. As a result of numerous defendant complaints about the alleged bias of Human Rights Tribunal rulings, many victims now complain about the considerable pressure to reach negotiated settlements. About sixty-five percent of the annual budget of a good-sized commission, such as the Canadian or the Québec Human Rights Commission, goes to case administration. In an average year, such a commission will be called upon to manage some fifteen hundred files.

In addition, everybody acknowledges the increasing complexity of discrimination complaints as well as the systemic impact of rulings. Also, some civil society organisations have themselves become human rights experts and experience their share of frustration when confronted with the gate-keeping function of Human Rights Commissions. Indeed, except in Québec, and a few recent exceptions elsewhere, only Human Rights Commissions have the capacity to investigate cases and to access Human Rights Tribunals. It may legitimately be claimed that such institutions often operate as closed, technocratic systems. Thus, while the system does contribute to the promotion of human rights, it is hardly a model of consultation and collaboration with civil society. Indeed, Human Rights institutions have tended to become very legalistic and rather insular.

It is therefore understandable that surveys usually conclude that the Canadian model of Human Rights Commissions basically dissatisfies everybody[2]. But one must be careful not to draw conclusions or propose solutions too quickly. Since the eighties, like all other areas of public administration, Human Rights Commissions have experienced the pressures of fiscal restraint. They have been asked to do more with less and to streamline their activities in accordance with a "business plan". Not only did such demands allow successive governments to avoid in-depth discussions about the core mission of Human Rights Commissions, it forced such agencies to develop a more pragmatic vision of their existence: Do taxpayers get the most for their money? Can we work faster? Can we deliver more settlements? Can we avoid judicial conflicts?

The Political Legitimacy of Human Rights Institutions

Paradoxically, the more the human rights model in Canada gained legal legitimacy the more it lost political relevance. On the one hand, Supreme Court decisions allow one to conclude that Human Rights Codes shall be interpreted in accordance with the Canadian Charter of Rights, and that the Charter governs all decisions rendered by administrative courts. On the other hand, such coherence has contributed to the hyper-legalization of the human rights system in Canada. Increasingly it has had to devote more resources to procedural debates, based on the requirements of due process and correspondingly less to the support of individual victims of discrimination. Some would say that this outcome was totally predictable as human rights, which are first and foremost a political and collective value system, have become increasingly the ammunition in a legal battle field based on individual rights.

Needless to say that this dichotomy – legal legitimacy vs. lack of political clout – best serves those who consider, on the whole, that the human rights system is an abusive intrusion on citizens' freedoms. But this begs the question regarding what citizens' freedoms are being abused, those of corporate citizens, who basically do not benefit from human rights, or those of more vulnerable individual citizens? Who benefits from the imbalance?

In the present context, the system has started to crack or to show signs of mutation. The key concept underlying such transformations is the notion of "direct access" to justice whereby it is insinuated that victims of discrimination are, in addition, victims of the gate-keeping function of Human Rights Commissions who control access to Human Rights Tribunals.

In 2002, the government of British Columbia abolished its Human Rights Commission with the rationale of providing more fair, efficient, effective and affordable outcomes. Thus, victims can now access the BC Human Rights Tribunal directly. More recently, the province of Ontario granted direct access to the Human Rights Tribunal to victims. But the Ontario Government kept the Commission which will now concentrate on strategic research, outreach to communities, and targeted litigation. Finally, it is difficult to

speculate about the future of the Québec system, where the Québec Court, Human Rights division, openly advocates direct access, or of the Canadian Federal Human Rights Commission. Both continue to deal with constraints and public pressures.

Where should we be going?

Historically, Human Rights Commissions in Canada have assumed a double function: protecting and defending the rights of victims of discrimination and promoting equality through education, research and outreach. Although these days the Commissions seem inclined to emphasize their links to the community, they exist primarily to defend the still numerous victims of discrimination. And these victims need to see their right to equality and to reparation respected. There is no reason to believe that currently fewer people suffer from social exclusion based on discrimination in Canada. But clearly, the causes and the consequences of such exclusion are more complex than in the past and require more attention.

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In the current debate, it seems that many wish to invite human rights institutions to abandon litigation and let the market forces of civil society occupy the judicial space. But the fact is, even though they may seek transformative systemic remedies, neither for profit nor non profit civil society organisations can claim to represent all victims of discrimination. In effect, an unacceptable number of victims of discrimination would be left out in the cold without the support of Human Rights Commissions.

And Human Rights Commissions in Canada go well beyond litigation. Often as a result of litigation, they become better policy thinkers and, in some cases, policy makers. This complimentary reality is one of the reasons a victim of discrimination is better supported within a Commission, even if the whole experience is often frustrating.

What should be at the centre of the debate is the synergy between all components of Human Rights Commissions' mandate. Otherwise, there is a risk of marginalizing great numbers of the isolated victims of discrimination who continue to register the bulk of human rights complaints. All things considered, one is tempted to conclude that the current assault on Human Rights Commissions is an assault, not so much on process as on the very fundamental issue of human rights themselves.

References

1. See Canadian Human Rights Commission, Special Report to Parliament, *Freedom of Expression and Freedom from Hate in the Internet Age*, June 2009.
2. See Brian Howe and David Johnson, *Restraining Equality–Human Rights Commissions in Canada*, University of Toronto Press, 2000.

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