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Comments on the Direct Access Model – CASHRA 2007

I have been invited to speak to you today on the direct access human rights model from a practitioner's point of view. I thank you CASHRA for that invitation and the people of Yellowknife for having me in their territory.

Although I have practiced human rights law in the bifurcated and direct access models, I have far greater experience with the direct access model. I am a human rights lawyer in the employ of the Community Legal Assistance Society, affectionately known by its acronym, CLAS. CLAS is a non-profit law firm which provides representation for people in British Columbia who are mentally, socially, economically or otherwise disadvantaged. It was constituted in 1971, and operates a number of programs, one of which is the human rights clinic. CLAS operates the clinic in partnership with the B.C. Human Rights Coalition (the "Coalition"), another non-profit community agency. CLAS receives funding from the B.C. Law Foundation, the Ministry of the Attorney General and the Legal Services Society. The CLAS Clinic has 3.5 human rights lawyers and 4 support staff. The Coalition Clinic has 4 advocates and 4 support staff.

Lawyers and advocates working in CLAS' Mental Health Law Program provide legal representation for persons detained under B.C.' *Mental Health Act* and under the Mental Disorder Provisions of the *Criminal Code*. Through its Community Law Program, CLAS lawyers provide legal services to persons with issues relating to poverty, human rights, equality, workers' compensation, residential tenancy, health and employment insurance issues. CLAS also undertakes test case litigation for the benefit of persons with disabilities under its Disability Law Program.

CLAS lawyers routinely appear before administrative tribunals and all levels of court. Long before CLAS began operating the human rights clinic it had made its mark in test case human rights legislation. CLAS lawyers appeared before the Supreme Court of Canada in ***Bliss*** *v. Attorney General*, [1979] S.C.R. 183, ***Cornish-Hard v. UIC Board****,* [1980] S.C.R. 1218; ***Jove*** *v. Canada (Unemployment Insurance),* [1988] 2 S.C.R. 53; ***University of British Columbia v. Berg****,* [1993] 2 S.C.R. 353; ***Rodriguez*** *v. British Columbia (Attorney General),* [1993] 3 S.C.R. 519;. *R. v.* ***O'Connor*****,** [1995] 4 S.C.R. 411; ***Winko*** *v. British Columbia (Forensic Psychiatric Institute),* [1999] 2 S.C.R. 625*;* ***Bese*** *v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 722; ***Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.,*** [1999] 1 S.C.R. 10; *British Columbia (Superintendent of Motor Vehicles)* v. *British Columbia (Council of Human Rights* (1999), [1999] 3 S.C.R. 868 ("***Grismer****"),* ***Law v. Canada (Minister of Employment and Immigration),*** [1999] 1 S.C.R. 497; ***Kovach*** *v. British Columbia (Workers' Compensation Board),* [2000] 1 S.C.R. 55; ***Blencoe*** *v. British Columbia (Human Rights Commission),* [2000] 2 S.C.R. 307; and ***Mazzei*** *v. British Columbia (Director of Adult Forensic Psychiatric Services),* [2006] 1 S.C.R. 326, 2006 SCC 7.

In March 2003, when the Province of B.C. dissolved the B.C. Human Rights Commission, CLAS and the Coalition entered into a contract with the Ministry of the Attorney General to provide Integrated Human Rights Services throughout the province. The Province established a program of Integrated Human Rights Services in order to ensure that eligible individuals who needed assistance with human rights complaints could obtain help from a publicly funded non-government source. The Coalition also provides human rights education and training to various organizations throughout the Province.

My job at CLAS is to represent eligible human rights complainants before the B.C. Human Rights Tribunal and in judicial reviews at all levels of court. Prior to joining CLAS, I practiced civil litigation in a downtown Vancouver law firm. I represented a number of clients with employment problems, including human rights problems. While I was in private practice I represented both complainants and respondents in what was then a bifurcated human rights model.

Today, I will provide you with my views on the direct access model. Because I only represent complainants, I have asked a number of my colleagues in the respondent's bar to share with me their thoughts as well. My comments are anecdotal, impressionistic and uncorroborated – and with all such evidence of this nature, inherently unreliable.

I will lay my cards on the table. Because I am a litigator, I prefer to practice human rights law in the direct access model. I do not like the soft law and palm tree justice approach characteristic of many administrative regimes created to deal with the legal problems of the poor. From my experience, the human rights tribunal in B.C. provides an excellent balance of formality and informality. I especially like the fact that all human rights decisions are arrived at in a procedurally fair and transparent manner.

One of the concerns I had as complainant's counsel of the bifurcated human rights system was its undue emphasis, in my view, on mediated resolution to complaints at an early stage. Although alternative dispute resolution is an essential component any human rights regime, mediation is often used as a tool to reduce case volumes rather than to effect a fair and proper resolution of the complaint. It is the preferred resolution process for non-lawyers and those who exaggerate the weaknesses of litigation. Mediations take place behind close doors and almost always result in an agreement in which the complainant, for a sum of money, vows to go away and never speak of the matter again. Parties are

shepherded into a meeting room where they are pressured into reaching a settlement agreement before the day's end.

It is chic to describe mediation as a process which is "owned" by the disputants which leads to a win / win resolution of the dispute. I challenge those assumptions. Many participants would describe mediated settlements in terms of lose / lose in that both parties believe they have sacrificed too much in the process. The more pressing concern, in my mind, is the lack of mechanisms to measure the fairness of outcomes from mediation, particularly where there is a substantial power imbalance between the parties. The ability to negotiate a fair settlement requires equality in social and economic power, something an unrepresented complainant has precious little of. I agree that mediation can be constructive, educative, and facilitate communication between parties still involved in a dynamic relationship. Mediation, however, is not always appropriate, particularly where there is a significant power imbalance or where the complainant (or respondent) feels intimidated or coerced into settling. An uninformed agreement is not a just result to a human rights complaint.

Every lawyer in our firm has had the unhappy experience of having mediated settlements unravel because the complainant was pressured into making a decision prematurely. I prefer to allow my clients to have a reasonable amount of time to think about a proposed settlement offer and discuss it with those people whose views they trust.

Mediation is also inappropriate where the legal issues or principles are unclear. The broad public interest purposes of human rights legislation benefits from public scrutiny and accountability. The law cannot advance behind close doors. The public cannot be educated as to their human rights and obligations if the processes for defining and affirming those rights are carried out in secret. For this reason, I believe it important that settlements in systemic human rights cases are not subject to confidentiality agreements. In two highly publicized cases, *Corren and Corren v. B.C. (Ministry of Education)* and *Pegura and Forster v. School*

District No. 36, the resulting settlements were subject to a mutually agreed press release. In fact, the *Corren* settlement agreement is posted on the B.C. Government website.

The fact that the Tribunal publishes all of its decisions on a public website injects a degree of formality into the decision making process. This benefits both parties as the Tribunal Member carefully considers the issues before it in light of the current case law. It also assures greater consistency in decision making. Although the human rights tribunal is not bound by its own decisions, it obviously strives to decide like issues consistently. In its reasons, the Tribunal sets out the facts upon which it based its decision, the law as it applies to those facts, and its findings. When exercising its discretion to dismiss a complaint on a preliminary basis, or to advance it to hearing, the Tribunal justifies its decision in a reasoned manner. Parties are rarely left guessing as to the reason for the Tribunal decision or frustrated because they do not know what facts the Tribunal Member took into consideration.

I find that a publically access database of Tribunal decisions is valuable for reasons other than stare decisis. Complainants are often willing to let go and settle the litigation amicably if there is a published preliminary decision which, in their minds, provides public recognition of their ordeal. Complainants, like plaintiffs in civil actions, often have an exaggerated view of the degree of interest others have in their disputes. On the other hands, Respondents are often willing to come to the table and discuss settlement in order to avoid having published the fact that they have been subject of a human rights complaint.

Another benefit of the direct access model is the superior training and adjudicative experience of the Tribunal Members. Although not all of the Tribunal Members are lawyers (I think there is one member who is not a lawyer), they all have years of experience. The relative expertise of the Tribunal Members ensures that generally their decisions are thorough, fair and well-reasoned. In

contrast, it seemed to me that the quality of the commission's investigations and decision-making in the bifurcated system was inconsistent.

Another advantage of the direct access model is the speed at which a complaint can be brought to hearing. If so inclined, I can file a complaint and set it down for hearing within 6 months or so. This rarely happens, however, because of the nature of our bifurcated human rights clinic and our busy hearing schedules. Still, a complaint does not languish in a rising backlog at the Tribunal level. There is no doubt that those seeking the services of our clinic experience delays due to its limited resources. Many complainants, however, can expedite the hearing of their complaint by retaining private counsel or proceeding on their own.

Although I find the direct access human rights model in B.C. eminently accessible, I understand that unrepresented litigants sometimes struggle with the process. Of course, the difficulties unrepresented litigants experience in advancing their case through the Tribunal pale in comparison to those trying to access the court system. Fairness necessitates formalized rules of practice and procedure. Some counsel and lay litigants believe that the Tribunal's rules are unduly complex. I do not agree. Like good contracts and well-built fences, comprehensive rules of practice and procedure make for harmonious relationships. Moreover, the Tribunal has case managers who steward the complaint through to hearing and provide unrepresented litigants with information and guidance. Unlike the civil court system, the parties have someone to contact at the Tribunal who knows something about the case.

Still, unrepresented parties do not have the benefit of a human rights officer's expertise in framing the complaint and evidence gathering. The Tribunal, as a neutral decision maker is necessarily limited on how much helpful advice it can offer to unrepresented parties. Most complainants have difficulty in articulating what it is they are complaining about. To address this concern, the clinic started a short service clinic which the Coalition now holds at the Tribunal. Coalition

advocates assist complainants with drafting and filing a complaint and redirecting would be complainants who clearly do not have a human rights complaint.

Before coming to this conference, I canvassed some of my colleagues in the respondent's bar for their views. The counsel with whom I spoke expressed some concern that the Tribunal's processes were beyond some represented litigants. Having said that, there is little evidence of legitimate complaints being dismissed because of the complainant's lack of representation or comprehension. The Tribunal does not generally dismiss a complaint simply because a well-represented respondent has inundated it with cleverly crafted affidavits in response to a handwritten, tear-stained complaint.

Some respondent's counsel would like to see a more informal process to deal with preliminary issues. Parties must seek a remedy by filing a formal application with the Tribunal. The Tribunal then sets a submissions schedule and a decision with or without an oral hearing. Some counsel would like a system where a conference with a Tribunal Member could be scheduled with minimal formality and notice. In light of the Members' adjudicative and meditative duties, it is unlikely they have time for such matters.

At the time of filing, the Tribunal will screen out complaints that are untimely or outside its jurisdiction. Some Respondents believe that the Tribunal ought also screen complaints for merit. It is difficult to see how an impartial decision maker could undertake such a task. The Tribunal has no investigative powers and it is the responsibility of the parties to put before it the information and documentation necessary for it to decide the issues before it. In any event, as a former civil litigator, I do not understand this expectation. Provided it is in the correct form, the court registry will accept for filing a Writ and Statement of Claim even though the claim is wholly without merit or discloses no cause of action. It is up to the

defendant to file an application to strike the pleadings or for summary judgment as disclosing no cause of action. No one expects the court registry staff to sift through the statement of claims to sift out vexatious actions.

Although the Tribunal does not screen out complaints at the acceptance stage on the basis of merit, the respondent can bring an application to dismiss a complaint. Generally this means the respondent has to retain legal counsel to put together thorough and complex submissions, complete with affidavits and corroborating evidence. Where there are competing visions of events which cannot be reconciled through corroborating evidence, then the Tribunal will advance the complaint to hearing.

A common Respondent complaint with which I have some sympathy is the cavalier manner in which complainants allege a continuing contravention when the events complained of took place outside the statutory time limit for filing a human rights complaint. In B.C., a complainant must file a complaint within 6 months of the alleged contravention. If it is a continuing contravention, however, the complaint must be filed within 6 months of the last alleged instance of the contravention. Some respondents believe that the Tribunal should exercise greater scrutiny where there is an allegation of continuing contravention of the *Code* and screen out those complaints which do not satisfy the established legal tests for such a claim.

As I recall, the bifurcated human rights system was criticised for delays, redundancies and lack of transparency. The direct access model does not suffer

from these same deficiencies, although some of the Tribunal's decisions can take some time in the rendering. The benefits of the bifurcated system was its informality and accessibility. In my view either system is a reasonable solution to addressing human rights infractions provided that it is properly staffed and funded.

As I mentioned earlier, in British Columbia, the Ministry of the Attorney General funds a human rights clinic to assist complainants with their human rights complaints. This assistance, however, is only available to a small percentage of the complainants and rarely from start to finish. The Clinic does its best to ensure that those persons with meritorious and systemic complaints have representation, but it has limited resources. Clinic clients already experience significant delay in having their complaints heard because its lawyers are often booked far into the future.

Small businesses and individual respondents argue it is unfair that complainants have access to free legal representation. The Victoria Law School provides services to unrepresented respondents, however, these services are not as well-staffed or funded as the clinic. Although I understand the respondent's sense of unfairness, in my view, represented complainants serve all parties and the Tribunal. Counsel can usually persuade complainants to be reasonable in their demands and demeanor. Counsel can settle matters which, in their absence, may simply lurch toward a hearing.

There is no argument that the direct access model would work far more efficiently with a well-funded independent clinic which assisted all complaints from the beginning of the complaint process until the completion of their case. An under

funded clinic would soon experience the same backlogs as the commissions if it were to try and assist all complainants. Our clinic has to make decisions as to whom they will represent. CLAS can and does accept clients directly, however, the majority of its files are received on referral from the Coalition.

The Coalition, when considering whether to intake a file into the clinic assesses the complaint and exercises its best judgment to decide whether the Complainant could not otherwise obtain equal access to the Human Rights Tribunal process. In making this determination, the intake staff takes into consideration the following factors:

(a) Has the Complainant sought representation in a timely manner?

(b) Is adverse differential treatment taking place?

(c) Is there a connection between the treatment and a protected ground of discrimination?

(d) Is the discrimination occurring in an area where the *Human Rights Code* has jurisdiction?

(e) Can the Complainant reasonably be expected to obtain assistance from other sources such as a law centre, union, community agency, or professional association?

(f) What is the Complainant's employment and financial status?

(g) What is the nature of the issues raised by the Complaint?

(h) Does the Complaint raise systemic issues or is the resolution of the Complaint more likely to benefit more than the Complainant alone?

(i) What are the merits of the complaint and what is the likelihood of success before the Human Rights Tribunal?

(j) Does the Complaint raise novel issues of law, the answers to which would advance the purpose of the Code?

(k) Does the Contractor have the resources at the current time to provide assistance to the Complainant?

We have vigorously resisted many attempts to implement a means test. We believe that to restrict our services in that way will mean that many important human rights cases will not proceed or not proceed with counsel.

In the direct access model, complainants can at least proceed with their complaints in the absence of professional assistance. Where the damages are significant, such as in employment cases, the complainants have an excellent chance of retaining private legal counsel on a contingency arrangement.

As a practitioner, the one thing that troubles me about the direct access model as it exists in British Columbia, is the lack of recorded proceedings. Because I represent complainants in judicial reviews and appeals, I miss having a transcript of the proceedings. This encourages respondent petitioners to continually attack the Tribunal's findings of fact.

In summary, the direct access model hovers mid-way between the bifurcated human rights system and civil court proceedings. It resembles the bifurcated human rights model with its screening powers and stewardship of the litigation process. It resembles the civil court system in that it is up to the parties to initiate applications and produce the evidentiary record. In my view, the Tribunal's procedures are no more complicated than fairness dictates. Litigation is complex and too much informality invites perceptions of bias and arbitrariness. I reiterate my comment that either the direct access or bifurcated model can produce just results provided they are properly staffed and funded. What is critical is that the

parties to a human rights complaint have an opportunity to tell their story and have it listened to in a respectful and empathetic manner.