NEW BRUNSWICK
HUMAN RIGHTS COMMISSION

COMMISSION DES DROITS
DE LA PERSONNE
DU NOUVEAU-BRUNSWICK

The New Brunswick Human Rights Commission: Future Directions

Recommendations to Government

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NEW BRUNSWICK HUMAN RIGHTS COMMISSION
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A. EXECUTIVE SUMMARY

This paper follows up on changes proposed in February of 2004, which was based on a comprehensive review of the *Human Rights Act* undertaken by the Human Rights Commission at that time.

Since 2004, the Human Rights Commission has implemented a number of important changes to the way it does its work and has gathered valuable experience with the *Act* as amended in 2004. This paper provides information on those changes and the positive impact they have made.

The Commission has made all the changes it can within its existing framework and is now ready to make additional recommendations on amendments to the *Human Rights Act*. This paper includes recommendations on amendments to the *Act* and discusses fundamental principles that should inform any changes to the governance structure of the Commission.

Two papers are attached as Appendices that will assist the reader in understanding the context for these recommendations. The first, titled "Future Directions: The Development of Commissions in Canada and New Brunswick", outlines the historical development of human rights commissions in Canada and the history of the New Brunswick Commission since its inception in 1967. The second paper "Mediation in the Administrative Law Context" describes the changes to the process used to handle complaints by the New Brunswick Commission.

The recommendations are listed below, more detail is provided in section C of this report.

1. Independence & Impartiality

The Human Rights Commission exercises important statutory functions. It promotes human rights in the province through public education and administers a variety of dispute resolution mechanisms for dealing with human rights complaints. To fulfil its statutory mandate, it not only has to be free from interference by government, it also has to be seen to be independent. In the course of any restructuring of the Commission, the following must therefore be assured:

a) Adequate funding must be ensured to fulfil the Commission's mandate of promoting human rights and dealing with complaints appropriately and in a timely fashion;

b) The Commission should represent itself directly in the budgeting process, at Public Accounts and at Main Estimates;
c) To ensure efficiency, administrative support should be provided from a government department for financial, general administration, purchasing, human resources, translation and IT services;
d) The Director of the Commission should be appointed at the ADM level;
e) The adjudicative function of a Board of Inquiry must be immunized from political interference and protecting it from the perception of political interference;
f) The Commission should be made responsible for the referral of a complaint to a tribunal without further need for a government appointment of a Board of Inquiry; and
g) The independence of the Commission for dealing with complaints must be guaranteed.

2. Appointments and Compensation of Commissioners

Appointments of Commissioners should be from the community, involving citizens in the administration of the *Act,* having regard to regional, linguistic and stakeholder representation. Members should be appointed for a three year term with rolling or staggered appointments to further continuity and ensure quorum. The Chair of the Commission should be appointed for a five year term. Per diems should more appropriately reflect the work and responsibility of the Commission.

3. Two languages – One Act

The *Act* should be revised in its entirety to bring the English and French versions in line with each other. The Commission should be given an opportunity to review the revised *Act* prior to its enactment.

4. Pension Plan Exception

The Pension Plan exception in s. 3(6)(a) should be removed.

5. Appointments of Vice-chairs – Labour and Employment Board

The *Labour and Employment Board Act* should be amended to provide for the appointment of two Vice-chairpersons of the Labour and Employment Board with expertise in human rights law who could then be allocated by the Chair to the human rights docket of the Board, particularly in cases unrelated to employment.

B. CHANGES SINCE 2004.

1. Changes to the Act:

It is four years since the Commission presented recommendations to the Government proposing amendments to the *Human Rights Act*. Some of those recommendations were implemented, others were not.

The Commission recommended the addition of the following prohibited grounds of discrimination: social condition, political belief or activity, family status, and language. Two of these grounds, social condition and political belief, were added to the *Human Rights Act* effective January 31, 2005.

The Commission recommended making the Human Rights Commission independent from government akin to the Office of the Ombudsman or the Language Commissioner. The government did consider implementing the recommendation from the Commission, but no changes were actually made.

On further recommendation from the Commission, the government introduced a Bill in June 2005 to remove the exemption to mandatory retirement if there is a bona fide pension plan, but the Bill died on the order paper.

The other proposed amendment dealing with bona fide occupational requirements and bona fide qualifications was not acted upon.

2. Changes to the way the Commission does its work:

The New Brunswick Human Rights Commission has completed a successful and complete overhaul in the way it deals with complaints.

The objective is to use its limited resources to handle complaints efficiently, fairly, effectively and in a timely manner and to increase the credibility of the Commission by providing a service that is fair and unbiased. The Commission embraces continuous improvement and is always looking for ways to improve the services it provides to all parties.

The changes that were implemented include early intervention, centralized intake, triage, a hugely successful early mediation program, more complete investigations leading to case analysis reports with recommendations and a more professional approach to representing cases at a Board of Inquiry and in court.

In addition to making these changes, staff had to handle a huge backlog of complaints that has been successfully eradicated. The current process using best practices from across the country works well but is severely hampered now by a lack of resources.

New Brunswick now deals with most complaints within an average of 11 months of filing. These results are similar to those in other jurisdictions such as Alberta.

The reputation and the credibility of the Commission in New Brunswick have greatly improved. For example, it is a common occurrence that employers now call the Commission staff to discuss an issue before it turns into a problem.

The Commission has developed several new guidelines to assist people understand their rights and obligations under the *Human Rights Act*. At the suggestion of the Commission, joint work was completed with the WHSCC and Employment Standards to create documents for employers and employees to understand their rights and obligations when an employee is returning to work from sick leave, injury or a disability.

The Commission makes approximately 70 different educational presentations a year in order to prevent discrimination from happening in the first place. Partnerships have also been created with a wide variety of stakeholders.

The budgetary resources available to each Commission vary. New Brunswick's Commission has one of the smallest per capita budgets; for example, Nova Scotia has double the budget of New Brunswick's Commission.

3. The results show how successful these changes have been:

- Today only 9% of complaints are older than 2 years; this compares to 35% in February 2004.
- The average age of the current inventory of complaints is 11.9 months; in 2004 it was 3 years.
- The average age of a closed complaint is now 11 months, in 2004 it was 30 months.
- In 2003-04 the Commission received 171 complaints, 136 were closed, of which 47 were settled. In 2007-08 these numbers are 197 new, 167 closed and 79 settled. Of the 79 settled 33 were within 6 months.
- On an annual basis the value of settlements ranges from $500,000 to $1.3 m.

Although the Commission has cleared out most of the backlog of complaints, there are still complaints that take too long to process because of a shortage of staff. There is a clear risk that the commission will be found liable by a court of not providing this service in a timely fashion. The Commission has raised with the department the concern that it may be found liable by a court for taking too long to handle certain complaints of discrimination.

The Commission does not have any offices in the North of the province. This is a serious lack of service.

The Commission would like to be able to focus more on educational work in order to prevent discrimination and assist the Province in becoming a welcoming place for immigrants. However, this objective is limited by the Commission's resources. The work greatly overwhelms the resources.

C. RECOMMENDATIONS

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1. Independence of the Human Rights Commission

The mandate of the New Brunswick Human Rights Commission as described in part in the *Act* is:

- To forward the principle that every person is free and equal in dignity and rights…
- To promote an understanding of, acceptance of, and compliance with the *Act*,
- To develop and conduct educational programmes designed to eliminate discriminatory practices…

In furtherance of this ambitious legislative mandate, the Human Rights Commission exercises important educational, dispute resolution and litigation functions. Despite this, funding has been inadequate. It has not been possible to ensure regional presence in the North of the province. The educational mandate is severely restricted because of a lack of funding. Annually, the Department has to cover a budget shortfall. Without adequate funding, the realization of the legislative mandate will be increasingly limited. Dealing with backlogs and delays is only partially effective when the Commission lacks staff to respond in a timely fashion. This exposes the Commission to potentially costly litigation as happened in British Columbia in the *Blencoe* case.[1] Therefore, the adequacy of funding is a priority in any reform process and we recommend that adequate

[1] *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307

funding be provided to ensure the fulfilment of the Commission's mandate of promoting human rights and dealing with complaints appropriately and in a timely fashion.

In part, underfunding is the result of a budgeting process that does not permit the government to hear from the Commission directly. Both the work of the Commission and the government would benefit greatly if a direct line of communication were to be opened in the budgeting process. Therefore, we recommend that the Commission should represent itself directly in the budgeting process, at Public Accounts and at Main Estimates.

The Commission has been assisted in carrying out its mandate by the administrative support currently provided by the Department. If the institutional location of the Commission is to change, continued administrative support must be guaranteed to preserve and build on the accomplishments of the Commission. Therefore, we recommend that administrative support should be assured from a government department for financial, general administration, purchasing, human resources, translation and IT services.

Increased independence of the Commission will bring additional responsibilities for the Director of the Commission. Commensurate with these responsibilities and in recognition of the central role of the Director for the advancement of human rights in the province, the position of Director should be at the ADM level.

Therefore, we recommend that the Director of the Commission should be appointed at the ADM level.

Not infrequently, governmental bodies are respondents in human rights complaints. This raises concerns by complainants of the ability of the Commission to represent the public interest and not the interest of the government of the day.

At present, a complaint cannot proceed to a Board of Inquiry without a ministerial act of reference or appointment. This could easily be avoided by making the Commission responsible for the referral. This is done in most other Canadian jurisdictions and has proven to be an effective way of protecting the independence of both the Commission and any Board of Inquiry.

Therefore, we recommend that the adjudicative function of a Board of Inquiry be immunized from political interference and protected from the perception of political interference. Further, we recommend that the Commission be made solely responsible for the referral of a complaint to a tribunal without further need for a government appointment of a Board of Inquiry.

2. Appointments of Commissioners

Human rights commissions play a vital role in the successful administration of human rights schemes. It was only when the commission model became standard across the country that Canada saw significant enforcement of human rights.

Despite this, since the mid-nineties, there have been considerable reform efforts to the commission model across the country addressing a variety of challenges in the administration of federal and provincial human rights schemes. British Columbia took the radical step of eliminating its human rights commission and replacing it with a direct access or tribunal model. Ontario also adopted a direct access model, but re-configured its human rights commission with an expanded investigative and public policy mandate. The federal commission underwent considerable administrative changes in response to concerns articulated in the LaForest Report.[2] In all three cases of reform, institutional delay and Commission gate-keeping were driving factors.

As indicated above, the New Brunswick Commission also underwent significant administrative changes and has managed, for the most part, to overcome its institutional delays without legislative change. Commissioners determine whether to recommend referral to a Board of Inquiry after mediation efforts have failed. The Commissioners have exercised their function in a way that has furthered the administration of human rights in the province by recommending referral to a Board where there was an arguable case, but keeping extra-jurisdictional and other non-meritorious cases out of the system. They are appointed as representatives of the community with a dedication to human rights and not as legal or other specialists. Thus, they are able to bring community values and life experience to bear on their decision-making.

Challenges have arisen from time to time with respect to quorum and continuity of appointments when commissioners' appointments ran out and new or re-appointments were not made in a timely fashion. This issue should be addressed by making rolling or staggered appointments (two per year) for a three year term each.

The position of Commission Chair requires continuity and security of tenure to fulfil its statutory mandate. For this reason, a five year appointment continues to be appropriate.

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[2] Canada, Minister of Justice and the Attorney General of Canada, *Report of the Canadian Human Rights Act Review Pa*nel (Ottawa: Canadian Human Rights Act Review Panel, 2000) (Chair: The Honourable Gérard V. La Forest)

The tasks performed by Commissioners require a high degree of skill, experience, independence and judgment. Adequate compensation is crucial to recruiting and retaining qualified commissioners. The current per diems have not been adjusted in many years and are wholly inadequate. They are also grossly disproportionate to other provincial boards.

It is therefore recommended that appointments of Commissioners should be from the community involving citizens in the administration of the *Act*; appointments should have regard to regional, linguistic and stakeholder representation. Members should be appointed for a three year term with rolling or staggered appointments to further continuity and ensure quorum. The Chair of the Commission should be appointed for a five year term. Per diems should more appropriately reflect the work and responsibility of the Commission.

3. Two Languages – One Act

The French version of the *Act* departs structurally and in its terminology, at times also in its substantive meaning, from the English version of the *Act* in many, if not most sections. There are historical reasons to believe that the English version was the primary version of the *Act* and the French version, at the initial time of enactment, a mere translation. The same cannot be said with any certainty about subsequent amendments. In that sense, there is now no primary version. The *Official Languages Act*[3] directs that both versions be equally authoritative. However, it is difficult to operationalize this command where there is significant difference between the two versions. In the *New Brunswick Human Rights Commission v. Potash* case, the Supreme Court of Canada preferred a significantly narrower interpretation of the right not to be discriminated against in employment by reason of age based on the difference between the English and French versions. The Court noted:

> [27] The French version of the statute, deemed by the *Official Languages Act*, S.N.B. 2002, c. O-0.5, s. 10, to be equally authoritative, also confirms the conclusion that "bona fide" means something different in s. 3(6)(a) than when used in s. 3(5) with the words "occupational qualification". The equivalent of "Bona fide" is expressed differently in s. 3(5) and in s. 3(6)(a). In s. 3(5), "bona fide occupational qualification" is "qualifications professionnelles réellement requises". This accords with the underlying Meiorin principle, that the qualification must truly be required for the employment. In contrast, a "bona fide pension plan" in s. 3(6)(a) is a "régime de pension effectif". "Effectif" means "concret, positif, réel, tangible"

[3] *Official Languages Act*, S.N.B. 2002, c. O-0.5, s. 10

> (*Le Nouveau Petit Robert* (2002), at p. 838). It does not mean "required". Clearly the legislature intended different meanings to attach to each provision.[4]

Another example is the definition of "physical disability" which in the English version requires that the disability be "caused by" a number of enumerated factors, whereas the French version is arguably broader by requiring "résultant de" or resulting from the factors, thus not requiring proof of a primary causal nature.

A complete review of both linguistic versions of the *Act* with a view to determining areas of divergence and tighter accordance is thus required. For this reason, it is recommended that the *Act* should be revised in its entirety to bring the English and French versions in line with each other. The Commission should be given an opportunity to review the revised *Act* prior to its enactment.

4. The Pension Plan Exception

The current version of the *Act* as interpreted by the Supreme Court of Canada in the Potash case permits employers to discriminate on the basis of age in employment by permitting mandatory retirement where a company pension plan or retirement benefit exists and the plan or benefit is not a sham.

Once the amendments abolishing mandatory retirement in Nova Scotia come into effect in July of 2009, New Brunswick, Newfoundland and Ontario will be the only Canadian jurisdictions where legislation expressly allows termination of employment in relation to a pension plan. Conversely, in Manitoba mandatory retirement in relation to a pension plan is prohibited and in Quebec and the Yukon it is only permitted if actuarial risk can be proven. Neither Quebec, Manitoba or the Yukon have reported a negative impact on their respective pension regimes and this is consistent with expert opinion which holds that there is no actuarial risk to pensions when forced retirement policies are abandoned. In the remaining jurisdictions the law is unclear and more litigation is likely.

Given changing demographics, mandatory retirement is not sustainable from a labour market perspective. More importantly, mandatory retirement is a flagrant form of age discrimination which should not be permitted unless it can be shown that an individual worker is no longer able to perform the essential functions of his or her job, an exception already captured in s. 3(5). For this reason, it is recommended that the pension plan exception in s. 3(6)(a) and (b) should be removed.

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[4] *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45

5. Appointments of Vice-Chairs – Labour and Employment Board

If a complaint does not settle, the Commission may recommend referral to the Labour and Employment Board or the appointment of an ad hoc Board of Inquiry. In either case, there is ministerial discretion to refer or appoint. This procedure is out of line with other Canadian jurisdictions.

The issue of ministerial discretion was discussed above under “Independence”. Why do we need two options, i.e. referral or appointment? Presumably, it permits the appointment of a board with experience in human rights outside the employment field. However, these ad hoc boards then lack the institutional support available to referrals and also are more vulnerable to bias allegations.

A better option would be to appoint two vice-chairs to the Labour and Employment Board who have specialized expertise in human rights. This would be fiscally responsible since they would be paid on a per diem basis, enable a single stream of referrals and bolster institutional independence and adequate administrative support.

Thus, it is recommended that the *Labour and Employment Board Act* should be amended to provide for the appointment of two Vice-chairpersons of the Labour and Employment Board with expertise in human rights law who could then be allocated by the Chair to the human rights docket of the Board, particularly in cases unrelated to employment. The *Act* should be amended to provide for the option of direct referral of all unresolved cases to the Labour and Employment Board. The decision about which vice-chair would hear a particular case would then rest with the Chair of the Labour and Employment Board.

D. CONCLUSION

New Brunswick is changing in many ways.

Our labour market is providing new opportunities and is experiencing new challenges. An aging population brings with it greater incident rates in the area of age discrimination, disability and accommodation as well as the need for inclusion for older workers. Our education system is facing challenges in providing high quality education for all of our children. Increased immigration calls on our communities to grow in tolerance and understanding as well as size.

The New Brunswick Human Rights Commission has successfully overhauled the process for dealing with complaints. This has removed the backlog of complaints and en-

sures, in most cases, a timely and appropriate handling of complaints of alleged discrimination. The Commission model has served the province well and will continue to serve us well.

However, there is a lack of both financial and human resources to provide adequate service around the province. There is an ongoing need for change to meet new demands, to make New Brunswick a place where everyone can realize his or her full potential because their human rights are respected and promoted.

The proposed changes will advance these goals.

APPENDIX 1

Future Directions: The Development of Commissions in Canada and New Brunswick

HISTORICAL AND LEGAL BACKGROUND:

2008 is an important year for the New Brunswick Human Rights Commission. 2008 marks the 60th Anniversary of the United Nations *Universal Declaration of Human Rights,* a good year for the Commission to be considering its *Future Directions*. The intent of this report is to provide relevant information to guide the future institutional direction of the Commission. It is important to be familiar with the past before charting new ground. This paper will provide a brief historical and legal background of the commission model in Canada and New Brunswick. By reviewing the previous models such as the criminal enforcement, tort, and administrative law models we will be better situated to assess the Commission's current institutional position.

1. Adoption of the of the Commission model in Canada:

The adoption of the commission model in Canada did not take place in a vacuum. For this reason it is important to review Canada's experience within the context of human rights and anti-discrimination mechanisms. Canada's contemporary history of human rights begins with the United Nations *Universal Declaration of Human Rights* in the aftermath of the atrocities of World War II. The UN Declaration influenced the creation of the *Canadian Bill of Rights* (1960), the *Human Rights Act* (1967 in New Brunswick, 1976 federally), and finally the *Canadian Charter of Rights and Freedoms* (1982). This was Canada's contribution to what has been dubbed as the global "rights revolution."[5]

No country possesses a flawless human rights record and Canada is no exception, despite its legacy of being a leader in the field. Before Confederation, slavery took place in the colonial territory that would one day be Canada. In 1800, the legality of slavery was unsuccessfully challenged in New Brunswick. Slavery was finally abolished throughout the British Empire in 1833.[6] Dismantling the institution of slavery was an important step in the protection of human rights.

Racial tensions grew during western expansion and the construction of the railways. Asian immigrant workers were subject to the head tax, denied the franchise, and were restricted from certain types of employment as well as purchasing property.[7] These dis-

[5] See Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. University of Chicago, 1998.
[6] Tarnopolsky, Walter S. and William F. Pentney, *Discrimination and the Law: including equality rights under the Charter*. Scarborough, Ontario: Thomson-Carswell Press, 2004, 1-2.
[7] Tarnopolsky & Pentney, *Discrimination and the Law*, 1-5.

criminatory laws and regulations at both federal and provincial levels were never fully addressed until the end of the World War II.

Women, during World War I and the interwar years attained expanded rights in the area of the franchise, as well as property and legal rights.[8] The legislative initiatives utilized in attaining these rights were certainty significant at the time however, this legislation failed to address the effects of discrimination against women in more general sense such as pay equity.

One of the most significant cases from this era was *Edwards v. Attorney General for Canada,*[9] commonly referred to as the *Persons Case* and raising the issue whether women were eligible to sit in the Canadian Senate. Women were prohibited from Senate appointment because they were not considered "persons" in eyes of the constitution, the *British North America Act, 1867*. The case was appealed to the Judicial Committee of the Privy Council in England, then Canada's final court of appeal and the Commonwealths' highest judicial body. The Privy Council affirmed that women were in fact "persons" and penned one of the most significant precedents in Canadian constitutional history. Lord Sankey wrote that "The *British North America Act* planted in Canada a living tree capable of growth and expansion within its natural limits."[10] This has come to be known as the "living tree doctrine" and is still frequently cited by the Supreme Court of Canada and connotes the idea that the constitution and the rights protected under it continue to evolve.

2. Failure of the criminal enforcement model in Canada:

Understanding the adoption of the commission model can be best grasped by reviewing the models that it replaced. As discrimination persisted, legislative remedies began to proliferate to confront various human rights issues. Canada's common law legal tradition enabled what can be called a 'right to discriminate.' Anti-discrimination legislation sought to close the gap left between the Canadian constitution and the common law. As Tarnopolsky and Pentney note "the constitutional enactment is a shield, but the victim of discrimination needs a sword as well…The sword is legislation that forbids discrimination."[11] Early anti-discrimination legislation was criminal or quasi-criminal in nature.

8 Tarnopolsky & Pentney, *Discrimination and the Law*, 1-6.
9 [1930] A.C. 124.
10 *Edwards*, 136.
11 Tarnopolsky & Pentney, *Discrimination and the Law*, 2-3.

For instance legislation pertaining to areas of employment and insurance were amended to include provisions that made it illegal to deny individuals due to their race or religion. Much of this early legislation was narrow and sector-specific and could not accurately address all of the various discriminatory practices at work within Canada.

During the late-1940s Ontario and Saskatchewan passed the *Racial Discrimination Act* and the Saskatchewan *Bill of Rights* respectively. This provincial legislation was enforced in a quasi-criminal framework. This framework was inadequate to address issues of discrimination over a number of reasons.[12] First, victims of discrimination were often reluctant to report crimes. Second, the courts applied a criminal standard of proof of beyond a reasonable doubt, a standard of proof that was impossible to meet in discrimination cases. Furthermore, criminal wrongdoing required proof of intention or malice which meant that it was required but difficult to prove that an individual had been denied access or a service for a discriminatory and not some other reason. Finally, the judiciary expressed reluctance to consider a discriminatory act as criminal in character. This was all further compounded by the fact that many minorities and traditionally discriminated against groups were either unaware of the legislation or sceptical of token policies created by the majority. Finally, a conviction could only lead to a fine which did nothing to provide the victim of discrimination with access to the desired service or employment opportunity.

3. Failure of the tort model:

Women's rights cases were not the only Canadian discrimination cases to wind up before the Privy Council. This legal body also heard civil cases barring "Chinamen" from working in the mining sector.[13] Blacks who were refused service in eateries[14] and theatres were denied their rights by domestic Canadian courts.[15] Unsympathetic judges in these various discriminations cases spurred the creation of anti-discrimination legislation.[16]

The courts refused to recognize a tort (or civil wrong) of discrimination, forcing a legislative response in the form of the fair practice and accommodation legislation. However, this legislation abandoned the role played by the public prosecutor in the earlier criminal

12 Tarnopolsky & Pentney, *Discrimination and the Law*, 2-5.
13 *Union Colliery Co. of B.C., Limited v. Bryden*, [1899] A.C. 580.
14 *Christie v. York Corporation*, [1940] S.C.R. 139.
15 *Johnson v. Sparrow et al.* (1899), 15 Que. S.C. 104
16 Tarnopolsky & Pentney, *Discrimination and the Law*, 1-24, 25.

model thus burdening the victim of discrimination with enforcement of the acts.[17] The Supreme Court of Canada's jurisprudence during the 1980s and 1990s reinforced and extended the scope of human rights legislation as essential public policy pertaining to the both the individual victims of discrimination as well as the larger community.[18] Despite this, the Supreme Court of Canada has continued to refuse recognition to a tort of discrimination, once in 1981, when the Court was asked to determine whether Pushpa Bhaudauria could institute a civil action against Seneca College on the grounds that she had been refused consideration for employment because of her race, it decided that she could not, because the *Ontario Human Rights Code* set out comprehensive enforcement procedures, and therefore foreclosed the possibility of a civil action based on an invocation of the public policy expressed in the *Code.*[19] Very recently, the Court once again reiterated its position that human rights interests could not found a civil cause of action.[20]

4. Advantages and challenges of the administrative law model:

The consolidation of human rights legislation into comprehensive codes, covering a range of grounds, and covering employment, accommodation and services, to be administratively enforced by a commission that was independent of government, was an important and distinct stage in the evolution of human rights legislation. Some of the shortcomings of the criminal law and torts models were alleviated by fair employment legislation. This legislation was first adopted by Ontario in 1950 and quickly spread to other jurisdictions. The *Fair Employment Practices Act* came into effect New Brunswick in 1956 followed by equal pay for equal work legislation in 1960.[21] Equal pay and fair employment were important developments but still suffered from some institutional defects as far as dealing with discrimination. Specifically, this legislation placed the entire burden of enforcement on the individual that had suffered the most and who was in the least advantageous position to help themselves. Put another way,

> It placed the administrative machinery of the state at the disposal of the victim of discrimination, but it approached the whole problem as if it were solely his problem and his

[17] Day, Shelagh. *Rolling Back Human Rights in B.C.*. (Vancouver: Canadian Centre for Policy Alternatives, September 2002), <http://www.policyalternatives.ca/documents/B.C._Office_Pubs/human_rights_code_brief.pdf>, 5.
[18] Day, Shelagh. *Rolling Back Human Rights*, 6.
[19] *Seneca College of Applied Arts and Technology* v. *Bhaudauria,* [1981] 2 S.C.R. 181, (1981), 2 C.H.R.R. D/468 (S.C.C.)
[20] *Honda Canada Inc. v. Keays*, 2008 SCC 39.
[21] Tarnopolsky & Pentney, *Discrimination and the Law*, 2-6.

> responsibility. The result was that few complaints were made, and very little enforcement was achieved.[22]

Finally, fair employment legislation only targeted specific forms of conduct thus failing to address the systemic problems human rights attempt to address.[23]

The province of New Brunswick adopted the *Human Rights Act* (S.N.B. 1967, c.13) which included a commission to administer it. Professor Alan Reid, writing shortly after the enactment of the *Act* asserted that "The very existence of the Commission should convey to the people of New Brunswick the idea that there is substance to the new human rights legislation and there is a body to which complaints may be made and where complaints will be investigated."[24] The addition of a commission gave the New Brunswick's human rights regime the institutional teeth and increased visibility it had lacked in the past under the criminal and civil law initiatives.

Early on in the NBHRC's mandate, public image and visibility posed challenges for the newly minted Commission. On one hand, few people were aware of the Commission's existence. On the other, the Commission had been effective in reaching settlements out of "fear of publicity, formal inquiry, and social stigma."[25] The importance of the advisory function of the Commission was demonstrated early on as employers submitted applications to ensure that their internal policies were consistent with the word and spirit of the new *Act*.[26]

5. The current legal framework – A Canadian Comparison:

The Commission model, characterized by the existence of a human rights commission with a power to pursue cases in the public interest before human rights tribunals or boards and with a triage function permitting the dismissal, at the commission stage, of cases that are without merit or where the prosecution would not be in the public interest has become the standard model across Canadian jurisdictions. It has proven much more successful than either the criminal law or the tort model and modern human rights codes are far more comprehensive, permitting the enforcement of human rights in different spheres and for greatly expanded grounds of discrimination. Despite this success and hundreds of cases of effective human rights enforcement to their credit, human

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22 Tarnopolsky & Pentney, *Discrimination and the Law*, 2-7.
23 Tarnopolsky & Pentney, *Discrimination and the Law*, 2-25.
24 Alan D. Reid. "The *New Brunswick Human Rights Act*." UTLJT, Vol 18, No 4 (Autumn,1968) pp. 394-400.
25 Alan Reid, NB Human Rights Act, 398.
26 Alan Reid, NB Human Rights Act, 400.

rights commissions have come under some considerable criticism since the mid-1990s. The objections were first that the complaints-based approach was not sufficiently responsive to systemic discrimination issues, second that in a situation of perpetual underfunding, commissions in Ontario, B.C. and federally were struggling with large case loads and increasing backlogs, and third that these high-volume jurisdictions were bending to administrative pressures and dismissing far too many cases, operating as gate-keepers preventing access to human rights enforcement rather than championing human rights. For this reason, both B.C. and more recently Ontario have moved to what is known as a "direct access" model. This model removes the gate-keeping function of the traditional commission model giving complainants an automatic right to a hearing of the merits of a complaint before a tribunal.[27]

Several reoccurring themes appear when one reviews the provincial governments' rationales behind moving towards direct access. Both jurisdictions were burdened by heavy annual caseloads, insufficient resources, and growing backlogs. In March 2003, the province of B.C. became the first Canadian jurisdiction to adopt a direct access model. In doing so, out of three agencies (a human rights commission, tribunal, and an advisory council) only the B.C. Human Rights Tribunal survives. Under this regime, complaints are directly filed and resolved at the Tribunal without investigation while the Ministry of the Attorney General assumed responsibility for public education and information, research and consultations, and human rights clinics to provide services to complainants and respondents in the human rights process.[28]

Shelagh Day predicted that the move to a direct access model would turn out to be a mistake and probably undermine effective delivery and enforcement of human rights services in B.C.[29] Day points out that various provisions within the newly amended B.C. *Human Rights Act* would fail to overcome the systemic problems that faced the late Commission. Delays and backlog were key motivators behind scrapping the Commission. The virtue of a direct access model is the removal of the gate-keeping function thus ensuring that complainants get a hearing. What B.C. has done is effectively transferred the gate-keeping function to the Tribunal. This has in actual fact allowed the B.C.H.R.T. a freer hand to dismiss a larger share of complaints before they go to inquiry.[30]

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27 Day, Shelagh. *Rolling Back Human Rights*, 9.
28 British Columbia Human Rights Tribunal, *Annual Report 2003-2004*, <http://www.B.C.hrt.B.C..ca/annual_reports/Annual_Report_2003-2004.pdf>, 4.
29 Day, Shelagh. *Rolling Back Human Rights*
30 .B.C.H.R.T., *Annual Report 2003-04*, 8.

Ontario's newly reformed human rights just came into affect as of June, 2008. Ontario's Commission like B.C. was struggling with heavy case loads (an average of 2500 cases filed each year[31]) and limited resources. The latest reforms only share superficial resemblance with B.C., however. They split institutional responsibilities between three agencies. First, the Human Rights Commission of Ontario is responsible for research, public education, and awareness of the root causes of discrimination. Second, the Human Rights Legal Support Centre provides assistance with applications and general advice about the complaint process. Finally, the Human Rights Tribunal of Ontario deals with all discrimination claims through either mediation or adjudication filed under the province's *Human Rights Act*.[32] According to the government, under the old system, "it could take four to five years for a human rights complaint to be resolved…The goal of Ontario's new system is to complete hearings within one year of receiving the application".[33]

6. History of the NBHRC until 2004:

The New Brunswick Human Rights Commission (NBHRC) is a creature of the *Human Rights Act* (henceforth the *Act*) enacted in 1967. The *Act* along with the *Official Languages Act* were cornerstones of the then Louis Robichaud government and his "Equal Opportunity" initiatives.[34] The *Act* was a consolidation of two New Brunswick o statutes, the *Fair Employment Practices Act* (1956) and the *Fair Accommodation Practices Act* (1959). It prohibited discrimination in employment based on *race, national origin, colour and religion*, and provided for protection in accommodation, services or facilities available to the public, as well as signs and symbols, on the bases of *race, creed, colour, nationality, ancestry, and place of origin*. These grounds reflected the concerns of the time, which focused very much on the problems related to racism in the Saint John area. Although other forms of discrimination existed such as gender discrimination, these issues were not yet at the forefront.[35]

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[31] Ontario's Ministry of the Attorney General, News Release, *Ontario Strengthens Human Rights Protection*, <http://www.attorneygeneral.jus.gov.on.ca/english/news/2008/20080630-ohrc-nr.asp>.

[32] Attorney General of Ontario, *Human Rights in Ontario*, <http://www.attorneygeneral.jus.gov.on.ca/english/ohrc/Default.asp>.

[33] Attorney General, *Ontario Strengthens Human Rights Protection*

[34] Dept. of Post-Secondary Education, Training and Labour. "Discussion Paper – Human Rights Commission." 2003. Government of New Brunswick. 7 Jul. 2008. <http://www.gnb.ca/hrc-cdp/13-e.asp>.

[35] New Brunswick Human Rights Commission, *Equality in Action: The New Brunswick Human Rights Commission 30 Years Review 1967-1997.* Fredericton, New Brunswick, Government of New Brunswick, 1998, 9.

The NBHRC addressed the cases brought before it, and the now codified *Human Rights Act* became the mechanism by which complaints were processed. It was this measure which effectively provided recourse for those subjected to discrimination. Senator Kinsella, the first Chair of the NBHRC stated that "But the most important function of the Commission would be this public education, would be the proactive changing of attitudes, of changing social values of the community and being very much a human relations commission."[36] In its first decade, the Commission was active in the areas of conciliation, education, and research. New prohibited grounds of discrimination were added by the Commission over the last few decades. These include sex (1971) martial status and age (1973), physical disability (1976), mental disability (1985), sexual harassment (1987), and sexual orientation (1992).[37] During the 1990s a series of incremental institutional reforms to the Commission were instituted. These included allowing the Commission, through its own counsel, to present the complaint before a Board of Inquiry (1996); allowing the Labour and Employment Board to sit as a Human Rights Board of Inquiry (1996); for the Human Rights Commission to publish its own annual report, separate from the Department of Labour (1990).[38]

In February 2004 the Commission made several recommendations to government. Some of these were accepted including the addition of two new grounds of prohibited discrimination, political belief or activity and social condition. The recommendation to remove the exemption to mandatory retirement if there is a bona fide pension plan was accepted but the amendments to the legislation died on the order paper. There was some support for the recommendation that the Commission report directly to the Legislature but it was not accepted.

These are some of the issues to be considered by the Commission when considering its future direction:

- Mandatory retirement exemption.
- Additional grounds.
- Changes to definition of current grounds.
- Changes to the *Act* that will affect the process used to deal with complaints.
- The governance structure.
- Other issues that are to be identified during discussion.

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36 NBHRC, *Equality in Action*, 10.
37 Dept. PSTL, *Discussion Paper*, <http://www.gnb.ca/hrc-cdp/13-e.asp>.
38 Dept. PSTL, *Discussion Paper*, <http://www.gnb.ca/hrc-cdp/13-e.asp>.

The Commission has come a long way in improving the process it uses to handle complaints, and is one of the best in the country. However, there is an urgent need for additional resources and more staff and for the Commission to act in a more proactive ways to prevent discrimination to educate people about their right and obligations under the *Act*, and to assist communities be welcoming places for immigrants.

APPENDIX 2

Mediation in the Administrative Law Context: The New Brunswick Human Rights Commission's Experience

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Introduction

Mediation, as a form of Alternative Dispute Resolution (ADR), is now widely recognized and utilized in the legal profession. Law schools across the country generally offer several courses in ADR and most if not all large firms advertize lawyers with expertise in the area of mediation. In fact, Chapter 4 of the New Brunswick Code of Professional Conduct for lawyers states that it is a lawyer's duty to "advise and encourage the client to settle or to compromise a contentious matter brought to the lawyer". Furthermore, Chapter 13 of the *Code of Professional Conduct* entitled "Alternative Dispute Resolution," deals exclusively with the expected ethical and behavioural guidelines for lawyers who act in the ADR process. The Canadian Bar Association has similar guidelines.

Section 18(1) of the New Brunswick *Human Rights Act,* states that the Commission "shall inquire into any complaint made… and shall endeavour to effect a settlement of the matter complained of." In order to fulfill its legislated ADR mandate, the Commission has implemented a process of encouraging mediation at every stage of the complaint process. Mediation is a procedure of structured negotiations, where a neutral mediator helps the disputing parties in reaching a settlement. Mediation offers an alternative to settling disputes by litigation and often proves much more timely and cost effective to both the parties and the Commission. Most importantly, in situations where future contact between the parties is important, as is the case with many of the Commission's employment complaints, the preservation of a positive business relationship can be achieved.

In November 2003, an acting director commenced employment with the Commission while the Commission's director was out on leave. From November 2003 through to March 2004, the Acting Director reviewed the policies and practices of the Commission and she visited other jurisdictions to determine what their best practices were with regard to the handling of complaints. Her review indicated that several changes needed to occur within the Commission's complaint process in order for the Commission to meet its goal of dealing with complaints in an efficient and speedy manner. She determined that the Commission needed a formal mediation program to assist with the above mentioned goal. Therefore, in April 2004, the Commission implemented its mediation program. As well, from April 2004 through to March 2008, the Commission has made continuous improvements to both its mediation and investigation process under the direction of the acting director, who is now the Director of the Commission.

This paper will provide background information regarding the New Brunswick Human Rights Commission's investigation and mediation process. I will provide: an overview of the Commission; information pertaining to the Commission's staff prior to April 2004;

information pertaining to the Commission's investigation and mediation process prior to April 2004; information pertaining to the investigation and mediation process in April 2004 and subsequent to April 2004; statistics from 2002 through to 2007; information pertaining to the types of human rights complaints and issues that have been resolved via the Commission's mediation process; information pertaining to mediation or ADR at the Board of Inquiry level; and information pertaining to the difficulties faced by the Commission and its staff with regard to both the mediation and investigation process.

1. An Overview of the New Brunswick Human Rights Commission

The New Brunswick Human Rights Commission was created in 1967 to administer the New Brunswick *Human Rights Act.* The Commission reports to the Minister of Post-Secondary Education, Training and Labour with regard to its budget and other administrative issues. The relationship between the Commission and the Minister is an at-arms-length relationship and neither the Minister nor his staff become involved in individual cases filed with the Commission. Once the Commission has completed its investigation of a matter and has decided to recommend that the Minister appoint a public board of inquiry, the Minister becomes involved only to the point of accepting the recommendation and then taking the necessary steps to appoint a board of inquiry. The Minister may also decide not to accept the recommendation of the Commission. However, to date, the Minister has never refused to accept the Commission's recommendation to appoint a board of inquiry.

By enforcing the *Act* and educating the public about human rights and responsibilities, the Commission promotes the principles of equality, seeks to eliminate discriminatory practices and contributes to more equitable, productive and inclusive environments in which to work, learn and live.

The Commission is a neutral third party that does not represent either complainants or respondents in any complaint filed with the Commission. As well, the Commission and its staff members are committed to providing fair and impartial investigations to ensure equal treatment of all parties involved in a complaint.

The Commission serves the people of New Brunswick by: exercising leadership on human rights issues of national and provincial importance; promoting a greater understanding of the *Human Rights Act*; providing for the effective, efficient and speedy disposition of individual complaints of discrimination; initiating partnerships with government departments, private sector institutions, community and volunteer organizations and the media to promote a human rights culture that will eradicate prejudice and discrimination; enhancing its proactive role in human rights education to foster environ-

ments of inclusion, fairness, equality and dignity for all New Brunswickers; and utilizing advanced information technologies, multimedia as well as print publications and speakers to project its mission and mandate to the widest public audience.

The Commission is comprised of Commission members and Commission staff. There is always a Chairperson of the Commission and the number of Commission members can vary, but there must always be three or more Commission members. Commission members are appointed by the Lieutenant-Governor in Council. Commission members are responsible for the administration of the *Act* and are mandated to promote equality and compliance with the *Act*. Once an investigation of a complaint is completed and mediation attempts have failed, Commission members are tasked with deciding whether or not a board of inquiry should be appointed to hear the matter as Commission members do not have the authority to make a finding of discrimination and order a remedy to complainants.

As well, as noted above, Commission members, when making a recommendation to appoint a public board of inquiry, must make the recommendation for the appointment of a board of inquiry to the Minister responsible for the Human Rights Commission.

Although the *Act* only specifically mentions the Commission members, the everyday work of the Commission is completed by Commission staff members, which include administrative staff persons, human rights officers (both investigators and educators), legal staff, and the director. The everyday work of the Commission staff members includes receiving, reviewing, mediating, and investigating complaints. As well, Commission staff members are responsible for educating the public on the topic of human rights.

The Commission has a central office, which is located in the City of Fredericton, and it also has three regional offices located in Moncton, Campbellton, and Saint John.

2. Commission Staff Prior to April 2004

Prior to April 2004, the New Brunswick Human Rights Commission consisted of 12 employees. This included in the central office (Fredericton): the Commission's director, legal counsel, assistant legal counsel, one investigation officer, two education officers, an intake officer, and an administrative support person. As well, in the Moncton office, there was one investigation officer and one education officer. In the Saint John and Campbellton offices, there was one investigation officer in each office.

Investigation officers were tasked with obtaining information to complete investigations. This mainly included obtaining documentation and statements from the parties to a complaint. The officers would then compile the information into an investigation report and that report was provided to the parties of the complaint for their review and comment. The report, with all attachments, and the parties' responses to the report were then presented by the officer at a Commission meeting. The Commission members would discuss the contents of the report and they would make a recommendation to either dismiss the complaint as being without merit or they would recommend that Commission staff attempt to effect a settlement between the parties. If a complaint was not dismissed and if settlement discussions failed, legal counsel for the Commission would complete a legal analysis of the complaint and make a recommendation to the Commission members as to whether or not they should recommend to the Minister responsible for the Commission that he/she appoint a public board of inquiry to hear the matter. The role of the legal counsel was to provide the required legal analysis of the complaint so that the Commission members could make an informed decision as to whether or not the complaint necessitated the appointment of a board of inquiry to hear and decide on the matter.

Education officers were mainly tasked with drafting and presenting educational sessions to the general public, to employers who requested training, and to organizations. As well, they were tasked with drafting the Commission's printed materials, such as fact sheets.

3. The Commission's Investigation Process and Mediation Services Prior to April 2004

Prior to April 2004, the Commission did not have a centralized intake system, and statistics on settled cases were not officially maintained. Due to the volume of complaints, the Commission was focused on investigating the complaints that were filed with the Commission. However, in late 2003, the Commission was working to develop an electronic system that would allow the Commission to track all contacts with the Commission and to assist investigation officers with their case files.

Prior to 2004, callers, who believed that they had been discriminated against, were referred to an investigating officer in the caller's region. The officer was tasked with obtaining the relevant information from the caller and then sending the caller a complaint kit that consisted of the front page of the complaint form and the particulars pages of the complaint form. Callers were responsible for completing their complaint forms and particulars of discrimination and then returning the documents to the officer. The officer would then commence his/her investigation of the matter, by firstly, sending the com-

plaint form by mail to the respondent and then requesting a reply from the respondent. Once the officer received the response to the complaint, the officer would contact the complainant and advise him/her of what the respondent's position was at that time. The complainant would then send in additional information and the officer would request from the parties any information deemed to be relevant to the investigation, such as a complainant's employee file, medical file, etc. The officer would then compile the information into an investigation report and attach all exhibits and submissions to the report and then he/she would send the report out to the parties of the complaint (complainant and respondent(s)) and the parties would be able to respond to the report. The information gathering or investigation stage of the complaint could be anywhere from six months to two years in duration. The investigation report was then presented by the officer to the Commission members at a Commission meeting and the Commission members would discuss the complaint and all exhibits and the Commission members would decide to dismiss the complaint as being without merit or they would send it to conciliation/mediation. If the complaint was not dismissed and was referred to conciliation or mediation, the officer was tasked with attempting to effect a settlement between the parties. In most cases, the officer received assistance from the Commission's legal counsel or assistant legal counsel. This mediation/conciliation process could last for several months to a year or two years. If a settlement was not reached, the file was then assigned to the Commission's legal counsel to complete an analysis so as to assist the Commission members in deciding whether or not a board of inquiry should be appointed to hear the matter.

As a result of the process noted above and the number of complaints filed with the Commission, the average age of complaints when closed was 30 months.

Prior to 2002, the Commission investigated and attempted to resolve informal complaints, complaints where a formal complaint form had not been filed. Typically, a complaint form was not completed if it appeared that the matter could be resolved expeditiously. However, in 2002, and in an attempt to improve the service provided by the Commission, the Commission changed its policy to require that complaint forms be completed in all cases and therefore, the Commission only investigated formal complaints.

As well, during the 2002-2003 fiscal year, the Commission implemented a pilot project where the Commission's intake/complaints officer would draft the formal complaint form based on a written summary and information provided by complainants. This pilot project was implemented due to many factors such as: some complainants had difficulty drafting their complaints and therefore, the resulting formal complaint was incomprehensible and difficult to investigate; because some complainants had difficulty drafting

their complaint forms, officers would have to spend time assisting the complainants with their forms and therefore, reducing the amount of time that the officer would have to investigate and conciliate the complaints assigned to the officer; and due to the Commission's change in policy requiring that all complaints be formal, signed complaints.

The above noted pilot project ended in early 2004 due to a variety of factors which included the perception voiced by respondents that the Commission was not neutral as they argued that the Commission had assisted complainants in formulating their complaints of discrimination against the respondents. As well, the Commission did not have the human resources to keep up with the volume of complaints that needed to be drafted.

Challenges Faced by the Commission and its Staff

Prior to 2004, the Commission experienced difficulties with its complaint process and its mediation/conciliation efforts as it appeared that respondents to complaints failed or refused to acknowledge the seriousness of a complaint filed with the Commission. In some instances, it took Commission staff over six months to a year to obtain a response to a complaint despite several efforts to obtain the response. Further, in some if not in most instances, respondents and their legal representatives had the perception that the Commission and its staff members were pro-complainant or that they represented complainants. This perception led to the belief that the Commission's complaint and investigation process and its conciliation process was not fair and not neutral. As a result, it became increasingly difficult for the Commission staff members to assist the parties of a complaint to reach a resolution.

4. Statistics from 2002 to 2004

During the 2002-2003 fiscal year, the Commission received 245 new formal complaints of discrimination, 187 of which involved cases of alleged discrimination in employment. At the end of the fiscal year, 149 formal complaint files were open, two files were pending at the board of inquiry level, four complaints were referred to a board of inquiry and 33 complaints were settled with the assistance of the Commission's staff.

During the 2003-2004 fiscal year, the Commission received 171 new formal complaints of discrimination. At the end of the fiscal year, 230 complaints files were open, 202 of which involved cases of alleged discrimination in employment, six files were pending at the board of inquiry level from the previous year (two settled prior to the actual hearing), and seven complaints were referred to a board of inquiry (two settled prior to the actual hearing). As well, the Commission requested that the Court of Queen's Bench review

two decisions rendered by two boards of inquiry. Further, parties in two cases requested that the Court of Queen's Bench review the Commission's decisions regarding their files.

5. The Commission's Investigation and Mediation Process April 2004

As one of the Commission's functions is to provide efficient and speedy disposition of individual complaints of discrimination and due to the volume of complaints and the age of the complaints that needed to be investigated, in early 2004, the Commission decided to implement a formal mediation/conciliation process. The Assistant Legal Counsel at the Commission became the Mediation Counsel. The Mediation Counsel became responsible for the creation of and implementation of a mediation program at the Commission. The focus at this time was on newer files (mediation within 2 months from the date of filing) and mediation of older, complex files. Early mediation services were offered to cases identified as ones suitable for mediation and approximately 50 percent of the new cases filed with the Commission were offered the mediation services. The criteria used typically involved: the nature of the complaint; the type of discrimination; the circumstances surrounding the complaint; the parties involved; and the date of the alleged discrimination. Cases where a complainant's employment had just been terminated, cases that were filed within weeks of the date of alleged act of discrimination, and cases that involved an ongoing relationship, were some of the cases identified for the offer of early mediation services to the parties of a complaint.

The mediation services were provided at no cost to the parties and it did not have an impact on the complaint if mediation failed. The type of mediation services provided varied based on the type of complaint and the desired outcome of one or more of the parties. In cases where the parties were looking to re-establish the employment relationship or repair the relationship, interest based mediation would occur.

As well, due to the fact that most human rights complaints involve a general damages component, which relates to an allegation from the complainant that his/her feelings, dignity and self-respect had been injured by the alleged violation, most face-to-face mediation sessions conducted by the Commission's staff included an opportunity for a complainant to express to the respondent his/her perspective and the effect the alleged discriminatory action had on the complainant. The respondent would also be given the opportunity to provide his/her perspective and to provide the complainant with reasons as to why he/she had made the decision that resulted in the complainant filing a human rights complaint. At this point of the mediation session, the parties would caucus and the mediator would shuttle back and forth obtaining settlement proposals and counter

proposals until a settlement was reached or it was determined that the parties had reached an impasse.

During the 2004-2005 fiscal year, the Mediation Counsel conducted a majority of the mediations held at the Commission. However, other Commission staff members conducted mediation sessions, but with direction from the Commission's Mediation Counsel. At this time, the mediation sessions or discussions were informal but were premised on the notion that all settlement discussions were strictly confidential, without prejudice, and on the basis of no admission of liability on the part of the respondents. Commission staff members acted as a neutral third party to assist the parties to resolve the complaint as early as possible.

If early mediation proved to be unsuccessful in a complaint, the file was assigned to an investigating officer. The officer was not advised of what had transpired during the mediation session and was only advised that mediation had failed. The officer would complete his/her investigation and then he/she drafted an investigation report that was presented to the Commission members.

Parties to complaints were also advised that mediation services were available at any stage of the complaint process. In some instances, for complaints that had previously failed at mediation during the early stage of the process, Commission staff, upon request from the parties to the complaint, attempted again to mediate or assist the parties in reaching a resolution to the complaint.

As well, mediation services or settlement discussion continued even after a complaint was referred to a board of inquiry by the Commission members. The Commission staff members continued to assist the parties to reach a resolution to complaints within hours of a scheduled board of injury hearing, and in some instances, during the course of the hearing.

Challenges Faced by the Commission and its Staff

As noted previously, respondents to complaints questioned the neutrality of the Commission and its staff members and therefore, some respondents were not receptive to the offer of mediation services by the Commission's staff. As well, some respondents maintained that if they agreed to participate in mediation it would give the perception that they had admitted liability for the alleged discrimination. Further, as the *Act* does not explicitly provide for mandatory mediation of complaints, Commission staff could not insist that the parties participate in settlement discussions.

As well, the continued lack of sufficient human resources at the Commission prevented Commission staff from offering and conducting mediation services in a variety of complaints as there were not enough staff persons to conduct the mediations and if mediations failed, there were not sufficient staff persons to investigate the complaints in a timely manner. Due to the fact that the Commission had limited staff members, it was difficult to completely separate the mediation and investigation functions. Some of the Commission's investigation officers were involved in the mediation of complaints and if the mediation failed, that officer would investigate the complaint. However, in cases where one or both of the parties maintained that the officer would then have access to "without prejudice" information, the file was reassigned to another officer who would not be privy to the settlement discussions that had previously taken place.

Successes at the Commission

To address the issue noted above and to address the issue of the age and number of complaints, the Commission and its director decided to expand the education officers' duties to include investigations. As a result, all officers were responsible for providing education services to the public.

The Commission, in attempting to address the human resources issue at the Commission, sought the assistance of pro-bono mediators who were willing to provide their mediation services at no cost to the Commission and/or the parties of a complaint. Several professionals were willing to provide their mediation services on a volunteer basis to the Commission and the parties to a complaint. One such mediator is a law professor from the law faculty at the University of New Brunswick. This law professor continues to provide his services on a regular basis.

As well, the Commission applied for and received a position under the Province's Internship program and this position was filled by an articling student, who during his law school career and other work experiences, had knowledge of mediation processes. This additional staff person assisted the Commission in its goal of dealing with complaints in a timely and efficient manner.

6. Statistics for the 2004-2005 Fiscal Year

During the 2004-2005 fiscal year, the Commission received 237 new formal complaints of discrimination (20 of these complaints were against the same respondent alleging the same ground of discrimination and another 24 of these 237 complaints were complaints against the a different respondent alleging age discrimination) and 82 percent of these new cases alleged discrimination in the area of employment. At the end of the fiscal

year, 258 formal complaint files were open, four files were pending at the board of inquiry level (five complaints settled prior to the hearing), two complaints were referred to a board of inquiry and 75 complaints were settled through the Commission's mediation process, 40 of which were complaints that were closed as a result of early mediation conducted by the Commission's staff.

7. The Commission's Investigation and Mediation Process During the 2005-2006 Fiscal Year

The Commission continued to make changes to the complaint process to improve the service provided to the public. The Commission implemented a process of centralized intakes that resulted in a more organized processing of the complaints. With this new centralized intake system, the Commission was able to offer pre-complaint mediation services to the parties of a potential complaint. Typically, these services were offered in situations that needed to be resolved immediately, which would include cases where a student needed accommodation to attend school or in cases where a complainant's employment was about to be terminated while they were out on sick leave, etc. The goal of offering mediation services for these types of issues was the avoidance of the filing of a formal complaint. As well, in cases where the actual act of discrimination had yet to occur, the goal was to prevent the alleged act of discrimination.

In late spring and early summer of 2005, the Commission received an influx of several calls, over 15, from employees whose employment had been terminated by their employers (different employers) because they were out on sick leave for more than five days. In most of these cases, the employees contacted the Commission within a few days from the date that their employment had been terminated. The Commission's mediation counsel then inquired of the individual employees who had physical or mental disabilities if they were comfortable with the Commission staff contacting their employers in attempt to resolve the issues. All of the callers (employees) stated that they were. Some of the employees wanted their employment back, while other were now weary of working for an employer who had terminated their employment because of their disabilities. Therefore, some of the callers were not looking for reinstatement, but were looking for a monetary settlement. The mediation counsel contacted the various employers and advised that the Commission had received a call from their employee alleging that their employment had been terminated while they were out on sick leave for their physical or mental disability. Most employers acknowledged that they had terminated their employees' employment and noted that they had done so because the *Employment Standards Act* stated that they only had to hold an employee's employment for five days if they were out on sick leave. These employers were advised of the different obligations and responsibilities found under the *Act* as compared to the *Employment Standards Act.*

Most of these employers stated that they were not aware of their obligations under the *Act* and that they had called the Employment Standards Branch and were advised that they could terminate their employees' employment. Most employers stated that they were willing to reinstate their employees. As well, in the cases where the employee did not want to return to work, the employers stated that they understood and were willing to provide the employees with monetary settlements and letters of reference. Approximately 95 percent of these specific pre-complaints were resolved. The remaining calls resulted in formal complaints being filed with the Commission as the employers believed that they had complied with the law and that no possible violation of the *Act* had occurred as they had followed the requirements under the *Employment Standards Act* and had followed the direction of the Employment Standards Branch.

As well, the Commission implemented a triage function. In this triage function, all formal complaints were reviewed by the triage team, which was and still is comprised of the director, legal counsel/mediation counsel, and the intake officer. The triage team would identify the human rights issues raised and they would answer any issues as to jurisdiction or the sufficiency of the complaint form. If complaint forms were not sufficient or a *prima facie* complaint of discrimination had not been set out, the director, under the delegation authority provided for under section 19.2(1) of the *Act*, would dismiss the complaint as being clearly without merit. Complainants, if they did not agree with the dismissal, could, within 15 days, make an appeal to the Commission members to review the complaint and the Commission members would decide to either uphold the director's decision or they would order the complaint to be re-opened and further steps taken to investigate the complaint.

If a complaint was not dismissed by the director at the triage stage, the triage team would assign the complaint to either mediation or investigation.

Further, the Commission created an investigation team, which was and still is, lead by an investigation team leader. Complaints were discussed during investigation team meetings and files were assigned based on an officer's workload and not based on the region from which the complaint originated.

The Commission also developed a practice by which officers assigned a complaint file contacted a respondent by telephone to advise the respondent of the complaint and offered mediation services. The officer would then send the complaint to the respondent for their response as to whether or not they wanted to attempt mediation in the file or to provide a written, formal response to the complaint.

As well, the Commission changed the format of the investigation report that was drafted by the investigating officers. Previously, reports were a compilation of the information gathered through the investigation and the officer did not provide a recommendation to the Commission as to whether or not the Commission should dismiss the complaint pursuant to section 18(2) of the *Act*, or whether the Commission should assign the file to mediation. The new reports contained a summary of the parties' positions, an analysis of the information gathered through the investigation and a recommendation from Commission staff to the Commission members to either dismiss the complaint or to send it to mediation/conciliation. The Commission members were not obligated to accept the recommendation and as the report now contained a recommendation and the analysis as to how the Commission staff reached that recommendation, parties to the complaint were able to provide a rebuttal to the report that either argued against the recommendation or supported the recommendation. This new report increased the transparency of the Commission's complaint process and the process by which the Commission members decided on the final disposition of complaints: dismissal or conciliation.

Due to the success of the mediation program implemented during the 2004-2005 fiscal year, the Commission expanded its early mediation program by offering pre-complaint mediation services to some intakes, and by offering mediation to the parties of all complaints that had been assigned to mediation or investigation. This included complaints where the respondents had not yet provided a formal written response to the complaint. As well, it was not a requirement that a formal response be filed prior to settlement discussions taking place or prior to a scheduled mediation session. The mediation services included face-to-face mediation sessions and settlement discussions by telephone, letter, fax, and email.

The Commission's mediation process evolved into a flexible process where in some cases more than one type of mediation technique was utilized during the sessions. For example, in one case, a complainant filed a complaint of alleged discrimination on the basis of physical disability in employment. The complainant was still employed with the respondent and was seeking both accommodation and financial compensation for the alleged violation of the *Act*. The mediation session began as an interest based mediation session and the parties worked together to re-establish or repair the working relationship that had been strained due to the circumstances that led the complainant to file his human rights complaint. During this part of the session, the parties identified the issues and brainstormed together to identify workable solutions for both parties to the complaint. Once the accommodation issue had been resolved, the issue turned to the monetary compensation component. The mediator made the decision to separate the parties when discussing monetary settlement proposals and the session continued with the parties in separate rooms and the mediator shuttling back and forth until a settle-

ment was obtained. In this case, the mediation session resulted in a workable employment relationship, accommodation, and monetary compensation for the complainant for the alleged breach of the *Act*.

Challenges Faced by the Commission and its Staff

As noted above, mediation services were offered in complaints where the respondents had not yet filed a response. It became apparent that in some instances, a respondent and/or their legal representation would use the Commission's early mediation process in an attempt to delay the processing and investigation of the complaint. This was most evident in cases where the respondents requested a face-to-face mediation session but stated that they could not schedule a face-to-face mediation session for at least four to six months. This in turn would delay the processing of the complaint for if the mediation failed, the respondents had still not filed their responses to the complaint.

As well, the Commission's staff experienced difficulty in some cases with regard to the behaviour of the parties, including their legal representatives, during the mediation process and session. As a result, the Commission's mediation counsel implemented a new practice wherein prior to the commencement of all mediation sessions, the parties, including their representatives, were required to sign mediation agreements that set out the rules and terms of the mediation session.

Further, the Commission's staff also experienced difficulty or delay caused by the parties with regard to the signing of the settlement documents and obtaining the settlement funds and other terms of the settlement. In some cases, the signing of the minutes of settlement and releases were delayed by several months despite the continued efforts of the Commission's staff to obtain the signed documents and close the complaint file.

With regard to the investigation process, the Commission's staff also encountered difficulties caused by parties to a complaint not cooperating with regard to requests for information relevant to the investigation. In some instances, respondents refused to provide a response to a complaint in a timely manner, or in some instances, at all. In some cases, complainants failed to provide a rebuttal to the respondents' responses or they failed to provide the officer with relevant documentation to support their allegations of discrimination.

The Commission's legal counsel left the Commission in October 2005 for other employment opportunities. The Commission's mediation counsel became the Commission's acting legal counsel and became responsible for all legal duties at the Commission in addition to being the Commission's mediation counsel.

Successes at the Commission

Due to the influx of calls concerning the five day sick leave issue under the *Employment Standards Act,* the Commission's staff worked with the Employment Standards Branch to train the Employment Standards Branch's employees on the obligations under the *Act* and to assist the employees in recognizing human rights issues and therefore, resulting in the referral of the caller to the Commission.

Further, the Commission's staff worked with the Employment Standards Branch and the New Brunswick Workplace Health, Safety and Compensation Commission to develop a joint publication entitled "Accommodation at Work: Rights, Obligations and Best Practices Under *New Brunswick's Workers' Compensation Act, Employment Standards Act,* and *Human Rights Act*." This document can be used as a resource for both employees and employers within the Province of New Brunswick.

The new triage function proved to be an asset to the Commission as it ensured that only complaints where a *prima facie* complaint had been made out prior to the receipt of the respondent's response were assigned to investigation or mediation. Complaints that were insufficient were dismissed by the director. As well, the triage function also assisted with the proper assignment of the complaints to either mediation or investigation, which, in some cases, reduced delay.

The investigation team approach provided assistance to the officers when completing their investigations and it ensured that all investigations, regardless of who was assigned the file, were conducted in a similar manner. As well, the new investigation report ensured that the parties to a complaint were provided with the opportunity to provide their written arguments to either support or refute the recommendation from the Commission's staff to the Commission members regarding the proper disposition of the complaint.

The Commission was also able to secure the services of some private practitioners who had experience in human rights issues to represent the Commission at the board of inquiry level.

8. Statistics for the 2005-2006 Fiscal Year

During the 2005-2006 fiscal year, the Commission received 205 new formal complaints of discrimination, and 77 percent of these new cases alleged discrimination in the area of employment.

During the 2005-2006 fiscal year, 248 formal complaints were closed, 95 of which were settled with the assistance of the Commission's staff through the mediation process. Of these 95 complaints that were settled, 28 of them were settled within 6 months from the date the complaint was filed, 39 cases were settled after six months but before they were considered by the Commission members and 22 cases were settled after being considered at a Commission meeting but before the appointment of a public board of inquiry. Six cases were settled after being referred to a board of inquiry but prior to the hearing.

The total monetary value of the settlements obtained in 2005-2006 was about 1.3 million dollars. In addition, 30 letters of reference and 26 letters of apology or misunderstanding were obtained. As well, 10 policy changes or developments were agreed to, 10 complainants were accommodated, 3 complainants received employment, while 3 other complainants were reinstated. Further, 20 respondents agreed to receive human rights training for themselves and/or their employees.

The Commission's staff made 125 direct offers of mediation services and in 26 cases, the respondents refused the offer. During this fiscal year, 127 mediation sessions were held and 104 mediated settlements were obtained, which included pre-complaint mediations and settlements. Therefore, the success rate was 82 percent.

At the end of the fiscal year, 218 formal complaint files were open, two files were pending at the board of inquiry level, and 28 complaints were referred to a board of inquiry (20 of these complaints involved the same issue (age discrimination) and the same respondents).

9. The Commission's Investigation and Mediation Process During the 2006-2007 Fiscal Year

The Commission continued with making improvements to the investigation process at the Commission by developing more stringent timelines with regard to mediation and investigation.

The Commission's staff were directed that they had to make every effort to make the offer of mediation services within two weeks from the date the file was assigned to the officer. This would ensure that all possible early mediations would occur in a timely manner and before the parties to the complaints would become too entrenched in their positions.

With regard to investigation, respondents to complaints were advised of the timeframe in which they were required to provide their responses to the complaint and complainants were provided with strict timelines as to when they were required to provide a rebuttal to the respondents' responses. Parties to a complaint were advised that the investigation of the matter would not be delayed by their failure to cooperate or their failure to provide relevant information and that the investigation would proceed without it, which could result in the dismissal of the complaint or an appointment to a board of inquiry.

With regard to mediation, parties were advised that respondents had three weeks from the date of notification to decide whether or not they wanted to mediate the complaint. If they decided that they wanted to mediate the complaint, the mediation session or settlement discussions had to be well under way within 10 weeks or the respondents were required to file their formal response. As well, they were advised that should mediation fail, respondents had to, within two weeks from the failed mediation, file their responses to the complaint if they had not already done so.

Successes at the Commission

In May 2006, the Commission was able to secure another legal position at the Commission and the internship student, who was called to the Bar in June of 2005, became the third lawyer at the Commission. This lawyer's duties included investigating complex complaints and mediating complaints.

The Commission was also able to fill the other legal counsel's position and therefore created two legal counsel's positions at the Commission. One legal counsel was responsible for representing the Commission at the board of inquiry level, conducting French mediations, and providing legal advice in all French complaints. The other legal counsel, who was also the mediation counsel, was responsible for overseeing the mediation program at the Commission and for providing legal advice on all English complaints at the Commission to the Commission's staff and Commission members.

The new enforcement of the timelines for both mediation and investigation had a positive impact on the process and assisted in addressing the issue of unnecessary delays caused by the parties to a complaint.

10. Statistics for the 2006-2007 Fiscal Year

During the 2006-2007 fiscal year, the Commission received 174 new complaints of discrimination and 78 percent of these cases were employment related. 198 complaints

were closed, 98 of which were settled with the assistance of the Commission's staff. Of these 98 complaints that were settled, 36 of them were settled within 6 months from the date the complaint was filed, 51 cases were settled after six months but before they were considered by the Commission members and 7 cases were settled after being considered at a Commission meeting but before the appointment of a public board of inquiry. Four cases were settled after being referred to a board of inquiry but before the hearing occurred.

The total monetary value of the settlements obtained in 2006-2007 was about five hundred thousand. In addition, 16 letters of reference and 17 letters of apology or misunderstanding were obtained. As well, 4 policy changes or developments were agreed to, 30 complainants were accommodated, 1 complainant received employment, while 4 other complainants were reinstated. Further, 15 respondents agreed to receive human rights training for themselves and/or their employees.

11. The Commission's Investigation and Mediation Process During the 2007-2008 Fiscal Year

The Commission continues to make changes and improvements in both its investigation and mediation processes.

In early summer 2007, the Commission implemented a centralized complaint notification process. Once files have been reviewed in triage by the triage team and are deemed sufficient enough to be investigated and mediated, they (all files) are assigned to one human rights officer who is tasked with contacting the complainants to: explain the Commission's process and timelines; review the role of the Commission and the fact that the Commission is a neutral third party that does not represent complainants or respondents; advise that offers of mediation or acceptance of the complaint for investigation does not indicate that the Commission has pre-determined the merits of the complaints; complete a settlement checklist as that information may be important to both the mediation process and/or the investigation process; explain the mediation process and the fact that all settlement discussions are strictly confidential, without prejudice and on the basis of no admission of liability; and obtain from complainants their "without prejudice" proposed terms of settlement should respondents decide to participate in the mediation process.

That officer then contacts the respondents to advise them of the complaint and to explain the complaint process and the Commission's role. This officer also explains issues pertaining to discrimination, the duty to accommodate, etc. The officer offers early mediation services to the respondents and the respondents are advised that this is on a

without prejudice, strictly confidential, no admission of liability basis. The respondents are also advised of the timeline for filing responses, etc.

This new process of centralized complaint notification ensures that parties to all complaints are provided with the same information and that early mediation services are offered to all parties of all complaints filed with the Commission within reasonable timeframes.

The Commission has also expanded its pre-complaint intervention mediation services by offering the service to more and more callers and possible respondents.

Further, due to the fact the mediation services are being offered in all complaints, there has been an increase in settlement discussions that occur via the telephone, fax, email and letter. In these cases, the Commission's staff members obtain from the complainant their "without prejudice" proposed terms of settlement and then they convey this information via telephone, letter, fax, or email to the respondent or their legal representative. Once the officer receives the counter offer from the respondent, the officer then contacts the complainant and the process continues until a settlement is reached or until it is determined that settlement would not occur and the respondent is required to file a response. Once the response is received it is sent to the complainant for their rebuttal and once that rebuttal is received, one of the Commission's legal counsels reviews the file to determine the appropriate next steps with regard to that complaint. The legal counsel would then make a recommendation to the director to either dismiss the complaint as being clearly without merit or recommend that the file be assigned to an investigator.

The Commission's staff also set new timelines with regard to the signing of settlement documents and this information is conveyed to all parties of the complaints, particularly in cases where a settlement has been obtained. The Commission's staff advises the parties that the settlement documents must be signed within 8 weeks from the date of settlement and that all terms of settlement must be met within that same timeline, except in cases where the respondents have agreed to receive a human rights training seminar from a staff person from the Commission. In those cases, all other terms must be met within 8 weeks, but the training session must occur within 6 months from the date of settlement.

Difficulties Faced by the Commission and its Staff

Due to the current human resource issues at the Commission, the officer who is assigned the function of centralized complaint notification and early conciliation of com-

plaints is also responsible for completing investigations of a number of files. This has an impact on her conciliation efforts as she must divide her time between investigation and mediation.

Successes at the Commission

This new centralized complaint notification process has proven to be very successful and despite the difficulty noted directly above, the officer, due to her flexibility and capabilities, has been able to balance the functions and has assisted the parties in numerous complaints to reach an early resolution.

12. The Types of Human Rights Complaints and Issues That Have Been Resolved Using ADR at the Commission

Many different types of complaints and human rights issues have been resolved using the Commission's mediation process. These include cases involving housing, professional associations, employment and services available to the public.

With regard to housing, the Commission's staff members have assisted parties in reaching resolutions to complaints where it was alleged that: landlords failed to accommodate their tenants' disabilities (both physical and mental); and landlords or potential landlords refused to provide or continue to provide housing due to a tenant's age or the age of a tenant's children. In one case, a landlord refused to permit a tenant to keep her dog despite the fact that the tenant had a medical note from her physician stating that due to her mental disability, she required the dog for therapy and treatment. In that case, a settlement was reached and the complainant was permitted to keep her dog as long as she maintained control of the dog and cleaned up after her dog.

In another case, a staff member was able to assist the parties to a complaint where a complainant alleged that her landlord threatened to evict her because her friend who visited on a regular basis required the assistance of a seeing-eye dog. The landlord maintained that he had a no pet policy and he could not accommodate the complainant and her friend as other tenants would assume that they could have pets. In this case, the landlord was advised of his duty to accommodate and the complaint was resolved to the satisfaction of the parties, which included the friend attending the premises with his seeing-eye dog.

In another case, a complainant alleged that he was evicted from his apartment because his landlord became aware of the fact that he was HIV positive. However, in this case, the complainant did not contact the Commission until after he had been evicted. Com-

mission staff were able to assist the parties in reaching a monetary settlement that also included a human rights training seminar for the landlord.

With regard to services, the Commission's staff members have assisted parties in a variety of complaints to reach a settlement with regard to a variety of services that include transportation services, education services, restaurant services, and health services.

In eight cases that alleged the same act of discrimination, complainants alleged that the respondents failed to accommodate their various physical disabilities as the respondents failed to provide public transportation services that met their needs. In fact, they alleged that the bussing services were not wheelchair accessible and the parallel wheelchair accessible service was not adequate. After several mediation sessions that spanned two years, a settlement was obtained that included the respondents changing its policies regarding the bumping process with regard to the parallel service (the process where a user of the service reservation for recreational use could be bumped for a last minute caller who needed to attend medical appointments or work) and by agreeing to purchase a set amount of wheelchair accessible buses over the next ten years.

With regard to complaints that alleged discrimination with regard to education services, the Commission's staff members have assisted many parties in reaching resolutions to several complaints. These complaints included complaints within the public school system and complaints at the post-secondary level. In one case, the Commission's staff members assisted in obtaining a settlement that included accommodating students with environmental illnesses within the school system. As well, in another case, a settlement was obtained that included a student with a mental disability being accommodated during her exams and tests. In one case, the minutes of settlement included more than 30 terms of settlement that eventually resulted in the complainant graduating from her program.

During one of the Commission's pre-complaint intervention mediations, a caller alleged that his education service provider was not accommodating his physical disability (asthma and extreme allergy to dog dander) when they failed to adequately address his health issue relating to another student's working dog. Pre-complaint mediation services were offered to the parties and the parties agreed to participate and they attended the session with the good faith effort of attempting to resolve the issue without the necessity of the caller filing a formal complaint. The parties attended the session with the intent of being reasonable and the other student affected was invited to participate as an interested party. This pre-complaint mediation required the balancing of competing human rights: the rights of the student with the disability who required the assistance of the working dog and the rights of the student who encountered serious breathing difficulties

because of the presence of the working dog in the education facility. A resolution was reached that met the needs of both students and included air filtration systems and extra cleaning of the physical facility by the education service provider.

With regard to restaurant services, the Commission's staff members have been able to assist parties to a complaint to reach a resolution with regard to the accessibility of a restaurant to a complainant who uses a wheelchair. The settlement included phased in accommodation that included the building of a wheelchair ramp.

With regard to health care services, the Commission's staff members have assisted many parties to many complaints in reaching a resolution to the complaint without the necessity of the appointment of a board of inquiry. Recently and after several years of settlement discussions, the Commission's staff members were able to assist the parties to a complaint involving sexual orientation discrimination in reaching a settlement. In this case, the complainant alleged that he had been discriminated against on the basis of his sexual orientation (homosexual) as he was prevented from being named as his same-sex partner's next-of-kin and their power of attorney for personal care was not recognized by a hospital and a regional health authority. Further, the respondents refused to advise the complainant whether or not a legal next of kin would be able to go behind the power of attorney for personal care. The complainant alleged that during the medical emergency, this caused him and his partner extreme stress during an already stressful time. At the time he filed his complaint, the complainant was prevented from being legally married due to the laws of New Brunswick. A resolution with the named regional health authority was reached and eventually all regional health authorities in the province agreed to develop policies that were in accordance with the terms of settlement reached with the named regional health authority.

The Commission's staff members have also assisted parties to reach settlements in cases involving employment. In several cases, the settlement terms included reinstatement or offers of employment to complainants. As well, in some cases, a complainant's disability or religious requirements were accommodated. In other cases, the settlements included monetary settlements, letters of reference, letters of apology or misunderstanding, amended records of employment, and human rights training seminars for the respondents and/or their employees.

13. Mediation at the Board of Inquiry Level

Under the *Act*, the Minister can appoint the Labour and Employment Board to sit as a human rights board of inquiry. Once a complaint has been referred to a board of inquiry and a board has been appointed, the Commission becomes a party to the complaint.

In recent years, the board of inquiry typically arranges for a pre-hearing conference and it is during these conferences that settlement opportunities are explored in addition to dealing with issues of disclosure and evidence to be presented during the hearing. As well, the board may hold independent settlement conference meetings where the main goal is exploring settlement opportunities. Usually the Chair or a Vice-Chair of the Labour and Employment Board acts as a mediator and the Commission's legal counsel participates as a party to the complaint.

As well, prior to the commencement of the hearing, the Commission's staff continue to explore settlement opportunities and continues to act as the mediator to facilitate settlement discussions between the respondent and complainant. In some cases, these discussions continue to occur throughout the board of inquiry process.

14. The Commission's Mediation Program in 2008 and the Impact of the Program on the Complaint Process

Over the past four years, the mediation program at the Commission has gained momentum and parties to a complaint are more willing to attempt mediation at the outset. As well, more cases return to mediation within months from the date of the original mediation session that had failed or parties who had previously rejected the mediation services contacted the Commission to advise that they were now interested in the service.

It appears that the reputation of the Commission has improved due to both the mediation program and the changes to the investigation process. Respondents and their representatives appear to be more willing to accept the mediation services that are offered by the Commission and it appears that parties to a complaint are cognizant of the fact that the Commission does not represent the complainant or respondent and that the Commission represents the public interest.

Due to the mediation program and the many changes to the mediation program and the investigation process, the average age of complaints when closed has been reduced from 30 months to just 11 months. However, there are still some cases that are older than 11 months. These cases are cases where one or both of the parties have refused to participate in mediation and the complaint requires a full investigation.

15. Hurdles Relating to the Mediation Process and the Impact on Human Rights Complaints

One hurdle faced by the Commission with regard to its mediation program still continues to be issues relating to human resources and the distribution of the caseload. However, the Commission is working towards a solution and it still continues to rely on the pro-bono services of outside mediators to assist with files and possible backlogs.

As well, one of the main hurdles in the advancement of human rights case law in complaints that have been mediated is the fact that most settlements are strictly confidential and therefore cannot be disclosed to the general public and cannot be used as precedents. Since the commencement of the mediation program at the Commission in 2004, only two settlements or resolutions have been made public as the parties agreed that the settlements or resolutions could be made public. These two cases are the Saint John City Transit cases (which was eight complaints in total) and the most recent case, the Peter Papoulidis complaint which was the sexual orientation case with regard to health services.

Most recently, settlements obtained via the Commission's mediation program tend to be higher than the awards rendered in New Brunswick Board of Inquiry decisions. As well, in some cases, the interests of the parties had been met via the terms of settlement, but the public interest raised through the complaint may not have been addressed to the satisfaction of the Commission. However, as the *Act* does not provide the Commission with the authority to veto a settlement between the parties until it meets the public interest, the Commission has not been able to ensure that the public interest has been met to the satisfaction of the Commission in every case that has been settled. However, not every case possesses a public interest component and some complaints actually only involves an individual remedy for a complainant.

As well, with regard to precedent setting complaints and establishing case law in New Brunswick to rely on, the mediation program does have an impact. Usually, stronger cases of alleged discrimination tend to settle prior to the Commission making a recommendation for the appointment of a board of inquiry. However, that does not indicate that only weak cases proceed to a board of inquiry. The cases that proceed to a board of inquiry are the cases that have not been able to be resolved and the legal analysis indicates that there is a *prima facie* complaint of discrimination that needs to be determined by the board of inquiry.

Another hurdle faced by the Commission's staff with regard to mediation is the fact that mandatory mediation is not explicitly stated in the *Act*. In some cases, respondents

have refused mediation services, while in other cases complainants have refused to participate in mediation and demand that the complaint proceed to a board of inquiry. This necessitates the complete investigation of such files, which could be stressful for all parties involved. Further, for complaints which the Commission members have decided are not without merit and have recommended that Commission staff attempt to effect a settlement between the parties, uncooperative parties make the task of the Commission's staff member much more difficult. Depending on the facts of the case, these cases typically move forward to the board of inquiry level, which also has an impact on the Commission's human resources as the Commission becomes a party to the complaint and the Commission's legal counsel must prepare the case for a hearing.

Conclusion

In conclusion, the Commission's mediation program has had an overall positive impact on the Commission's complaint process and appears to have improved the Commission's credibility. Due to the success of the mediation program and the settlements obtained, investigations are not required in all cases filed with the Commission. As well, in some instances, the public interest and the private interests of the parties have been met. The mediation program has also worked towards improving the Commission's reputation with the parties to complaints and to re-enforce the fact that the Commission is a neutral third party.

Further, outside of the mediation program, the Commission has made other changes in the complaint process that also has a positive impact on the overall work at the Commission. Complaints that are clearly without merit are dismissed during the triage stage or the early stage of the complaint process via the delegation authority provided for under the *Act*. However, complainants do have the statutory right to seek appeal of this decision to the Commission members within 15 days from the date they are advised of the dismissal. As well, new timelines have been implemented and enforced by the Commission and its staff members and the Commission's staff members proceed with investigations with or without the cooperation of one of the parties. Further, the Commission's investigation team has created a new type of case analysis report that increases the transparency of the Commission's decisions regarding the disposition of complaints, which in turn, ensures that the parties to a complaint are treated fairly and this treatment and process is in accordance with the principles of natural justice.

The Commission continues to strive to improve both its mediation program and investigation process by reducing delays as much as possible. As well, the Commission has developed new presentations to be presented to the public that will educate the public with regard to their rights and their obligations. Further, the Commission has developed

an extensive guideline on the duty to accommodate students with disabilities and will be making presentations on this new guideline to school officials, school personnel and parents.

In the end, it is apparent that utilizing ADR in the administrative context, particularly at the New Brunswick Human Rights Commission, is a step in the right direction in providing excellent service to the citizens of the Province of New Brunswick.