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# Direct Access in Ontario: A Call to Re-Examine

Anita Anand & Gita Anand\*

*Amendments to the Ontario Human Rights Code that took effect in 2008 introduced a new hybrid direct access model, which allows complaints to be taken directly to the Human Rights Tribunal of Ontario without prior investigation by the province's Human Rights Commission, and which limits the Commission's role to the protection of the public interest through policy development and public education. The authors are of the view that there was inadequate cost-benefit analysis of the new model before it was implemented, and that the three-year period between the implementation of the new model and the preparation of the Pinto Report on its operation was not long enough to allow for a thorough analysis of how well the model was working. They argue that cost-benefit analysis is still needed to assess whether the model is meeting its policy goals and whether it is cost-effective and efficient. However, they acknowledge that one of the challenges in performing an analysis of a human rights regime lies in the difficulty of quantifying the regime's costs and benefits; it is hard, for example, to place a value on factors such as access to justice. With an eye to the differences between the new Ontario model and the human rights regimes in other Canadian jurisdictions, the authors highlight a number of potential problems with the hybrid Ontario model that call for future research using a cost-benefit approach: the lack of Commission-initiated public interest cases; the risk that more non-meritorious cases will reach adjudication because of the lack of screening by the Commission; the shifting of the costs and other burdens of litigation to private parties; and the question of the effectiveness of the Legal Support Centre in helping to meet those burdens.*

## 1. INTRODUCTION

The purpose of this article is to provide a framework for a discussion of optimal models for human rights adjudication and to argue that an approach which considers costs and benefits should motivate

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our policy response to such adjudication. Revisions to the Ontario *Human Rights Code* which came into force in 2008 introduced a hybrid form of direct access which allows an applicant to pursue a discrimination complaint directly before the Human Rights Tribunal of Ontario (HRTO); the Ontario Human Rights Commission is no longer responsible (as it was under the earlier non-bifurcated model) for investigating the matter beforehand and pursuing it on the complainant's behalf. The new hybrid direct access model (which we will refer to as the hybrid model) appears to be based on a goal of increased efficiency, including reductions in delays in the investigation and adjudication processes. The new model also allows public entities to shift some of the costs of adjudicating human rights complaints to private parties, including applicants. We argue that a full analysis of the efficacy of the 2008 reform is now warranted.<sup>1</sup>

The 2008 amendments to the *Human Rights Code* included a requirement that the government conduct a review of how well the new model was working, and this culminated in a report three years after the amendments came into force. The importance of that report, known as the Pinto Report,<sup>2</sup> cannot be overstated: the future of human rights adjudication in Ontario hangs in the balance. Unfortunately, the purposes that the hybrid model was expected to achieve were not clearly elucidated in the Pinto Report. Was the objective of the reforms to reduce costs? If so, which costs? What were the expected benefits of the new model, and would they come at the expense of other laudable goals?

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1 But see Raj Anand & Mohan Sharma, "Report on Direct Access to Binding Adjudication under the Canadian Human Rights Act" (Paper prepared for the CHRA Review Panel, 1 December 1999), online: <[http://www.law.utoronto.ca/documents/conferences/admin05\\_anand.pdf](http://www.law.utoronto.ca/documents/conferences/admin05_anand.pdf)> (discusses the "transfer of time and cost" and attempts to specify certain costs, including the Commission's costs of investigation and conciliation).

2 Andrew Pinto, *Report of the Ontario Human Rights Review 2012* (2012), online: Ministry of the Attorney General, Ontario: [http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/human\\_rights/Pinto\\_human\\_rights\\_report\\_2012-ENG.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/human_rights/Pinto_human_rights_report_2012-ENG.pdf) [Pinto Report]. The report was commissioned under section 57(1) of the *Code*, which now says: "Three years after the effective date, the Minister shall appoint a person who shall undertake a review of the implementation and effectiveness of the changes resulting from the enactment of [the *Human Rights Code Amendment Act, 2006*]."

In other Canadian jurisdictions, benefits of the direct access model (DAM) have included the following: speed, because the investigative process is curtailed; transparency, because tribunals make their decisions publicly; and increased control for complainants over the processing of their own complaints.<sup>3</sup> Disadvantages have included: fewer systemic complaints; the undermining of advances in human rights law by the fact that some meritorious complaints are settled without adjudication; and potential abuse of the human rights tribunal's process due to the lack of gatekeeping and the lack of filing fees.<sup>4</sup>

In this study, we explore the advantages and disadvantages of Ontario's hybrid form of the DAM through the lens of cost-benefit analysis (CBA). We acknowledge that there are shortcomings in favouring an approach that takes costs and benefits into account. CBA emphasizes maximizing utility to the exclusion of other valid objectives. It also assumes that costs and benefits can be quantified, which is often difficult, especially in terms of benefits. Thus, our argument for using CBA puts forth the simple claim that it is but one of several considerations that should be taken into account when introducing fundamental policy changes. Other objectives, including increasing both the access to justice and the accountability of administrative tribunals, are also important. If we were to engage in a full-fledged debate about the appropriate adjudicative model for Ontario, we would likely agree that the ultimate objective is to reduce human rights violations, both in number and severity. We might also agree that achieving this goal drives second-order goals, such as access to justice, unbiased determinations, and the accountability of the administrative tribunal. The question then becomes how to achieve those goals. A direct access model may be one way of doing it, but we cannot reach an informed decision on that question without undertaking

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3 Heather McNaughton, "Lessons Learned: The BC Direct Access Human Rights Tribunal" (2010), online: Yukon Department of Justice, Articles from Human Rights Experts, <[http://www.justice.gv.yk.ca/pdf/Heather\\_MacNaughton\\_Article.pdf](http://www.justice.gv.yk.ca/pdf/Heather_MacNaughton_Article.pdf)>.

4 *Ibid.*

a systematic comparative analysis of the aggregate costs and benefits of such a model.<sup>5</sup>

Part 2 of this article reviews the academic literature on CBA and places the study of human rights adjudication in the context of the literature on adjudication, alternative dispute resolution and mediation. Part 3 sets forth three models of human rights adjudication — the traditional non-bifurcated model, the DAM, and the hybrid model adopted in Ontario in 2008. It also discusses data on the Ontario model. Part 4 focuses on policy directions and alternatives, arguing that CBA is an important approach to take in assessing whether Ontario should continue to use a type of direct access model. Part 5 concludes the discussion by highlighting our main arguments and pointing to additional areas for future research.

## 2. APPLYING COST-BENEFIT ANALYSIS TO THE DIRECT ACCESS MODEL

Generally speaking, CBA is a useful tool that allows governments to evaluate policy initiatives and decide whether they should be implemented in light of the expected benefits and the anticipated costs.<sup>6</sup> CBA can be relevant to both positive and normative analysis,<sup>7</sup>

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5 One could reasonably construe “aggregate costs and benefits” as referring to costs and benefits imposed on all parties and stakeholders in the process of human rights adjudication (including applicants, respondents, the provincial government, and such government-funded entities as the Human Rights Legal Support Centre). In this article, we define aggregate costs and benefits as those that are imposed on the parties appearing before the HRTO. In particular, we suggest that the introduction of a direct access model, including the hybrid type now in place in Ontario, imposes aggregate costs on applicants.

6 Robert H Frank, “Why is Cost-benefit Analysis so Controversial?” (2000) 29:2 *J Legal Stud* 913 (the rather obvious associated policy stance is that only those policies where net benefits exceed costs (however each of them is calculated) should be implemented).

7 Gary Becker, cited in Richard A Posner, “Cost-Benefit Analysis: Definition, Justification and Comment on Conference Papers” (2000) 29:S2 *J Legal Stud* 1153 at 1154.

but the two types of analysis are surely interrelated. If a CBA finds that the costs of the non-bifurcated model, as opposed to a direct access model, exceed the benefits, that finding is at least relevant to (though perhaps not determinative of) which model should be in place. As Nikos Passas has explained, unless we engage in CBA, “we do not know at which point we may over-shoot and reach a point of diminishing returns.”<sup>8</sup>

The paucity of detailed CBA in the proposals supporting a direct access model in human rights adjudication is somewhat surprising, given the prominence of CBA in the broader academic literature.<sup>9</sup> Perhaps this shortfall is a response to the discrediting of CBA over the years. In particular, critics have argued that CBA is shallow because a financial metric cannot be placed on benefits relative to costs, even though both are in fact difficult to quantify and the costs of a policy cannot be compared with its benefits because the two are incommensurable.<sup>10</sup> How, for example, could we place a monetary figure on the benefits of the direct access model? In fact, what are those benefits precisely?<sup>11</sup>

Despite these types of criticisms, CBA and variations of it continue to be considered in policy-making in many areas because of the importance of evaluating the potential effects of a proposed or

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8 Nikos Passas, “Combating Terrorist Financing: General Report of the Cleveland Preparatory Colloquium” (2009) 41:1 Case W Res J Int’l L 254.

9 See e.g. Matthew D Adler & Eric A Posner, “Rethinking Cost-Benefit Analysis” (2000) 109:2 Yale LJ 165; Robin W Boadway, “The Welfare Foundations of Cost-benefit Analysis” (1974) 84:336 Econ J 926.

10 Frank, *supra* note 6 at 914, provides the following example: “When a power plant pollutes the air, our gains from the cheap power thus obtained simply cannot be compared with the pristine view of the Grand Canyon we sacrifice.”

11 It is this search to quantify costs and benefits which leads to the criticism that CBA is morally void. See e.g. Martha C Nussbaum, “The Costs of Tragedy: Some Moral Limits of Cost-benefit Analysis” (2000) 29:2 J Legal Stud 1005 (Nussbaum disavows CBA because it does not allow for a consideration of whether the policy would occasion serious moral wrongdoing, directly or indirectly).

existing policy.<sup>12</sup> While perceived benefits cannot be quantified in the way that CBA may demand, the costs of a proposed law or policy are not irrelevant to whether that law or policy should be implemented and some method should be employed to assess those costs. Furthermore, as Cass Sunstein has argued, CBA is important because it keeps all risks and issues “on screen,” allowing us to think through policy reform systematically.<sup>13</sup>

Some CBA exists in the academic literature on adjudication, especially with regard to alternative dispute resolution (ADR). The gist of the literature suggests that while ADR and settlement processes have the potential to increase the efficiency of complaints resolution and thus to deliver results on a relatively expedited basis, there are several issues that must be considered. In particular, what are the costs and benefits of each mechanism? Do individual litigants benefit directly from these alternatives, or are the benefits largely systemic? Are there public policy reasons to favour ADR over traditional litigation? Or should human rights claims be resolved in strictly public forums where tribunal lawyers with a public interest mandate represent the complainant?

A leading 1995 article by Steven Shavell examined why parties use ADR, and what the social interest is in using it, by drawing

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12 In securities regulation, for example, the U.S. Securities and Exchange Commission, and to a lesser extent the Ontario Securities Commission, routinely incorporate CBA into their rule-making procedures. See e.g. *Securities Act*, RSO 1990, c S.5, s 143. These CBAs are not usually based on statistical analysis, and are qualitative in form. For a discussion, see Edward Sherwin, “The Cost Benefit Analysis of Financial Regulation” (2006) 12:1 *Stanford JL Bus & Fin* 1. Note also that a more flexible iteration of CBA exists in Regulatory Impact Analysis (RIA), a technique which includes specific steps such as identifying and quantifying the impact of the legislation; isolating alternatives (which may be non-law-based) to address the problem; undertaking risk-based analysis; and consulting affected parties. RIA includes CBA to the extent that it is feasible, and also includes other considerations that defy quantification, such as equity and fairness, which are important especially from a public interest standpoint. The attempt is to assess the positive and negative effects of a proposed policy rather than the strict costs and benefits alone. See e.g. Organisation for Economic Co-operation and Development, *Regulatory Impact Analysis: A Tool for Policy Coherence*, online: OECD <<http://www.oecd-ilibrary.org>>.

13 Cass R Sunstein, “Cognition and Cost-Benefit Analysis” (2000) 29:*S2 J Legal Stud* 1059.

a basic distinction between different ADR arrangements.<sup>14</sup> Shavell explained that an *ex ante* arrangement can be made before a legal dispute arises to use ADR to decide any claim. In contrast, in the *ex post* model, opposing parties can agree to use ADR to resolve a dispute, but only after the dispute has arisen. Shavell argued that pre-adjudication ADR might lower the cost of resolving disputes or the risk of failing to resolve them; this would consequently create better incentives by inducing more accurate results. In particular, if parties knew that cases of substandard contract performance would be heard by an expert arbitrator who would be likely to reach a correct decision, they would be more inclined to perform fully, rather than proceed to adjudication. Shavell also asserted that post-dispute ADR produces mutual gains by promoting settlement and reducing dispute resolution costs.

While ADR is generally considered to reduce transaction costs, certain disadvantages persist, and they admittedly are not easily quantifiable in terms of costs. Lisa Bernstein has argued that court-sanctioned arbitration would not increase access to justice, and might even decrease it for poorer litigants.<sup>15</sup> Similarly, Owen Fiss has argued that ADR assumes equality between the parties, when in reality parties often come to the table with an imbalance in resources and levels of autonomy, particularly in contractual disputes.<sup>16</sup> Thus, Fiss contended that although settlement and ADR might remove a large number of cases from the dockets, the procedural disadvantages should not go unnoticed. Finally, Richard Ingleby has made the point that arguments for voluntary mediation should be treated with caution, because some conflict may in fact be constructive.<sup>17</sup>

These claims seem to favour a model akin to the structure in place in Ontario before the implementation of a hybrid DAM. A direct access model is akin to the *ex ante* model sketched by Shavell, in

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14 Steven M Shavell, "Alternative Dispute Resolution: An Economic Analysis" (1995) 24:1 J Legal Stud 1.

15 Lisa Bernstein, "Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs" (1993) 141:6 U Pa L Rev 2169.

16 Owen Fiss, "Against Settlement" (1984) 93:6 Yale LJ 1073.

17 Richard Ingleby, "Court Sponsored Mediation: The Case Against Mandatory Participation" (1993) 56:3 Mod L Rev 441.



that it is an attempt to reduce the costs, broadly conceived, of entering into full-fledged adjudication. However, as critics have suggested with regard to Shavell's model, strict direct access does not take into account differing levels of autonomy and resources between the parties, and the fact that individual litigants must bear their own legal fees. The plight of the poor litigant then becomes highly conspicuous.

### 3. MODELS OF ADJUDICATION OF HUMAN RIGHTS COMPLAINTS IN CANADA

We now turn to an analysis of differing models of human rights adjudication and their costs and benefits. All but three provinces and territories have in place a non-bifurcated model of adjudication (NBM). In NBM jurisdictions, a human rights matter is adjudicated by a tribunal after the staff of a human rights commission have completed an investigation. In direct access model (DAM) jurisdictions, complaints proceed directly to adjudication, without investigation by a public body. Two jurisdictions, British Columbia and Nunavut, have implemented DAMs. Finally, Ontario has a hybrid model in place.<sup>18</sup>

#### (a) The Three Models

##### (i) *Non-Bifurcated Model (NBM)*

Under this model, the adjudicative body is housed within an administrative structure known as a human rights commission. Ontario had such a model before the 2008 reforms; the Ontario Human Rights Commission was responsible for receiving discrimination complaints by individuals, investigating them and then referring them to the HRTO if warranted. The process was multi-staged and lengthy. In cases where a potential complainant who was not represented by counsel made initial contact with the Commission, an Intake Officer determined whether the claim fell within the Commission's

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18 See a discussion paper by the Yukon Department of Justice which suggests that the Ontario model is a hybrid one. We adopt this view here. "Modernizing the Human Rights System in the Yukon" (2010), online: Yukon Department of Justice <[http://www.justice.gov.yk.ca/images/discussion\\_paper\\_aug\\_10.pdf](http://www.justice.gov.yk.ca/images/discussion_paper_aug_10.pdf)>.

jurisdiction and, if it did, drafted the complaint.<sup>19</sup> Where legal counsel or a support agency represented the complainant, that counsel or agency would draft the complaint and file it with the Commission. Either the Commission staff or the respondent could request early dismissal based on certain limited grounds, including the allegation that the complaint was trivial, vexatious or made in bad faith. Commission staff would then make a recommendation to the Commission as to whether the complaint should be dealt with any further. If there were no early dismissal, an investigator would determine whether the complaint should be referred to the HRTO for adjudication.

In short, the Commission played an extremely important role as it was charged with acting in the public interest. The idea that there was a public interest to protect, including the prevention of systemic violations of human rights, motivated the Commission's approach to litigation. Furthermore, the decisions in human rights cases that the Commission brought formed a body of publicly available law that could be relied upon by other prospective litigants.

(ii) *Direct Access Model (DAM)*

By contrast, under the DAM, a tribunal bears responsibility for dealing with complaints while another arm of government handles human rights promotion, research and education. In other words, the tribunal is the sole independent agency through which human rights services are delivered. Complaints are filed and resolved directly at the tribunal without investigation, which has been dropped in this model. In a strict DAM there is no human rights commission at all, but the government may fund non-governmental organizations (NGOs) to assist with complaints.<sup>20</sup> British Columbia has had such a model since 2003. There, NGOs undertake human rights research and education, act as human rights watchdogs and advocates and may also assist complainants. In exceptional cases, specialized legal

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19 This procedure was eventually modified to require prospective applicants to draft their own complaints. Ontario Human Rights Commission Media Release, "Commission to Implement New Self-Draft Complaint Process" (24 September 2004).

20 Examples of government funded NGOs include the B.C. Human Rights Coalition and the B.C. Community Legal Assistance Society (CLAS).

clinics may offer representation, but ensuring that parties have such representation is not a goal of a strict DAM.<sup>21</sup>

(iii) *Hybrid Model*

Under the hybrid version of the direct access model that now exists in Ontario, the Human Rights Commission no longer processes claims of discrimination. Instead, claims are filed directly with the HRTO,<sup>22</sup> which is charged with providing an expeditious and accessible process, helping parties to resolve disputes through mediation and deciding those complaints that the parties are unable to settle.<sup>23</sup>

Although the Human Rights Commission continues to exist in Ontario's hybrid model, the Commission retains only a public interest function. Its work includes looking at the roots of discrimination in order to effect systemic change; developing policies and providing targeted public education; monitoring human rights; carrying out research and analysis; and conducting human rights inquiries. In matters affecting the broad public interest, the Commission may take its own cases to the HRTO or intervene in other human rights cases.

A third aspect of the hybrid model implemented in Ontario is the creation of the Human Rights Legal Support Centre to provide advice, support and legal representation to applicants.<sup>24</sup> The Centre can assist applicants in filing applications with the HRTO, in taking a matter to mediation or to a hearing before the HRTO, and in enforcing an order.<sup>25</sup> The availability of such support facilitates self-representation by prospective applicants.

**(b) Data Used to Assess Ontario's Hybrid Model**

As part of our research, we examined publicly available data on Ontario's hybrid model. From the HRTO's annual reports for 2008-2009 and 2009-2010, and from information disclosed on the

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21 Ingleby, *supra* note 17.

22 See Ontario Human Rights Commission, "The Human Rights System," online: <<http://www.ohrc.on.ca/en/human-rights-system>>.

23 *Ibid.*

24 *Ibid.*

25 See Ontario Human Rights Legal Support Centre "What Services Does the Centre Provide?" online: <<http://www.hrlsc.on.ca/en/ServiceStages.aspx>>.

organization's website for 2010-2011 and information released in the Pinto Report, we were able to gather the data summarized in Table 1.

Table 1 shows that in the second year of the new model (2009-2010), there was a remarkable increase in the number of applications brought. In that year, the number of decisions quadrupled, the number of mediated settlements tripled, and the total number of applications peaked at 3,551, doubling the previous year's number before dropping slightly in the following year. The proportion of mediated settlements to total applications increased from 14% in 2008-2009 to 23% in 2009-2010.<sup>26</sup> Unfortunately, the data that we have gathered at

**TABLE 1**  
**Application Outcomes under Ontario's Post-2008 Hybrid Model**

	2008-2009	2009-2010	2010-2011
<i>Total New Applications*</i>	1,738	3,551	3,167
<i>Mediations</i>	350	over 1,200	433 for Q4**
<i>Mediated Settlements</i>	245	over 804	not provided
<i>Proportion***</i>	70%	67%	over 60% (for Q4)
<i>Decisions Issued</i>	424	1,740	1,617
<i>Hearings (i.e. final decisions on the merits)</i>	16	75	104
<i>Cases Closed</i>	N/A	1,938	2,717
<i>Open Cases****</i>	N/A	3,384	3,828
<i>Self-Represented</i>	n/a	n/a	71%

\* Not including 1,150 Transitional Applications and 301 Commission Referred Complaints.

\*\* Because of a change in data-gathering methodology, the HRTO offered only Q4 data. For a rough comparison, we can project this figure to be  $433 \times 4 = 1,732$ .

\*\*\* Proportion of mediations that resulted in a settlement.

\*\*\*\* Includes cases still open from previous year as well as new cases from the same year.

26 This data was gleaned from the annual reports of the HRTO for 2008 and 2009, which can be found on its website. The HRTO's 2010-2011 annual report is not on the HRTO's website, but is available as part of the annual report of the Social Justice Tribunals cluster. We question why, for ease of access, the HRTO's 2010-2011 report is not on its own website. However, the HRTO website does provide some data for that year, as set out in Table 1, above.

this stage is somewhat sparse and does not allow us to draw definite conclusions.

Appendices to the Pinto Report break down the types of HRTO decisions more finely and make it clear that very few of the large number of decisions issued annually by the HRTO are final decisions.<sup>27</sup> A substantial proportion of applications (an average of 28.8% from 2009 to 2012) were dismissed on a preliminary basis. This figure includes those dismissed after a summary hearing. Also between 2009 to 2012, an average of 4.9% applications were withdrawn each year.<sup>28</sup> Taken together, these figures show a decrease in the percentage of decisions that can be considered to be final. This was not the result that activists were aiming to achieve by removing the Commission as gatekeeper.

Before the 2008 reforms, an average of 2,201 new complaints were brought annually over the 13-year period from 1995 to 2008. Under the new model, the average number of new applications brought annually from 2008 to 2012 increased to 2,799. Although the difference is not necessarily striking, the higher number of applications under the new model is perhaps indicative of the fact that individuals can file applications without the need for a gatekeeper to bring the case forward after an investigation. The increase might suggest that the HRTO is highly accessible to individual applicants. However, this is only one of a number of possible conclusions that can be drawn from the available data. Other factors, such as the relative scarcity of final decisions on the merits and the costs of private litigation, must also be considered.

#### **4. COST-BENEFIT ANALYSIS OF ONTARIO'S HYBRID MODEL**

How does one decide on the optimal process for resolving human rights disputes? In this section we argue that without CBA,

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27 Final decisions are those that may not be appealed in the courts, although they are subject to reconsideration by the HRTO or to judicial review. Pinto Report, *supra* note 2 at 38. In 2009-2010, 2010-2011, and 2011-2012, the number of final decisions was, respectively, 75 (4.3% of total decisions), 104 (6.43%), and 95 (4.15%).

28 As reported in Appendix E of the Pinto Report, *supra* note 2, reproduced here in Table 2 [notes omitted].

**TABLE 2**  
**Tribunal Statistics from Appendix E of the Pinto Report**

	2008-2009 (June 2008 to 31 March 2009)	2009- 2010	2010- 2011	2011- 2012
<i>New Applications</i>	1,738	3,551	3,167	2,740
<i>Cases Reactivated</i>	0	52	58	40
<i>Closed</i>	18	1,937	2,717	3,364
<i>Active Remaining Cases</i>	1,720	3,378	3,886	3,302
<i>Mediations Conducted</i>	350	1,200	1,425	1,635
<i>Matters Settled</i>	245 (70%)	804 (67%)	(60%)	1,013 (62%)
<i>Final Decisions</i>	43	75	104	95
<i>Discrimination Found</i>	–	29 (39%)	41 (39%)	40 (42%)
<i>Discrimination Not Found</i>	–	46 (61%)	63 (61%)	55 (58%)
<i>Dismissal on a Preliminary Basis</i>	–	301	562	786
<i>Deferrals</i>	–	147	233	229
<i>Withdrawals</i>	–	212	38	–
<i>Other Procedural Issues</i>		931	570	1,026
<i>Reconsideration Decisions</i>	7	66	103	140
<i>Breach of Settlement Decisions</i>	–	8	7	12
<b>Total Decisions</b>		1,740	1,617	2,288

any assessment of the hybrid model is inconclusive. In other words, CBA is necessary but not sufficient for a definitive assessment. There are potentially significant costs associated with a hybrid model — costs that would also be present under a strict DAM — and these costs should be taken into account in devising and endorsing any model of human rights adjudication.

(a) **Costs and Benefits of the Hybrid Model**

Ontario's hybrid model was implemented in part because of inefficiencies in the former model, under which the human rights complaints process was generally very lengthy.<sup>29</sup> Investigations took an average of about three years, and the entire process commonly took four to five years.<sup>30</sup> The process had not been modified in over 40 years, and it was not designed to deal with the progressively expanding number and scope of human rights complaints. As a result, the Commission became bogged down in adjudicating complaints, while ignoring its mandate to promote human rights. The provincial government claimed that introducing the hybrid model would help make the system faster and more effective. The government also sought to increase access to justice by giving every applicant the chance to have his or her case heard by the HRTO. Before the new model was introduced, only 10% of applicants were given that opportunity.<sup>31</sup>

However, it seems that the government did not publicly acknowledge the various costs associated with a shift to a hybrid model. While most observers agreed that some reform was necessary, the question that must be asked is whether a DAM, even a hybrid version, was the appropriate reform. CBA is undoubtedly relevant where cost reduction should be undertaken. However, it is surely not the case that a DAM or a hybrid model would eradicate all costs inherent in

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29 Janice B Payne & Christopher C Rootham, "Are Human Rights Commissions Still Relevant?" (First Annual Catherine Helen MacLean Memorial Lecture, 21 February 2005), online: Nelligan O'Brien Payne LLP <[http://www.nelligan.ca/e/pdf/Are\\_HR\\_Comm\\_Still\\_Relevant.pdf](http://www.nelligan.ca/e/pdf/Are_HR_Comm_Still_Relevant.pdf)>.

30 Mark Hart & Geri Sanson, "Getting Rid of the 'Gatekeeper': A Practical Model for Human Rights Reform" (Paper delivered at the conference, Administrative Design and the Human Rights Process in Ontario: Can We Do This Better? (2005)), online: University of Toronto Faculty of Law <[http://www.law.utoronto.ca/documents/conferences/admin05\\_hart.doc](http://www.law.utoronto.ca/documents/conferences/admin05_hart.doc)>.

31 See Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 2d Sess, online: <<http://www.ontla.on.ca/>>. The underlying idea was that applicants would have control over their cases rather than relinquishing such control to the Commission. The government would also provide every applicant with access to legal information through the Human Rights Legal Support Centre. Those who qualified could also get free legal representation from that Centre.

the previous structure, and it is questionable whether it would reduce those costs. What are the hybrid model's advantages over the prior system? What are the relative costs?

We will not try to go back and conduct a CBA of the choice that existed before the hybrid model was introduced, but we will see what a CBA can tell us about the new model as it now functions. One key cost that must be looked at is the expenditures entailed in the investigation of complaints. Because the Commission no longer conducts such investigations, respondents have less information about the strength of the case they have to meet. They must therefore expend more resources to find that out on their own and to assess the likely cost of proceeding or settling. The Pinto Report found that under Ontario's new system, about 85% of respondents but only 35% of applicants had retained lawyers to prepare their case and to represent them before the HRTO.<sup>32</sup> In 2006, when the new model was being debated, the Ontario Public Service Employees Union argued that this would ultimately raise costs:<sup>33</sup>

The cost of running hearings, where lawyers have to be paid at least \$80 per hour, will be considerably more expensive than an investigation, where Commission staff are paid \$30-40 per hour. The system could only be revenue neutral if it threw out a significant number of complaints at the front end without a hearing, or it implemented measures that deterred members of the public from filing complaints . . . In B.C., when the cost of providing limited legal representation is factored in, it is estimated that the direct access system is costing \$700,000 more each year than the Commission system.<sup>34</sup>

The HRTO's hearing rules now require early production of documents and detailed witness statements, but this does not do away with the need for an investigation. At least from the point of view of respondents, it is not at all clear that the hybrid model has reduced costs.

Some of the other benefits from the Commission's involvement under the earlier model appear to have been lost. Under the new

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32 Pinto Report, *supra* note 2 at 104.

33 Ontario Public Service Employees Union, "Making Ontario's Human Rights Commission Work" (2006), online: <<http://www.opseu.org/ops/ontariohuman-rightscommissionreport.doc>> [OPSEU, "Human Rights"].

34 Brad Teeter, "Human rights holes: B.C. queers better off with old HR Commission: experts," *Xtra West* (14 April 2005), cited in OPSEU, "Human Rights," *ibid*.



model, although Commission staff are charged with defending the public interest, no cases initiated by them have so far proceeded to a HRTO hearing. The Commission has become invisible in the dispute resolution process, as that process has moved wholly into the private sphere. Unless a dramatic shift occurs, perhaps as a result of lobbying or internal governmental pressure, we would expect that Commission inactivity in this area will become the norm, especially as the number of mediated settlements continues to rise. Although the benefits of public interest adjudication are impossible to quantify, they surely include society's support for the protection of human rights. Under the new system, the Commission is not leading the charge in this respect.

Under the old system, the Commission's work was principally directed toward guarding the public interest by investigating complaints, making submissions to various levels of government, conducting research, publishing policies and reports, and advancing public education. The introduction of the hybrid model means that the public interest component of human rights protection and promotion has generally not been left intact.<sup>35</sup> This may lead one to consider whether policy-makers have appropriately considered its loss.

The demise of public interest prosecution begets a further cost: privately paid litigation fees. Under the old model, the Commission acted as the prosecuting party, thereby effectively representing the complainant's interests. If a complaint succeeded, complainants could keep 100% of the damages awarded to them.<sup>36</sup> By contrast, under the hybrid model, unless the complainant represents herself before the HRTO or the case is one of the few taken on by the Human Rights Legal Support Centre,<sup>37</sup> any damages are net of the amount owed to legal professionals. Although a self-represented party will incur only

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35 See Kristy Neurauter, "Direct Access to Privatization: The Demise of Human Rights under the British Columbia Human Rights Tribunal," online: Vancouver Island Human Rights Commission <<http://www.vihrc.org/doc/DirectAccessToPrivatization.pdf>> at 2, citing William Black, "Human Rights Reform in B.C." (1997) 31 UBC L Rev 255 at 268 (stating that the legislative changes in British Columbia "leave little of the public function of the Commission intact").

36 OPSEU, "Human Rights," *supra* note 33.

37 In 2011-2012, that Centre represented only 12% of applicants before the HRTO. It does not represent respondents. See Pinto Report, *supra* note 2 at 92.

some personal costs, such as time away from work or home to pursue the case, someone who is not familiar with the litigation process is likely to be unable to investigate and advocate effectively. If we take into account the costs of private investigation as well as of those of privately paid counsel, costs under the strict or hybrid DAM may exceed those under the old non-bifurcated model.

Thus, although the DAM and the hybrid model may reduce delay in bringing cases before the HRTTO, they impose significant costs that are borne disproportionately by applicants; as a result these costs bear further examination. To be clear, the best policy option is not necessarily one where benefits exceed costs, as a definitive calculation in this regard is likely unattainable. Rather, the best option is one that is supported by a combination of CBA and other considerations. One might argue that under the old regime, a litigant was effectively subsidized and did not bear the “true” cost of litigation. In response, however, it can be argued that the downloading of those costs to individual litigants under the new model is inefficient. Because of specialization and economies of scale, the Commission is better equipped than individual litigants to investigate claims. In addition, the dramatic increase in open cases clearly indicates that the need to incur private litigation costs may not ultimately reduce the number of litigated cases.

Furthermore, the hybrid model may allow a greater number of non-meritorious applications to proceed, since all applicants are entitled to a hearing. Admittedly, the problem of non-meritorious applications can be addressed in several ways. The HRTTO already engages in a limited amount of gatekeeping at the pre-hearing stage, by deferring some applications pending the outcome of overlapping proceedings in other forums. In addition, since July 2010, the HRTTO has had the power to address some claims by way of a summary hearing,<sup>38</sup> in which the parties do not lead evidence in a formal manner or go through a process of discovery, but only identify evidence they believe to be reasonably available. This runs a risk of inaccuracy: a

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38 Human Rights Tribunal of Ontario, *Rules of Procedure*, r 19A.1 (“The Tribunal may hold a summary hearing, on its own initiative or at the request of a party, on the question of whether an Application should be dismissed in whole or in part on the basis that there is no reasonable prospect that the Application or part of the Application will succeed”).

finding made on the basis of evidence that is thought to be reasonably available may not be as firmly grounded as one that is made after a full hearing. On the other hand, summary hearings can serve to reduce litigation costs by resolving disputes without a prolonged discovery process;<sup>39</sup> they can also help (even if only slightly) to meet concerns about the number of non-meritorious claims brought forward under the hybrid model.

The Legal Support Centre undertakes an assessment of the merits of complaints, and provides services only in those cases that are deemed meritorious. However, its assessment is not determinative of whether a complaint goes forward, because an applicant can bring a matter to the HRTO without the Centre's assistance. The Pinto Report expressly denied the suggestion that the Centre serves as a *de facto* gatekeeper, highlighting the fact that 44% of successful applicants were self-represented<sup>40</sup> and explaining that the HRTO has been very accommodating to self-represented litigants. Interestingly, however, the report did not attribute the high proportion of self-represented applicants (about 65%) to the reforms,<sup>41</sup> but describes it as a feature of the Ontario legal system in general.

The "triage approach" taken by the Legal Support Centre has been described as one of the main improvements in the new model.<sup>42</sup> By taking a proportional and tailored approach that balances an applicant's level of need and the level of legal support provided, the establishment of the Centre might seem (in cost-benefit terms) to offer a major improvement over the all-or-nothing approach taken by the Commission under the old system. That said, this proposition has not been tested. The 2010-2011 Report states that half of all successful applicants were self-represented, and that 90% of those successful

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39 Human Rights Legal Support Centre, "Summary Hearings," online: <<http://www.hrlsc.on.ca/>>.

40 Pinto Report, *supra* note 2 at 108.

41 *Ibid* at 110-111.

42 See e.g. Tiffany Tsun, "Overhauling the Ontario Human Rights System: Recent Developments in Case Law and Legislative Reform" (2009) 67 UT Fac L Rev 125. Tsun suggested that the Centre, through its assistance to claimants, is an effective antidote to abuse of process by respondents. However, she was critical of the Centre in other respects. *Ibid* at 132.

applicants had received support from the Centre.<sup>43</sup> Such support appears to have been given largely through the Centre's website and help-line, although some access to staff lawyers was also available.<sup>44</sup> Web-based instruction on self-representation cannot be expected to work well for people who lack the skills or self-confidence to navigate complex litigation procedures.

Self-help instruction in the context of human rights law may do little more than download the costs of pursuing a complaint from the state to the individual. The move to a hybrid model may therefore constitute a significant shift in public policy, away from the idea that the state is the protector of the public interest. This shift should not be taken lightly. Information on the total number of applicants, even successful applicants, says nothing about individuals who may have a legitimate claim but do not file an application at all because of a lack of skills or resources.<sup>45</sup> This points to the need for an independent quantitative and qualitative assessment of the efficacy of the Human Rights Legal Support Centre. In particular, as alluded to above, there needs to be an assessment of the Centre's success in equipping those who would not otherwise have engaged with the system with the knowledge and tools needed to do so.

### **(b) Beyond Cost-Effectiveness**

While there were many criticisms of the old non-bifurcated model, including the delay in bringing cases in front of the HRTO, the bundle of considerations that motivated policy reform and the shift to the hybrid model remain somewhat unclear. This made it difficult for the Pinto Report to provide a full assessment of the hybrid model. How does one measure the success of the system? Is it best to take a cost-based approach? Or a comparative approach?

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43 Ontario Human Rights Legal Support Centre, *Annual Report 2010-2011*, online: Human Rights Legal Support Centre <<http://www.hrlsc.on.ca/en/AnnualReports.aspx>> at 9.

44 *Ibid* at 12. The Centre received almost 26,000 calls in 2010-2011, about 30% of them relating to issues outside the scope of the *Human Rights Code*.

45 Admittedly, it might be objected that such figures (the total number of applicants and successful applicants) could be meaningful for purposes of comparison with models that have no direct access elements.

As discussed above, we recommend taking a systematic approach to assessing efficacy — one that is based in CBA. We also suggest that certain policy goals should be explicitly stated up-front. What is the purpose of reforming or maintaining a policy after review? At a minimum, if we are concerned with eradicating or at least limiting violations of human rights, we ought to have reasons to believe that the model implemented in fact achieves that end. Even if we cannot quantitatively balance all costs and benefits, a CBA-based qualitative evaluation would at least provide more complete grounds on which to favour a particular policy. In Jeffrey MacIntosh's words:

All regulation is costly, both because of the direct and opportunity costs of compliance. The question is, and must always be, whether additional regulation is cost-effective. The cost-effectiveness criterion essentially reduces to this: does the new regulation produce at least as much wealth as it costs to implement?<sup>46</sup>

MacIntosh was writing in the context of corporate law, which is directly and predominantly aimed at creating wealth for issuers and investors. Human rights law, by contrast, has other policy goals that must be balanced against cost-effectiveness. The first of those goals is applicants' access to justice, which the new hybrid model in Ontario tries to further by having no filing fee; in other words, all requests by applicants to have their complaints heard by the HRTO are regarded as equally legitimate. On the other hand, the hybrid model moves the carriage of human rights complaints from being a public matter to being a private matter, in that complainants now need to retain their own counsel or represent themselves. This is a significant problem for access to justice and as suggested above, it is not clear that self-representation is the answer.<sup>47</sup>

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46 JG MacIntosh, "Corporate Governance in Canada: A Broad-Brush Assessment" in *Securities Regulation: Issues and Perspectives* (Scarborough: Carswell, 1994) 321 at 322, cited in Anita Anand, "Fairness at What Price" (1998) 43 McGill LJ 115 at 135.

47 One way to evaluate the effect of converting human rights adjudication from a public process to a private process is to look at empirical data (where available) on the number of complaints and the number of successful complaints, in comparison with those figures under previous models. While even increased rates of adjudication would not be conclusive, they would suggest that the objectives of human rights law are better advanced under a DAM or a hybrid model.

A policy goal of human rights adjudication must be the protection of the public interest. With mediated settlements and privately handled complaints gradually taking the place of cases brought in the public interest and given the rarity of systemic complaints initiated by the Commission under the hybrid model, much may be lost in terms of the development of a body of cases that shape our understanding of what serves the “public good.” Does the infrastructure now in place focus more on protecting the public interest (taking that term in the broad sense) or on protecting the parties’ private interests? If it is the latter, this marks an apparent shift in policy that should be openly acknowledged and debated.

Our understanding of what is in the public interest must include the accountability of the adjudicative tribunal and its processes. Cases decided by a tribunal can be scrutinized on judicial review, but mediated settlements cannot — and as we have seen above, such settlements are reached in an increasingly high proportion of cases brought to the HRTO. When that happens, what checks are there to ensure accountability? There is no representation of the public interest in the adjudication of private disputes before the HRTO and public interest remedies are absent from mediated settlements. As for cases alleging systemic discrimination, the Commission rarely brings them forward. In short, there are many reasons why we ought to be concerned that the HRTO is not subject to fundamental oversight.

## 5. CONCLUSION

To conclude, a systematic cost-benefit analysis should in our view have preceded the introduction of the hybrid model in Ontario. The advantages of CBA are clear: it helps to ensure that recommendations for fundamental changes in policy meet their proposed objectives, and do so within certain acceptable financial parameters. Governments at every level have an obligation to be fiscally responsible. Maintaining a human rights model that is more costly than the alternatives and fails to meet the stated objectives is arguably not only a policy wrong but also a moral wrong, because it wastes public funds.

In examining how well the hybrid model is working today, and before a commitment is made to it for the future, the aggregate costs it imposes on the parties should be carefully analyzed. For instance,

how effective have the Commission, the HRTO, and the Legal Support Centre actually been? What can be done to counter the problem of the Commission's relative inactivity in human rights adjudication? A series of factors will be relevant to the analysis, including the transparency of the system, the speed with which cases move through it, the prevalence and costs of self-representation, the costs to private litigants, and the cost of investigations. More broadly, although in this article we emphasize the usefulness of CBA in assessing efficiency, we do not recommend it as the final determinant of policy choice and reform options. Other objectives, including access to justice concerns and the protection of the public interest, should also explicitly motivate reform in this area.