Late-Filed Complaints in the Federal Human Rights Process

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I. INTRODUCTION

IT IS WELL RECOGNISED that human rights legislation provides important and substantive legal protections for disadvantaged groups in Canada.[1] Nevertheless, there are ongoing concerns about the procedures used for the enforcement of human rights.[2] Indeed, human rights commissions have increasingly been criticised for backlogs and delays in the surfeit of cases with which they deal.[3] Delays are particularly problematic in the context of labour relations, where discharged employees are seeking reinstatement at the same time as their employers are hoping to remove or replace them.[4]

The procedures of the Canadian Human Rights Commission[5] have not been immune from criticism and judicial commentary. In particular, the Commission has been judicially admonished for its delays in processing human rights com-

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1 *Canada (A.G.) v. Mossop*, [1993] 1 S.C.R. 554 [hereinafter *Mossop*]; *Action Travail Des Femmes v. Canadian National Railway Co. et al.*, [1987] 1 S.C.R. 1114 [hereinafter *Canadian National Railway*]; and *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd. et al.*, [1985] 2 S.C.R. 536 [hereinafter *O'Malley*].

2 See *e.g.*, Labour Law Casebook Group, *Labour Law*, 5th ed. (Kingston: Industrial Relations Centre, Queen's University, 1991) at 1006.

3 See *e.g.*, E. Hore, "Caught in the Act", *Saturday Night* (September 1989) at 25.

4 K. Swinton & K. Swan, "The Interaction Between Human Rights Legislation and Labour Law" in K. Swinton & K. Swan, eds., *Studies in Labour Law* (Toronto: Butterworths, 1983) 111 at 121.

5 Hereinafter the "Commission."

plaints.[6] It appears that such delays may be caused by a combination of factors, including a backlog of cases, the possibility that Commission staff are overworked and short-staffed, and indecision within the Commission as to whether or not particular complaints should be entered. In view of the patent inefficiencies in its procedures, the Commission seems to have lost sight of the importance of timeliness in resolving complaints which are brought to it.[7]

A continuing expansion of the prohibited grounds of discrimination may add further to the backlog of human rights cases. However, it has been suggested that the time limit for filing complaints acts as a countervailing force.[8] Almost all jurisdictions in Canada provide statutory time limits to minimise the passage of time between the incident giving rise to a human rights complaint and the date upon which the complaint is filed with the appropriate commission.[9] In general, the limitation periods run between six months[10] and one year.[11]

In the federal scheme of human rights legislation, paragraph 41(e)[12] of the *Canadian Human Rights Act*[13] permits the Commission to refuse to deal with a complaint that has been filed more than one year after the occurrence of the acts upon which it is based. In rendering decisions pursuant to this provision, the Commission has been described as "a human rights watchdog."[14] This description is thoroughly apropos, as it is the Commission's role to screen all human rights complaints which are brought to it,[15] so as to determine which late-filed complaints will be rejected and which may nevertheless proceed to the

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6 *Canada Post Corp.* v. *Canada (Canadian Human Rights Commission) (re Canadian Postmasters and Assistants Assn.)* (1997), 130 F.T.R. 241 [hereinafter *Canada Post*]; *Motorways Direct Transport Ltd.* v. *Canadian Human Rights Commission* (1991), 43 F.T.R. 211 [hereinafter *Motorways Direct*].

7 *Canada Post*, *ibid.* at 28–29.

8 Swinton & Swan, *supra* note 4 at 122.

9 R.W. Zinn & P.P. Brethour, *The Law of Human Rights in Canada: Practice and Procedure* (Aurora, Ont.: Canada Law Book, 1996) at 17–12.

10 See *e.g.*, *Human Rights Code*, R.S.N. 1990, c. H-14, ss. 20(2); and *Human Rights Code*, R.S.O. 1990, c. H.19, paragraph 34(1)(d).

11 See *e.g.*, *Human Rights Code*, R.S.N.B. 1973, c. H-11, ss. 17.1(1); and *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, s. 22.

12 Formerly subparagraph 33(b)(iv) of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33.

13 R.S.C. 1985, c. H-6, [hereinafter CHRA].

14 *Canada (A.G.)* v. *Canadian Human Rights Commission et al.* (1991), 43 F.T.R. 47 at 59 [hereinafter C.(A.G.)].

15 *Cooper* v. *Canada (Human Rights Commission)* [hereinafter *Cooper*]; *Bell* v. *Canada (Human Rights Commission)* (1996), 140 D.L.R. (4th) 193 (S.C.C.) at 216 [hereinafter *Bell*].

next stage in the human rights complaints process.[16] Employing a useful analogy, the CHRC process may be viewed as a fortress designed specifically for the protection of human rights. The Commission is like the guard posted at the gates of the fortress. It is the Commission's duty to regulate access into the CHRC process by refusing, in appropriate circumstances, complaints that are filed after the expiry of the one year time limit in paragraph 41(e).

However, in permitting or denying access to the CHRC process on the basis of late-filed complaints, the Commission does not act alone. The Federal Court of Canada,[17] in its judicial review capacity, is in a position to monitor and, to some extent, influence the screening process undertaken by the Commission at the gates to the CHRC process. Thus, the Court, like an inspector of the guard, seeks to ensure that the Commission performs its role in a reasonable manner.

Despite the hurdles placed in the path of late-filed complaints at various stages of the CHRC process, the Commission rarely dismisses human rights complaints on the basis of delay.[18] This article will seek to divine the possible reasons why so many late-filed complaints are able to penetrate the gates of, and obtain ingress into, the fortress of the CHRC process, despite the frequency of delays and the insurmountable backlog of human rights cases. The present constraints placed on the Commission and the Court, when making decisions in respect of late-filed complaints, will be assessed, and the criteria that are consistently applied in regard to decisions under paragraph 41(e) of the CHRA will be reviewed. Recent developments in the law will be discussed with a view to discerning whether additional forces can be mobilised in an effort to increase the potency of the prescribed one-year time limit defined in paragraph 41(e).[19]

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16 Hereinafter the "CHRC process."

17 Hereinafter the "Court."

18 See *e.g.*, Zinn & Brethour, *supra* note 9 at 17–12. In fact, in one case, a complaint before the Ontario Human Rights Commission was allowed to proceed where the delay from incident to investigation spanned approximately 19 years: *Guthro* v. *Westinghouse Canada Inc.* (1991), 15 C.H.R.R. D/388 (Ont. Bd. Inq.).

19 The context of the present discussion relates mainly to human rights complaints brought by employees against employers, as these represent the preponderance of cases in which paragraph 41(e) of the CHRA is invoked. Moreover, this paper is intended to focus on the complainants' delays in filing complaints (pre-complaint delays) and not on the Commission's delays in processing complaints (post-complaint delays).

II. COMMISSION MECHANISMS FOR SCREENING LATE-FILED COMPLAINTS

A. The Basic Scheme of the CHRC Process

The Commission is an administrative agency established pursuant to s. 26 of the CHRA Its powers, duties, and functions are set out in ss. 27 and 29. In respect of the CHRA as a whole, the Supreme Court of Canada has recently concluded that it is the Commission's role to deal with the intake of human rights complaints, and to screen them for proper disposition. Thus, the Commission is an administrative and screening body with no appreciable adjudicative role.[20]

The Commission is generally responsible for the administration of Parts I,[21] II,[22] and III[23] of the CHRA The Commission must be distinguished from a Canadian Human Rights Tribunal,[24] which may be appointed at a later stage in the CHRC process pursuant to subs. 49(1.1). The present discussion will concentrate on the decisions rendered by the Commission at the initial stage of the CHRC process—when complaints are first filed with the Commission.

An individual or a group of individuals can initiate a complaint to the Commission, pursuant to subs. 40(1) of the CHRA, on the basis of an alleged discriminatory practice within the meaning of ss. 5 to 14. When a complaint is first filed, the Commission must simply decide whether or not to deal with the complaint.[25] At the initial stage of the CHRC process, complaints may be dismissed by the Commission on a number of grounds, including the following: the victim ought to pursue recourse to other procedures; the complaint is beyond the jurisdiction of the Commission; the complaint is trivial, frivolous, vexatious, or made in bad faith; or the incident giving rise to the complaint occurred more than one year prior to the initiation of the complaint.[26] Pursuant to paragraph 41(e), however, the Commission is authorised to extend the time for filing a complaint where the extension is considered to be appropriate in the circumstances of the case.

When rendering a first-stage decision, the Commission's determination is made on the basis, *inter alia*, of a pre-investigation report. If a complaint is filed more than a year after the occurrence of the acts upon which it is based, the

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20 *Cooper*, *supra* note 15; *Bell*, *supra* note 15 at 216.

21 "Proscribed Discrimination" ss. 3–25 of the CHRA.

22 "Canadian Human Rights Commission" ss. 26–38 of the CHRA.

23 "Discriminatory Practices and General Provisions" ss. 39–65 of the CHRA.

24 Hereinafter the "Tribunal."

25 Hereinafter "first-stage decision."

26 See paras. 41(a)-(e) [now paras. 41(1)(a)-(e)] of the CHRA.

Commission appoints an investigator to conduct a preliminary investigation.[27] The investigator prepares a Report Prior to Investigation, which details whether or not the Commission should hear a late-filed complaint, irrespective of its merits.[28] If the Commission decides not to deal with the complaint, written notice must be provided to the complainant, setting out the reasons for the decision.[29]

If the Commission allows a complaint to proceed past the initial hurdle of a first-stage decision, an investigator will generally be appointed to investigate the complaint.[30] Upon completion of an investigation, the investigator must submit to the Commission a report detailing the findings or results of the investigation.[31] Following the investigation, the Commission must determine whether or not to permit the complaint to proceed to the next stage of the CHRC process for further consideration by a Tribunal.[32] In rendering a second-stage decision, the Commission is empowered to refer the complaint to a more appropriate forum, such as a grievance procedure, to request that a Tribunal be appointed to inquire into the complaint, or to dismiss the complaint.[33]

When a complaint passes the first and second screening stages in the CHRC process, and is subsequently referred to a Tribunal pursuant to s. 49 of the CHRA, a Tribunal must hold a full hearing and provide ample opportunity to examine witnesses, cross-examine witnesses, and make representations.[34] The manner of proceeding and the powers of the Tribunal are set out in ss. 50 to 55 of the CHRA At this third stage of the CHRC process, a Tribunal may dismiss a complaint which is not substantiated.[35] Where it is determined that the complaint has been substantiated, a Tribunal is empowered to issue an order providing one or more of the remedies delineated in s. 53(2). Pursuant to s. 55, the Tribunal's decision may be appealed to a Review Tribunal, which will be constituted to hear the appeal.

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27 A full investigation and hearing are not undertaken when complaints are first screened by the Commission.

28 *Canada (A.G.) v. Canadian Human Rights Commission and Boone* (1993), 60 F.T.R. 142 (T.D.) at 153 [hereinafter *Boone*].

29 See subs. 42(1) of the CHRA.

30 See subss. 43(1) and (2) of the CHRA.

31 See subs. 44(1) of the CHRA.

32 Hereinafter "second-stage decision."

33 See subss. 44(2) and (3) of the CHRA.

34 See s. 50 of the CHRA.

35 See subs. 53(1) of the CHRA.

B. The Statutory Time Limit

Paragraph 41(e) of the CHRA provides:

> 41. Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that
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> > (*e*) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint. [36]

This provision provides the Commission with a statutory discretion, enabling it to permit late-filed complaints to gain access to the CHRC process.[37] It is well settled that the Commission acts primarily in an administrative capacity, and not a judicial or *quasi*-judicial capacity, in exercising its discretion under paragraph 41(e).

The question of late-filed complaints is resurrected at the second stage of the CHRC process, in subs. 44(3) of the CHRA That provision states:

> 43. On receipt of a report referred to in subsection (1), the Commission
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> > (*a*) may request the President of the Human Rights Tribunal Panel to appoint a Human Rights Tribunal ... if the Commission is satisfied
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> > (*ii*) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to (e); or
> >
> > (*b*) shall dismiss the complaint to which the report relates if it is satisfied
> >
> > (*ii*) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).

The Commission's second-stage decision under s. 44(3) is also administrative in nature.[38]

While subs. 44(3) appears mandatory, it incorporates by reference the discretion contained in the ground for dismissal delimited in paragraph 41(e).[39] Therefore, when rendering a second-stage decision, the Commission may, in

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[36] *Canada (A.G.) v. Merrick et al.* (1995), 105 F.T.R. 1 (T.D.) at 5 [hereinafter *Merrick*]; and *Canada (A.G.) v. Bernard* (1995), 36 Admin. L.R. (2d) 233 (F.C. T.D.)[hereinafter *Bernard*].

[37] *Intermediate Terminals Warehouse Ltd. v. Canadian Human Rights Commission* (1991), 50 F.T.R. 62 (T.D.) at 66–67 [hereinafter *Intermediate Terminals*]. See also *Canada (A.G.) v. Burnell* (1997), 2 Admin. L.R. (3d) 285 (T.D.) [hereinafter *Burnell*]; and *Canadian Broadcasting Corp. v. Canadian Human Rights Commission et al.* (1993), 71 F.T.R. 214 (T.D.) at 220.

[38] *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879 [hereinafter *Syndicat*].

[39] *Kamani v. Canada Post Corporation* (1993), 94 C.L.L.C. 16,015 (C.H.R.T.) at 17,003.

certain cases, have regard to the statutory time limit in paragraph 41(e).[40] When making a determination at the second stage of the CHRC process, however, the Commission is in receipt of an investigator's report and may have received additional details of the case beyond those which were available at the time when a first-stage decision was made. Since paragraph 41(e) requires the Commission to determine whether the time for filing a complaint should be extended, it is likely that the time limit need not be considered in a second-stage decision if the time for filing has already been extended, and the complaint has thereby gained entrance into the CHRC process.

It is evident from the rather nebulous language in paragraph 41(e) that the statutory time limit is cast in very broad, discretionary terms. The Commission may simply extend the time for filing a human rights complaint where it "considers it appropriate in the circumstances." Yet, the legislation does not delineate any criteria or factors to be applied by the Commission in determining whether it is appropriate in the circumstances to extend the time for filing a complaint.[41]

It is clear, however, that the Commission, in its statutory discretion, has the authority to stipulate those factors to which it should advert in rendering a decision under paragraph 41(e) of the CHRA For instance, in *Re Electric Power and Telephone Act (P.E.I.), ss. 6 and 26*,[42] McQuaid J. stated the following,

> Where the legislation is silent as to the factors an administrative tribunal must take into consideration, the tribunal has the discretion to determine the factors to be considered. There is, however, a limit on the exercise of this discretion and, it is, that a tribunal must consider factors which are related to the purpose and object of the statute which confers discretion upon the tribunal.

Since the CHRA is silent as to the criteria that must be taken into consideration when deciding whether or not to dismiss a late-filed complaint, the Commission has created its own internal guidelines for extending the time for filing human rights complaints.[43]

In *Merrick*, MacKay J. set out the Commission's policy in relation to late-filed complaints. The policy includes the following internal guidelines of the Commission:

> Extending the time limit is a discretionary option which the Commission may exercise in special circumstances; it is not automatic.

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[40] See subparas. 44(3)(a)(ii) and (b)(ii) of the CHRA

[41] This contrasts with the comparable legislation in other jurisdictions. For example, under paragraph 34(1)(d) of the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, the Board may extend the time for filing a complaint where the delay in initiating the complaint was incurred in good faith, and no substantial prejudice will result to any person affected by the delay.

[42] (1994), 109 D.L.R. (4th) 300 (P.E.I.C.A.) at 304-305.

[43] See *e.g.*, *C.(A.G.)*, *supra* note 14 at page 64.

> In determining whether it is appropriate in particular circumstances to recommend for investigation a complaint that is based on acts or omissions which occurred over a year before filing the complaint, three factors are considered. The report, to the Commission, must cover each of the following three factors:
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> [1] Prejudice to the respondent occasioned by the delays:
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> Examples of things to consider under this factor:
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> whether witnesses or documentary evidence are likely to be unavailable;
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> whether the respondent has acted in a way which indicates that he/she/it has relied on the fact that no complaint was laid within one year;
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> whether the respondent knew that discrimination was alleged and that a complaint was likely to be filed.
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> [2] The length of the delay itself and the explanation offered by the complainant:
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> Examples of things to consider under this factor:
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> whether other procedures have been exhausted without the complainant obtaining satisfaction;
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> whether the complainant has been misled by Commission staff or by his or her lawyer or union;
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> whether the complainant has been led to believe that the action would be settled (although one should consider the time elapsed before filing the complaint after the complainant knew or ought to have known that settlement was not likely);
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> whether the complainant was reasonably deterred from filing a complaint by threats of retaliation;
>
> whether the complainant has been reasonably prevented from taking action due to illness or other major life crisis.
>
> [3] The public interest in the complaint itself:
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> Examples of things to consider under this factor:
> the extent of loss of equal opportunity which the complainant as an individual has suffered;
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> whether there are other avenues of recourse open to the complainant;
>
> whether the case will aid in clarifying the law through recognition of policy principles by courts or tribunals;
>
> whether the case will have a significant social impact because it affects a group or class rather than an individual.[44]

These sweeping guidelines deal comprehensively with most of the relevant issues that may pertain to a case involving a late-filed complaint.

A number of recent cases have demonstrated that the Commission does refer to its own guidelines when determining whether it should extend the time

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[44] See *e.g.*, C.(A.G.), *supra* note 14 at 64.

for filing a complaint.[45] In so doing, the Commission does not fetter the discretion provided to it under paragraph 41(e).[46] In fact, the Commission's exercise of discretion under paragraph 41(e) should be judged against its internal guidelines and other circumstances applicable to a given case.[47] However, where it fails to follow its internal guidelines, the Commission breaches the rules of procedural fairness.[48]

In view of the foregoing, it appears that relatively few constraints are placed on the Commission when it exercises its broad discretion under paragraph 41(e) of the CHRA. Apart from the requirement that the extension be "appropriate in the circumstances," the legislation does not, by its language, fetter the Commission's discretion to decide when to extend the time for filing a complaint beyond the prescribed one year time limit. In determining the appropriateness of an extension of time, the Commission relies upon its expansive guidelines, which delineate the factors that may militate in favour of the acceptance of a late-filed complaint. Hence, it is not surprising that so many late-filed complaints infiltrate the gates to the CHRC process. Having regard to the discretionary nature of its enabling provision and its broad guidelines, the Commission, as guardian of the gates, is ill-equipped to halt the passage of complaints which are filed more than one year after the occurrence of the acts on which they are based.

C. The Nature of the Prescribed Limit

The time limit established in paragraph 41(e) of the CHRA was designed to benefit the employer in cases where an employee alleges discrimination in his or her employment. In C.(A.G.),[49] Muldoon J. commented on the purpose of paragraph 41(e) as follows:

> Now, it is apparent that Parliament in setting the datum-line criterion of one year's limit in s. 41(e) did so in order seriously to confer a benefit, and not just wantonly to complicate the CHRA That one year's limit appears to be of no direct benefit to the complainant. Whom did Parliament intend to benefit? The limit—permeable as it is in terms of the Commission's consideration of what is appropriate—appears to be of direct benefit to a respondent employer... It is just too plain for elaboration that if the employer is to be deprived of the benefit which Parliament provided, the Commission must give some cogent signal or demonstration of why it considered it to be appropriate so to deprive the employer.

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[45] See, for example, *Merrick*, *supra* note 37; *Bernard*, *supra* note 37; and *Boone*, *supra* note 28.

[46] *Lever* v. *Canada (Human Rights Commission)* (23 November 1988), Ottawa A-947-87 (F.C.A.).

[47] *Merrick*, *supra* note 37 at 7.

[48] See, for example, *Merrick*, *ibid.*; *Bernard*, *supra* note 37; and *Boone*, *supra* note 28.

[49] *Supra* note 14 at 64.

In deciding to extend the time for filing a human rights complaint, then, there must be sufficient justification why an employer should be deprived of the benefit conferred upon it by paragraph 41(e).[50]

While it may be true that paragraph 41(e) was designed to protect employers, the Commission's readiness to accept late-filed complaints testifies to the fact that employers are not the frequent recipients of the legislative benefit accorded them. If the Commission sought to uphold the employers' benefit on a regular basis, it would likely approach its determinations under paragraph 41(e) in a manner more consistent with a mandatory limitation period. As noted above, however, paragraph 41(e) is clearly discretionary, and the Commission is granted broad powers to decide whether the time for filing a human rights complaint should be extended in any particular case. Therefore, there must be countervailing forces at work within the scheme of the CHRA which lead the Commission so often to accept late-filed complaints, thereby denying employers the benefit of the time limit prescribed in paragraph 41(e).

1. *The Permeability of the Time Limit*

The prescribed time limit in paragraph 41(e) is not, strictly speaking, a true limitation period. In civil proceedings, statutory limitation periods prescribe time frames outside of which certain claims cannot be brought. A limitation period is a known limit to litigation that is fixed by law, beyond which a litigant is precluded from asserting her right of action.[51] Like many of the human rights statutes in Canada, paragraph 41(e) of the CHRA does not provide a *fixed* limitation period, as late-filed complaints are not automatically time-barred. In fact, the time limit in paragraph 41(e) is rarely referred to as a "limitation period." Instead, the Court has employed such terms as "datum-line criterion" and "permeable" limit[52] to describe the time limit. Rather, paragraph 41(e) establishes a flexible or "floating" time frame for filing human rights complaints: it provides a specified time frame within which a complaint must be filed, unless the Commission exercises its discretion, expressly granted in the provision, to extend the time period for filing the complaint.

Unlike true limitation periods, the one-year time limit in paragraph 41(e) of the CHRA is discretionary, not mandatory;[53] therefore, it is not strictly enforceable. The time limit merely represents a signal to the Commission that Parlia-

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[50] See also *Motorways Direct*, *supra* note 6 at 218.

[51] *Cholmondeley* v. *Clinton* (1820), 37 E.R. 527 as cited in M.(K.) v. M.(H.), [1992] 3 S.C.R. 6 at 30.

[52] C.(A.G.), *supra* note 14 at 64.

[53] See *Bhadauria* v. *Toronto (City) Board of Education* (1987), 9 C.H.R.R. D/4501 (Ont. Bd. Inq.) at D/4505, wherein a similar comment was made in respect of the analogous time limit in the Ontario *Human Rights Code, 1981*, S.O. 1981, c. 53, paragraph 33(1)(d).

ment considered one year to be a reasonable time period beyond which the filing of a human rights complaint may be inappropriate. It is likely, then, that the Commission's lenient treatment of delayed complaints stems from its recognition that the time limit in paragraph 41(e) does not establish a fixed limitation period which, once expired, will automatically bar a complaint.

2. *The Uncertainty of First-Stage Decisions*

In *Merrick*,[54] MacKay J. made the following comments in respect of the preliminary nature of the Commission's first-stage decision:

> Moreover, the same characterization, i.e., speculation, is apt at this stage in considering the outcome of the Commission's decision to deal with Mr. Merrick's complaint. Whatever its ultimate decision may be, that decision may be subject to judicial review in due course.

This uncertain nature of first-stage decisions appears to provide the Commission with further justification for its lenient approach to late-filed complaints.

The liberal approach to regulating complaints at the gates to the CHRC process was recently articulated by Rothstein J. in *Canada Post*, wherein he stated the following:

> A decision by the Commission under section 41 is normally made at an early stage before any investigation is carried out. Because a decision not to deal with the complaint will summarily end a matter before the complaint is investigated, the Commission should only decide not to deal with a complaint at this stage in plain and obvious cases. The timely processing of complaints also supports such an approach. A lengthy analysis of a complaint at this stage is, at least to some extent, duplicative of the investigation yet to be carried out. A time consuming analysis will, where the Commission decides to deal with the complaint, delay the processing of the complaint. If it is not plain and obvious to the Commission that the complaint falls under one of the grounds for not dealing with it under section 41, the Commission should, with dispatch, proceed to deal with it.[55]

In view of this approach, the Commission's power to deal with a complaint under s. 41 of the CHRA is mandatory, unless it is plain and obvious to the Commission that the complaint should be dismissed.

Accordingly, the uncertain nature of a complaint's status at the first stage of the CHRC process may further explain why the Commission so frequently denies employers the benefit conferred upon them by paragraph 41(e) of the CHRA[56] As the Commission does not address the merits of complaints when rendering first-stage decisions, it may be loathe to dismiss late-filed complaints that could eventually be found to be meritorious.

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[54] *Supra* note 37 at 7.

[55] *Canada Post*, *supra* note 6 at 6.

[56] See also *Burnell*, *supra* note 36.

3. *The Nature of the CHRA Scheme*

The special, almost constitutional,[57] nature of human rights legislation has been recognised by the Supreme Court of Canada in a number of cases. In *Canadian National Railway*,[58] for example, Chief Justice of Canada Dickson stated the following:

> Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact.

In the interpretation of human rights provisions, substantial emphasis is placed on the remedial nature of the legislation and the rights which it seeks to protect.

Indeed, the objective of the CHRA is not to punish the discriminatory, but to prevent discrimination and provide relief for the victims.[59] The express purpose of the CHRA is encapsulated in s. 2. The provision states that the statute is intended to give effect to the principle that every individual should have an equal opportunity to achieve a life for himself or herself without being hindered by discriminatory practices.

It is also well recognised that human rights legislation in Canada has become a substantial influence in our law of employment. In this regard, the CHRA constitutes one of the most extensive protections of the individual employee against discrimination in the workplace.[60]

Not surprisingly, the Commission frequently exercises its discretion, pursuant to paragraph 41(e) of the CHRA, to extend the time for filing delayed human rights complaints. Such complaints are generally brought by employees who allege that their employers carried out discriminatory practices. If the Commission refuses to accept a late-filed complaint, it gives effect to the time limit in paragraph 41(e), which was designed to benefit employers. However, it is generally the employers who are the respondents to human rights complaints. Consequently, the dismissal of a complaint under paragraph 41(e) allows an allegedly discriminatory employer to take advantage of a benefit conferred upon it by the provision. In exercising its discretion under paragraph 41(e), then, the Commission may be manifesting its view that a beneficial act toward an allegedly discriminatory employer thwarts the remedial nature of the CHRA, which was devised to benefit and protect employees from discrimination.

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57 *O'Malley*, *supra* note 1 at 547.

58 *Ibid.* at 1134.

59 *Canadian National Railway Co.*, *supra* note 1; and *O'Malley*, *supra* note 1.

60 Labour Law Casebook Group, *supra* note 2 at 1002.

4. *Summary*

Although it confers a benefit on employers, the one year limit in paragraph 41(e) of the CHRA is neither fixed nor mandatory. Therefore, the Commission need not strictly enforce the limit. Furthermore, the merits of a complaint are not considered at a first-stage decision.[61] Thus, a peremptory dismissal of all late-filed complaints at this stage could be premature and defeat the remedial nature of the CHRA Additionally, the overall scheme of the CHRA was intended to benefit employees. As this legislation is "not quite constitutional but certainly more than the ordinary,"[62] it does not create a regulatory environment conducive to the conferral of a benefit on employers. Hence, in cases of late-filed complaints, when the internal disharmony between paragraph 41(e) and the other provisions of the CHRA becomes evident, it is not startling that employees' rights, as protected by the statute, generally win out over the singular benefit conferred upon employers under paragraph 41(e).

III. Inspection of the Guard: Judicial Review and the Court's Role in Influencing the Regulation of Late-Filed Complaints

As the preceding discussion reveals, the Commission—which regulates passage through the gates of the CHRC process—plays a vital role in determining which late-filed complaints can proceed to the second stage of the process, and which will summarily be dismissed. Nevertheless, it is not the Commission alone that has authority to administer the flow of complaints through the gates of the fortress: the Federal Court of Canada is a vigilant inspector that keeps a watchful eye on the procedures followed, and decisions made, by the Commission under paragraph 41(e) of the CHRA Complainants or employers who wish to challenge a decision of the Commission rendered under paragraph 41(e) may apply to the Court for judicial review of the impugned decision.[63]

However, whereas the Commission operates under a broad grant of discretion with few statutory fetters, the Court's reviewing powers are narrowly defined. When it reviews the Commission's decisions in regard to the time limit in paragraph 41(e), the Court's scope of review is limited by the strictures placed on its judicial review function. In particular, the Court's standard of review in such cases is confined to a narrow range, due to the combined effect of three influential factors: the judicial trend towards curial deference, the statutory grounds for judicial review, and the character of the Commission's decisions

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61 *Boone*, *supra* note 28 at 153.

62 *O'Malley*, *supra* note 1 at 547.

63 Paragraphs 18(1)(a) and (b) of the *Federal Court Act*, R.S.C. 1985, c. F-7, set out the Trial Division's jurisdiction to review decisions of the Commission.

under paragraph 41(e). Because of these forces, the Court's ability to restrict the flow of late-filed complaints through the gates of the CHRC process is virtually inconsequential.

A. Curial Deference and the Statutory Grounds for Review

Beginning in the 1970s and continuing into the mid-1980s, courts in Canada began to exhibit judicial deference towards administrative agencies. The metamorphosis from an interventionist approach to a deferential approach indicated that the courts were starting to acknowledge tribunals' accumulated traditions, practices, procedures, and expertise in areas of law with which the courts had little experience.[64]

According to Estey J., in *Skogman* v. *The Queen*,[65] judicial review essentially equates to jurisdictional surveillance by a superior court of statutory tribunals, with jurisdiction being given its narrow or technical sense. The court may also review for errors of law on the face of the record in the absence of a privative clause. However, even then, the error must assume a jurisdictional dimension. Jurisdictional errors are committed, *inter alia*, when the administrative tribunal is responsible for the following: exercising powers in such a way that its decision or order, in whole or in part, exceeds its lawful authority; unlawfully refusing to exercise powers which have been delegated to it; exercising powers without taking into account all relevant considerations; exercising powers after having taken irrelevant considerations into account; exercising powers in an arbitrary, capricious, or unreasonable manner; and exercising powers without abiding by the rules of natural justice or procedural fairness.[66] Thus, the courts defer to the decisions of expert tribunals in all matters that have no jurisdictional element.

While the Federal Court's powers of review in respect of the Commission's decisions are limited by judicial restrictions, the supervisory jurisdiction of the Court—as a creature of statute itself—is restricted to that set out in the Court's enabling legislation.[67] Subsection 18.1(4) of the *Federal Court Act* details the grounds for review in respect of which the Court will intervene in a decision of a statutory tribunal such as the Commission. That provision states:

> 18.1(4) The Trial Division may grant relief ... if it is satisfied that the federal board, commission or other tribunal

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64 *Re Ontario Public Service Employees Union and Forer et al.* (1985), 23 D.L.R. (4th) 97 (C.A.) at 111-114. Despite this period of curial deference, however, it has been suggested that the courts are, once again, exhibiting a tendency towards interventionism: See R.W. Macauley & J.L.H. Sprague, *Practice and Procedure Before Administrative Tribunals* (Scarborough, Ont.: Carswell, 1997) at 28-26 to 28-34.

65 [1984] 2 S.C.R. 93 at 99.

66 R. Macdonald, (1983) 43:2 at 311.

67 Macauley & Sprague, *supra* note 64 at 28-42.

> (*a*) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
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> (*b*) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
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> (*c*) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
>
> (*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
>
> (*e*) acted, or failed to act, by reason of fraud or perjured evidence; or
>
> (*f*) acted in any other way that was contrary to law.

This provision explicitly articulates the standards to which the Court must adhere when embarking upon a judicial review of the Commission's decisions regarding late-filed complaints.

The Court has made it clear that the judicial review remedies available under s. 18.1 of the *Federal Court Act* are to be meted out with curial deference.[68] Moreover, a functional and pragmatic approach should be used in determining the degree of deference owed to a particular tribunal. On judicial review, the Court should accord specialised tribunals "considerable" or "significant" deference when they have acted squarely within their areas of expertise. In those cases, the Court should interfere only if the tribunal acted outside the scope of its mandate, such that its conclusions cannot be sustained on any reasonable interpretation of the facts or the law. The Court does not have the power to render the decision that the federal tribunal ought to have given; it can only quash the decision and refer the matter back to the tribunal with directions.[69]

It is clear that a measure of curial deference is owed to decisions of the Commission. In this regard, Justice Nadon, in *Slattery* v. *Canada (Human Rights Commission)*,[70] commented as follows:

> [I]n the spirit of the Supreme Court of Canada in *Mossop*, deference must prevail over interventionism insofar as the CHRC deals with matters of fact-finding and adjudication, particularly with respect to matters over which the CHRC has been vested with such wide discretion, as in the case of the decision whether or not to dismiss a complaint pursuant to subparagraph 44(3).

The same degree of substantial deference should be applied by the Court when reviewing decisions of the Commission under paragraph 41(e) of the CHRA, as

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[68] *Sivasamboo* v. *Canada (Minister of Citizenship and Immigration)* (1995), 87 F.T.R. 46 (T.D.) [hereinafter *Sivasamboo*]. See also Macauley & Sprague, *supra* note 64 at 28-42.3, who have observed that the express recitation of the grounds in s. 18.1 of the *Federal Court Act* has apparently had no impact on the degree of curial deference demonstrated on judicial reviews.

[69] *Sivasamboo*, *supra* note 67.

[70] (1994), 73 F.T.R. 161 (T.D.).

such administrative determinations fall squarely within the competence and discretion of the Commission.[71]

Accordingly, the prevalence of judicial deference and the compartmentalised grounds for judicial review restrain the Court when fulfilling its mandate of overseeing federally-constituted administrative tribunals. When reviewing the Commission's decisions under paragraph 41(e) of the CHRA, the Court clearly operates only within certain circumscribed parameters. As a result of this limited scope of review, few late-filed human rights complaints that have passed through the gates of the CHRC process are subsequently excluded by the Court when it functions in its review capacity as inspector of the gatekeeper's decisions.

B. Judicial Review of Administrative and Discretionary Decisions

When determining whether or not it should deal with a late-filed complaint under paragraph 41(e) of the CHRA, the Commission renders a decision which is administrative, not judicial or *quasi*-judicial, in nature.[72] It is trite law that tribunals exercising administrative functions have a duty to comply with the rules of procedural fairness.[73] The duty of fairness applies to all parties to a proceeding, and it is axiomatic that all parties must be treated equally.[74] Therefore, when dealing with late-filed complaints under paragraph 41(e), the Commission has a duty to accord procedural fairness.[75]

Additionally, as stated above, it is well settled that the Commission is granted a broad discretion to decide whether or not to extend the time for filing complaints under paragraph 41(e).[76] In general, the law holds that a court should not interfere with an administrative tribunal's exercise of discretion where it has been exercised in good faith, in accordance with the principles of natural justice, and without placing reliance upon considerations irrelevant or extraneous to the statutory purpose.[77] Indeed, a court of superior jurisdiction should be most reluctant to intervene in the exercise of a discretion by an inferior tribunal.[78]

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71 *Burnell*, *supra* note 36 at 21; and *Canada Post*, *supra* note 6.

72 *Merrick*, *supra* note 37 at 5; and *Bernard*, *supra* note 37. See also *Burnell*, *supra* note 36.

73 *Nicholson* v. *Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311 [hereinafter *Nicholson*].

74 *Motorways Direct*, *supra* note 6 at 217–218.

75 *Boone*, *supra* note 28.

76 *Intermediate Terminals*, *supra* note 36 at 66–67.

77 *Merrick*, *supra* note 37 at 6; and *Maple Lodge Farms Ltd.* v. *Government of Canada*, [1982] 2 S.C.R. 2 at 7–8.

78 *Intermediate Terminals*, *supra* note 36 at 67.

In *Merrick*,[79] MacKay J. discussed the appropriate standard to be applied by the Court when reviewing decisions of the Commission under paragraph 41(e) of the CHRA He referred to the bounds of the Commission's discretion, as articulated by Jerome A.C.J. in *Lukian* v. *Canadian National Railway Co.*:

> Generally, when courts are called upon to review the exercise of an administrative tribunal's discretionary power, they will be reluctant to interfere since tribunals, by virtue of their training, experience, knowledge and expertise, are better suited than the judiciary to exercise those powers. Provided the Commission's decision is within the discretion given to it, the court will not interfere with the manner in which it was exercised, unless it can be shown the discretion was exercised contrary to law. What the law requires is the Commission to consider each individual case before it, to act in good faith, to have regard to all relevant considerations and not be swayed by irrelevant ones, and to refrain from acting for a purpose contrary to the spirit of its enabling legislation or in an arbitrary or capricious manner.[80]

As the Commission's determination under s. 41 is set forth in subjective terms, the scope for review of a decision under that provision is narrow.[81]

The Court should only interfere with the manner in which the Commission's discretion was exercised where it is shown that the Commission erred in law or acted unreasonably.[82] In particular, the Court has been restricted, and has appropriately restricted itself, to reviewing first-stage decisions under paragraph 41(e) on three main bases: breach of the rules of procedural fairness, the Commission's failure to exercise its discretion, and lack of a reasonable basis for the Commission's decision.

1. *Breach of the Rules of Procedural Fairness*

According to paragraph 18.1(4)(b) of the *Federal Court Act*, the Court may review the Commission's decision under paragraph 41(e) of the CHRA on the basis of procedural error. A procedural error involves a failure by the Commission to follow proper procedure at any stage of the CHRC process. The content of the duty of fairness depends upon the stage at which the alleged error occurred. At any time before a Tribunal is appointed to hear a complaint, the procedure followed by the Commission must accord with the rules of procedural fairness.[83] These require, at a minimum, that the tribunal comply with the *audi alteram partem* rule and afford all interested parties a right to be heard by an im-

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[79] *Supra* note 37 at 6.

[80] (1994), 80 F.T.R. 38 at 40.

[81] *Canada Post*, *supra* note 6.

[82] *Merrick*, *supra* note 37 at 6.

[83] In contrast, a hearing before a Tribunal takes the form of an adversarial proceeding. Therefore, Tribunals must follow the principles of natural justice. The content of a hearing before a Tribunal is considerably more onerous than it is at the first and second stages of the CHRC process: See subs. 50(1) of the CHRA; and Zinn & Brethour, *supra* note 9 at 18–8 to 18–9.

partial decision-maker.[84] However, the Commission is not required to observe the entire panoply of the principles of natural justice.[85]

Accordingly, when assessing the Commission's decisions under paragraph 41(e),[86] the Court's scope of review for procedural error is extremely narrow: the Commission will have met the standards expected of it simply by satisfying the rules of procedural fairness.[87] In the context of screening late-filed complaints, the content of the hearing requirement includes the respondent's right to receive notice of the complaint against him, and to respond to the complaint in writing.[88]

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84 *Nicholson*, *supra* note 73.

85 Zinn & Brethour, *supra* note 9 at 18–8.

86 At a second-stage decision, the rules of procedural fairness also apply. Subsection 44(3) of the CHRA confers on the Commission a very broad discretion to either dismiss a complaint or refer it to a Tribunal. Such a determination is part of the investigatory or administrative phase of the CHRC process, and need not be made on a judicial or *quasi*-judicial basis; therefore, the Commission does not have to follow the formal rules of natural justice: *Miller* v. *Canadian Human Rights Commission* (1996), 112 F.T.R. 195. In rendering decisions under subs. 44(3), the Commission has a duty to inform the parties of the substance of the evidence that was obtained by the investigator and subsequently put before the Commission. The parties must also be given the opportunity to respond to this evidence and make all relevant representations: *Syndicat*, *supra* note 38 at 899–902. The Commission is not required to make available to a complainant the entire contents of the investigator's files; rather, a fair summary of the relevant evidence, witnesses' statements, and investigator's notes is sufficient: *Whiteman* v. *Canada (Canadian Human Rights Commission)*, [1987] 3 F.C. D-34 (F.C.A.).

87 *Merrick*, *supra* note 37; and *Bernard*, *supra* note 37.

88 Zinn & Brethour, *supra* note 9 at 18-8. It has also been suggested that the Commission may breach the rules of procedural fairness, by its laches and post-complaint delay, where the delay is unreasonable, and the untimely processing of the complaint has prejudiced an employer: See *Boone*, *supra* note 28 at 153; and *Motorways Direct*, *supra* note 6. However, it is unlikely that the doctrine of laches would continue to apply in the same context today. According to *Lindsay Petroleum Co.* v. *Hurd* (1874), L.R. 5 P.C. 221 at 239–240, delays and lapse of time are material where, in view of a *party's* conduct, it is practically unjust to give a remedy. In *M.(K.)* v. *M.(H.)*, *supra* note 51, La Forest J. confirmed that laches provides a defence to a claim in equity where a party delays in the institution or prosecution of his case. In both *Motorways Direct* and *Boone*, the Commission was a respondent to the judicial review application, and was granted limited standing to participate in the proceedings. Following the decision in *Canada (Human Rights Commission)* v. *Bernard*, [1994] 2 F.C. 447 (C.A.), the Commission is no longer a proper party to an application for judicial review of its own decision, and may only participate in the proceedings as an intervenor. As the doctrine of laches apparently operates on the basis of a party's delay, it would no longer be appropriate to assert that the Commission breaches its duty of fairness by way of laches and post-complaint delay. Presumably, the Commission's post-complaint delay can still be reviewed for procedural error simply on the basis of extreme delay, not the doctrine of laches.

Continuing delay on the part of the complainant, though, may form the basis for an application of the defence of laches, as the complainant is a party to the proceedings. In *Canada (Canadian Human Rights Commission)* v. *Canadian Broadcasting Corporation (re Vermette)*

i. Providing an Opportunity to be Heard

In *Boone*,[89] Justice Teitelbaum considered the content of the duty of fairness in respect of Commission decisions under paragraph 41(e) of the CHRA In regard to the requirement to hold a fair hearing, Teitelbaum J. stated the following:

> [I]f the complaint i[s] filed more than a year after the incident complained of occurred, then the Commission, before proceeding with the complaint, must hold a "hearing" and with the discretion afforded to it, may decide to continue to investigate the complaint.
>
> In order for the Commission to make such a decision, it must allow the "employer" to make submissions as to why the Commission should not continue with the investigation. That is, procedural fairness requires the Commission to consider the submissions. After this is done, the Commission, considering all the evidence put before it, decides that it is in its discretion whether or not to allow the investigation to continue.

The hearing to which Teitelbaum J. referred is merely one which is conducted by way of written submissions tendered by the parties, as the CHRA does not provide for an oral hearing in the case of an investigation.[90]

Accordingly, when making a first-stage decision under paragraph 41(e), the Commission abides by the rules of procedural fairness when it carries out the following procedures: it provides the employer with a copy of the complaint form, a summary of the allegations, and a copy of the Report Prior to Investigation containing the reasons why the delay in filing occurred; it affords all parties the opportunity to file written submissions in response to the investigator's report; and it considers these comments, along with the report, when arriving at its decision.[91] The Commission is not required to provide the employer with the entire contents of the documents; it is sufficient if the employer is provided with

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(1994), 94 C.L.L.C. 17,034 (C.H.R.T.), aff'g [1996] 120 F.T.R. 81 (T.D.) [hereinafter *Vermette*], the doctrine of laches was applied in respect of the complainant's pre-complaint delay. The Tribunal held that it was required to balance the degree of diligence that might reasonably be expected from the complainant, against the extent of the prejudice experienced by the employer in regard to its ability to mount a full answer and defence to the complaint. However, historically, the doctrine of laches provided a limitation defence for those equitable claims to which the statutes of limitations did not apply: *M.(K.)* v. *M.(H.)*, *supra* note 51. If that principle continues to operate, the doctrine of laches would only be applicable to a complainant's *post-complaint* delay, as its *pre-complaint* delay is governed by the statutory time limit in paragraph 41(e) of the CHRA.

89 *Supra* note 28 at 158.

90 *Ibid.* at 154-155; and *Mercier* v. *Canada (Canadian Human Rights Commission)* (1991), 51 F.T.R. 205 (T.D.) at 213.

91 *Merrick*, *supra* note 37 at 8; and *Boone*, *supra* note 28 at 155.

the substance, and not all of the details, of the relevant facts before the Commission.[92]

In dismissing a late-filed complaint on the basis of non-compliance with the time limit in paragraph 41(e), the Commission breaches a principle of procedural fairness where it fails to consider, or does not have before it, the submissions of the complainant which address that specific issue. To solicit the representations of a party and, subsequently, to fail to consider them, renders hollow the hallowed principle of the right to be heard.[93]

ii. Following its Internal Guidelines

The Commission breaches the rules of procedural fairness under paragraph 41(e) of the CHRA when it fails to follow its own internal guidelines.[94] However, if the record supports the assertion that the Commission did comply with, and did not ignore, its own policies regarding late-filed complaints, the Commission will have met the duty of fairness. Compliance with its internal guidelines can be determined by reference to the Report Prior to Investigation, which may discuss factors delineated in the Commission's own guidelines.[95]

iii. Providing Reasons

It is not a common law requisite that an administrative tribunal provide reasons for its decision, in the absence of a legal provision so requiring. The only question that can arise in the absence of written reasons is whether the decision reached can be rationally supported, or whether it is perverse. Therefore, a mere deficiency in the Commission's decision is not sufficient grounds for judicial review on the basis of procedural error.[96]

Where the Commission permits a late-filed complaint to gain entry into the CHRC process, pursuant to paragraph 41(e), it need not provide written reasons. Rather, it can be inferred that it is the Report Prior to Investigation which formed the basis of the Commission's decision.[97] The Commission need only provide written reasons when it decides not to deal with a complaint, as required by s. 42(1) of the CHRA[98]

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92 *Boone, ibid.* See also *Motorways Direct, supra* note 6.

93 *Tiedeman* v. *Canadian Human Rights Commission et al.* (1991), 66 F.T.R. 15.

94 *Merrick, supra* note 37; and *Boone, supra* note 28.

95 *Ibid.*

96 *Canadian Human Rights Commission* v. *Canada* (1995), 192 N.R. 125 (F.C.A.), at 128, aff'g (1994), 76 F.T.R. 265 (T.D.).

97 *Canada Post, supra* note 6 at 11; and *Syndicat, supra* note 38 at 902.

98 *Canada Post, ibid.* at 11. See however *Tsai* v. *Human Rights Commission (Can.)* (1988), 91 N.R. 374 (F.C.A.), leave to appeal to the Supreme Court of Canada refused (1989), 101 N.R. 157 (S.C.C.), where the Commission simply decided that it would not deal with the com-

iv. Summary

The Commission must meet certain minimum criteria so as to comply with the content of the duty of fairness that governs its decisions under paragraph 41(e) of the CHRA Provided it complies with the requirements of the right to be heard, adheres to its own internal guidelines, and provides written reasons in cases where it dismisses a late-filed complaint, the Commission will have satisfied the requirements of procedural fairness in respect of its first-stage decisions. If the Commission fulfils these rudimentary standards, its decision to accept or reject a late-filed complaint cannot be overturned by the Court on the basis of procedural error.

2. *Failure to Exercise its Discretion*

Pursuant to paragraph 18.1(4)(a) of the *Federal Court Act*, the Court may grant relief, on judicial review, where the Commission has failed to exercise the discretion afforded it under paragraph 41(e) of the CHRA In *C.(A.G.)*,[99] Muldoon J. was required to determine whether the Commission had demonstrated an exercise of its statutory discretion to undertake consideration of a late-filed complaint.[100] He noted that exercise of the discretion was not evinced in the Commission's letter of notification to the employer. More importantly, however, the Commission's resolution did not show why the Commission would consider such a marked departure from the prescribed one year time limit in paragraph 41(e). On the basis of the record, therefore, Muldoon J. determined that the

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plaint "because it [was] based on acts which occurred more than one year before the filing of the complaint". According to Heald J.A., the Commission had probably complied, in a formal manner, with subs. 42(1) [then subs. 34(1)] of the CHRA Madame Justice Desjardins, dissenting, took a different view. She recognised that the Commission had, in its written notice, referred to the arguments of the employer, upon which the decision to refuse the complaint had been based. However, she felt that formal compliance with subs. 34(1) required the Commission, in its decision, to also review the reasons given on behalf of the complainant in support of the extension of time. According to Desjardins J.A., the Commission should explain in its reasons why the circumstances of the case were not such as to justify the extension of time for filing the complaint.

[99] *Supra* note 14.

[100] While the impugned decision in this case was rendered at the second stage of the CHRC process, pursuant to subs. 44(3) of the CHRA, paragraph 41(e) was nevertheless engaged. The complainant, Mary Pitawanakwat, filed a complaint with the Commission, alleging discrimination in her employment. The Commission decided not to deal with the complaint, pursuant to subparagraph 33(b)(i) [now paragraph 41(1)(b)] on the basis that the matter had more appropriately been dealt with in another legal forum. The complainant challenged the Commission's decision in this regard, and the Federal Court of Appeal ruled that the Commission had to proceed with an investigation into the complaint: *Pitawanakwat* v. *Canadian Human Rights Commission*, [1988] 1 F.C. D-6 (C.A.), leave to appeal to the Supreme Court of Canada refused (1988), 86 N.R. 265 (S.C.C.). Therefore, the Commission was not called upon to fulfil its screening role under s. 41 of the CHRA, as the Court's order had the effect of automatically advancing the complaint to the second stage of the CHRC process.

Commission wilfully ignored, or was oblivious to, the fact that the complaint was out of time.

Muldoon J. concluded that the Commission acted in a manner largely inconsistent with its statutory imperatives when it decided to refer the complaint to a Tribunal. The Commission deprived the employer of the benefit of the one-year limit by extending the time for filing a complaint, without seeming to know what it was doing, and without giving a "scintilla of signal" that it was exercising its discretion under paragraph 41(e) of the CHRA By disregarding the complaint's lateness the Commission failed to recognise the need to exercise its discretion under paragraph 41(e). Hence, Justice Muldoon held that the Commission, in failing to have regard to its discretion to extend the time for filing a complaint under paragraph 41(e), had not assumed jurisdiction to deal with the complaint under subparagraph 44(3)(a)(i) of the CHRA It had therefore committed an error of law.

Accordingly, where it deliberately deprives an employer of the statutory benefit conferred by paragraph 41(e), the Commission is obliged to evince consciousness of the exertion of its power to extend the time for filing a human rights complaint. A failure to do so results in a loss of jurisdiction. It is insufficient for the Commission to merely discuss its jurisdiction—the Commission must actually exercise its jurisdiction. Moreover, an exercise of the Commission's discretion must be distinguished from the expression of reasons explicating why the discretion was evoked.[101]

3. *Unreasonable or Improper Exercise of Discretion*

When reviewing decisions made under paragraph 41(e) of the CHRA, the Court may grant a remedy, pursuant to paragraph 18.1(4)(c) of the *Federal Court Act*, where the Commission has committed an error of law. While the Commission has the discretion to extend the time for filing a human rights complaint, it must exercise its discretion based on probative grounds.[102] Before an employer may be deprived of the benefit conferred upon it by paragraph 41(e), there must be some reasonable justification or reasonable basis for the deprivation.[103] Where the complainant is not responsible for her delay in filing the complaint, a good reason is shown for the late filing, and no serious prejudice is caused to the employer, the Commission should not be prevented from allowing the complaint to gain entry into the CHRC process.[104]

In an application for judicial review, the Court cannot inquire into the correctness of the Commission's decision; it may only ensure that the Commission

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[101] *C.(A.G.)*, *supra* note 14.

[102] *Boone*, *supra* note 28 at 156.

[103] *Motorways Direct*, *supra* note 6.

[104] *Intermediate Terminals*, *supra* note 36 at 76.

did not render the impugned decision in an unreasonable manner by placing reliance upon considerations irrelevant or extraneous to the statutory purpose of the provision.[105] This accords with relevant jurisprudence, which holds that an administrative tribunal cannot exercise its discretion unreasonably.[106] Where the Commission's decision can be reasonably supported on the basis of the recommendation contained in the Report Prior to Investigation, the submissions of the parties, and all other material before the Commission, it may be concluded that the Commission exercised its discretion on proper principles, having regard to the correct facts and relevant circumstances.[107] In such a case, the Court is precluded from interfering with the Commission's decision to dismiss or deal with the late-filed complaint.

In *Tsai*,[108] a complainant sought judicial review of the Commission's decision to dismiss his late-filed complaint pursuant to paragraph 41(e) [then subparagraph 33(b)(iv)] of the CHRA The complainant asserted that the Commission erred in failing to exercise the discretion given to it, pursuant to paragraph 41(e), as the Commission did not fully consider the circumstances surrounding the case.

According to Heald J.A., speaking for a majority of the Federal Court of Appeal, the Commission had before it, when it made its decision, various reports and letters, some of which referred to the complainant's alleged health problems and his assertion that illness was the reason for his delay in filing his complaint. Justice Heald stated that the material that was before the Commission disclosed at least four reasons for refusing to accede to the complainant's request for an extension of time. These were summarised by the Court as follows:

> (*a*) the applicant had not provided reasonable grounds to believe that he had been treated differently and dismissed because of his national or ethnic origin ... ;
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> (*b*) any delay in filing was not caused by the Commission;
>
> (*c*) the applicant had already been given two opportunities to have his complaint addressed; and
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> (*d*) this [was] an individual complaint and the public interest [was] not engaged in any way.[109]

As the Commission's decision specifically referred to these reasons and the materials that were placed before it, including those which detailed the complain-

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105 *Merrick*, *supra* note 37 at 6; and *Maple Lodge Farms Ltd.* v. *Government of Canada*, *supra* note 77 at 7.

106 *Pinto* v. *Minister of Employment and Immigration et al.* (1991), 39 F.T.R. 273 (T.D.).

107 *Boone*, *supra* note 28 at 157.

108 *Supra* note 98.

109 *Ibid.*, at 377.

ant's medical problems, it was clear to Justice Heald that the Commission had properly exercised the discretion available to it under paragraph 41(e). Consequently, the application for judicial review was dismissed.

The decision in *Tsai*[110] reveals a non-interventionist approach to the review of the Commission's decision under paragraph 41(e). The Court merely assessed whether the Commission's decision had been rendered on reasonable grounds. It did not delve into the evidence before the Commission in order to ascertain if the Commission's decision had been correct. Indeed, the reasons for the Commission's refusal of the late-filed complaint may not, in fact, justify the decision reached in that case.

When rendering a decision under paragraph 41(e) of the CHRA, the Commission is required to take into account the reasons for the complainant's delay in filing the complaint.[111] In fact, where reasonable, institutional delay is an acceptable ground for delay in filing a complaint.[112] Additionally, pursuant to the Commission's internal guidelines, the public interest is a factor to be considered when rendering a decision under paragraph 41(e). Hence, the second and fourth reasons to which Heald J.A. referred in *Tsai* could probably support the Commission's decision to dismiss the late-filed complaint.

However, it is less clear that the complainant's lack of reasonable grounds for discrimination—the first of the reasons enumerated by Justice Heald—could properly be considered by the Commission when deciding to dismiss the late-filed complaint. The Commission's role as gatekeeper to the CHRC process does not entail or require an inquiry into the merits of the complaint before it.[113] Therefore, the grounds for the alleged discriminatory practice should be of no relevance to a decision under paragraph 41(e).

Additionally, in *Tsai*, the complainant's exhaustion of other avenues of redress was cited as a reason why the late-filed complaint should be dismissed. Yet, paragraph 41(a) of the CHRA requires the Commission to deal with a complaint unless it appears that the complainant ought to exhaust grievance or review procedures otherwise reasonably available. The CHRA contemplates that a complaint normally will not be entertained until other redress mechanisms have been exhausted.[114] However, the Commission cannot shirk its duty just because another enquiry has already rendered a decision on the same matter.[115] Perhaps Justice Heald was merely cognisant of the Report Prior to Inves-

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[110] *Supra* note 98.

[111] *Intermediate Terminals*, *supra* note 36 at 66–67.

[112] *Boone*, *supra* note 28 at 158; and *Motorways Direct*, *supra* note 6.

[113] *Boone*, *supra* note 6 at 153.

[114] *Chopra* v. *Canada (Treasury Board)* (1996), 100 F.T.R. 226 (T.D.) at 230.

[115] C.(A.G.), *supra* note 14 at 54.

tigation, which indicated that additional proceedings in the same matter would cause prejudice to the employer. In that case, it would be the element of prejudice, and not the exhaustion of other redress mechanisms, that would provide justification for the Commission's decision to dismiss the late-filed complaint.

As the reasons for the Commission's decision in *Tsai* are somewhat questionable, there is a possibility that the decision could have been found by the Court to be incorrect. However, as the Court was limited to a narrow scope of judicial review, a reasonable basis for the impugned decision was sufficient to uphold the Commission's determination under paragraph 41(e) of the CHRA Indeed, as stated by MacKay J. in *Bernard*,[116] it is not for the Court to speculate on the Commission's reasons.

Similarly, in *Merrick*,[117] it was clear from the record that the Commission exercised its discretion under paragraph 41(e), and based its decision on the material before it. According to MacKay J., the Commission made the decision having regard to the presumed prejudice to the employer as a result of late filing, and the complainant's denial of that prejudice. There was no evidence before the Commission of actual prejudice to the employer, nor was there evidence in regard to the public interest. Justice MacKay was not persuaded that the Commission's decision was unreasonable or without reason in the circumstances of the case. As there had been reasons for the Commission to reject the investigator's recommendation, and accept the late-filed complaint, the Court did not interfere with the decision under review.

As the foregoing cases demonstrate, the Court does not inquire into the Commission's exercise of discretion under paragraph 41(e) of the CHRA Provided that there was a reasonable basis upon which the Commission could have rendered the impugned decision, the Court will dismiss the application for judicial review.

4. *Summary*

The Court is clearly restricted in the degree to which it can interfere with the Commission's decisions regarding late-filed complaints. There are various forces which serve to constrict the Court's scope of review of Commission decisions under paragraph 41(e) of the CHRA These include the following: curial deference; the statutory grounds for review by the Court; and the administrative and discretionary character of the Commission's first-stage determinations. Consequently, as inspector of the guard, the Court can do little to modify or influence the lenient approach that the Commission has taken in allowing late-filed complaints to pass through the gates to the fortress of the CHRC process.

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[116] *Supra* note 37.

[117] *Supra* note 37.

IV. COURT & COMMISSION POWERS: ADDITIONAL FORCES

AS THE PRECEDING discussion illustrates, the standards which govern the Commission's first-stage decisions under paragraph 41(e) of the CHRA do little to ensure that employers can reap the benefit of the statutory time limit established under the provision. Moreover, the Court's circumscribed powers on judicial review have minimal impact on the influx of late-filed complaints entering the CHRC process. Nevertheless, some recent developments in the law suggest that additional forces may exist to supplement the first-stage screening mechanisms that presently defend the fortress of the CHRC process against stale complaints.

A. Limits Imposed by Subsection 44(3)

It is well established that the Commission has the power, by virtue of subparagraphs 44(3)(a)(ii) and (b)(ii) of the CHRA, to take into account the one year time limit in paragraph 41(e) when rendering a second-stage decision. For example, in *C.(A.G.)*,[118] the impugned decision was made at the second stage of the CHRC process, under subs. 44(3). Nevertheless, as Justice Muldoon noted, paragraph 41(e) was engaged. As noted above,[119] the Commission had decided not to deal with the complaint, pursuant to subparagraph 33(b)(i) [now paragraph 41(1)(b)] of the CHRA Ultimately, however, the Commission was ordered to accept the complaint and carry out an investigation. Therefore, the Commission was deprived of the first-stage opportunity to screen the complaint under paragraph 41(e).

Additionally, in *Canada (A.G.)* v. *Liu et al.*,[120] the Commission decided to exercise its discretionary power, under paragraph 41(e), to extend the time limit within which a delayed complaint could be filed. Subsequently, in its second-stage decision, the Commission decided, pursuant to paragraph 44(3)(a) and s. 49 of the CHRA, to request that a Tribunal inquire into the complaint. The employer applied for judicial review on the grounds, *inter alia*, that the Commission erred in law and exceeded its jurisdiction under paragraph 41(e). Justice Richard noted, however, that the Commission's first-stage decision was not the subject of the judicial review before him. Moreover, no judicial review application had been filed in regard to that decision. Hence, in the view of Richard J., the employer could not seek, by an order to quash the Commission's second-stage decision under paragraph 44(3)(a), to launch a collateral attack on the first-stage decision extending the time for filing a complaint under paragraph 41(e).

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[118] *Supra* note 14.

[119] See *supra* note 100.

[120] (1994), 86 F.T.R. 235 (T.D.) [hereinafter *Liu*].

At first blush, it may appear that the two decisions in *C.(A.G.)* and *Liu* conflict. However, careful analysis reveals that the decisions are, in fact, compatible. In *Liu*, paragraph 41(e) of the CHRA was not engaged in the Commission's second-stage decision to refer the complaint to a Tribunal. The Commission had already exercised its discretion under that provision, and accepted the late-filed complaint into the CHRC process. Moreover, the Commission, in its second-stage decision, made no reference to the time limit in paragraph 41(e). This suggests that new evidence had not come to light, during the second-stage investigation, such that the Commission would be obliged to dismiss a late-filed complaint with which it had previously decided to deal. Thus, Justice Richard was justified in holding that the employer could not seek to challenge the Commission's first-stage decision in a judicial review of a second-stage determination.

In contrast, the circumstances in *C.(A.G.)* were much different. In that case, the Commission had been required, by a Court order, to investigate the complaint in question. Therefore, the Commission's discretion had not yet been exercised, and no decision had yet been rendered, in respect of the time limit in paragraph 41(e). As the Commission members had never turned their minds to the issue of the lateness of the complaint, Justice Muldoon found that the Commission had completely failed to exercise its discretion under paragraph 41(e). The provision was engaged at the second stage of the CHRC process because the Commission had not earlier ascertained whether or not its discretion should be exercised in favour of allowing the late-filed complaint to proceed. Thus, unlike *Liu*, this was not a case where the employer sought to challenge the Commission's first-stage determination in a judicial review of a subsequent decision—no first-stage decision in regard to the time limit had been made.

In view of these two cases, it appears that paragraph 41(e) of the CHRA becomes relevant to a second-stage decision in one of two instances: where the Court refers the complaint to the second-stage, thereby depriving the Commission of the first-stage opportunity to screen the late-filed complaint at the gateway to the CHRC process; or where new evidence is produced in an investigation which would lead the Commission to decide to dismiss a complaint which had previously been accepted. The Commission would not have, and would not require, the jurisdiction to extend the time for filing a complaint under subparagraph 44(3)(a)(ii) where it has already extended the time limit and accepted the late-filed complaint. However, if the investigation reveals new evidence suggesting that the time limit should not have been extended—perhaps because of latent prejudice to the employer—the Commission can apparently decide to dismiss a late-filed complaint at the second stage of the CHRC process.

Thus, the entry of late-filed complaints into the CHRC process may be regulated by the Commission at a later stage in the proceedings, beyond the initial screening phase. The additional power afforded the Commission under subs. 44(3) of the CHRA may, to a limited extent, help to impede the progres-

sion of late-filed complaints that have not undergone scrutiny by the Commission or its reviewing Court in regard to a first-stage decision under paragraph 41(e).

B. Limits Under Subsection 49(1)

In *C.(A.G.)*,[121] the Court held that the Commission had improperly assumed jurisdiction to deal with a complaint pursuant to subparagraph 44(3)(a)(i) of the CHRA However, that did not foreclose the Commission's ability to deal with the complaint, as it could invoke subs. 49(1). That provision reads as follows:

> 49. (1) The Commission may, at any stage after the filing of a complaint, request the President of a Human Rights Tribunal Panel to appoint a Human Rights Tribunal, in this Part referred to as a "Tribunal", to inquire into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted.

By virtue of this provision, the Commission may ask a Tribunal to inquire into a complaint even if it has not scrutinised the complaint at the first or second stages of the CHRC process.

According to Justice Muldoon in *C.(A.G.)*, the stage at which the Commission can obtain a Tribunal inquiry under subs. 49(1) is free of most statutory fetters: the Commission may appoint a Tribunal at any stage of the proceedings after a complaint has been filed. Nevertheless, Muldoon J. held that the statutory fetter residing in paragraph 41(e) of the CHRA continues to operate in respect of decisions rendered under subs. 49(1). As subs. 49(1) makes no reference to the discretion conferred in paragraph 41(e), Justice Muldoon read into the provision the additional discretion to consider whether or not to dismiss a complaint on the basis of the expiration of the one year statutory time limit. While the Commission, as an administrative agency, only has those powers which are specifically conferred upon it in its enabling legislation,[122] subs. 49(1) does require the Commission to be satisfied that, "having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted." This phrase may encompass the Commission's authority to consider the prescribed one-year time limit in paragraph 41(e) when rendering decisions at any stage of the CHRC process.

Consequently, if the Commission decides to invoke subs. 49(1) of the CHRA any time after a complaint has been filed, the time limit under paragraph 41(e) may become relevant. It appears from Justice Muldoon's decision in *C.(A.G.)*,[123] though, that the invocation of the discretion in paragraph 41(e)

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[121] *Supra* note 14.

[122] Macauley & Sprague, *supra* note 64 at 28–42.

[123] *Supra* note 14.

will only be necessary if the Commission, in failing to follow the normal two-stage procedure leading to a Tribunal inquiry, has not been required to consider the statutory time limit. It is only where the Commission has failed to exercise its discretion at the first-stage of the CHRC process—under paragraph 41(e)—or at the second-stage of the process—under subs. 44(3) and paragraph 41(e)—that the Commission should have to resort to its residual power in subs. 49(1) to consider the one year time limit in paragraph 41(e). Nevertheless, the Commission's ability to have regard to the statutory time limit when referring complaints to a Tribunal, pursuant to subs. 49(1), provides the CHRC process with an added layer of defence against the surge of complainants attempting to file complaints after the expiry of the prescribed time limit.

C. The Possible Role of the Tribunal in Considering Late-Filed Complaints

In *Vermette* v. *Canadian Broadcasting Corporation*,[124] a Tribunal considered its jurisdiction to review a decision of the Commission rendered under paragraph 41(e) of the CHRA The Tribunal recognised that it did not have the power to quash a decision of the Commission where, in the exercise of its discretion under paragraph 41(e), it decided to deal with a late-filed complaint. The Tribunal recognised that only the Court has the power to quash decisions of the Commission. However, the Tribunal stated that it was not precluded from determining, based on the evidence before it, whether an employer should be deprived of the benefit conferred upon it by the time limit in paragraph 41(e). In the result, the Tribunal concluded that it had the jurisdiction to dismiss a late-filed complaint which the Commission had previously allowed to proceed through the CHRC process. Clearly, if the Tribunal's decision in this regard ultimately receives the Court's endorsement, it will provide the CHRC process with an additional means of stemming the inflow of late-filed complaints.

On judicial review of the Tribunal's decision, Justice Muldoon dismissed the Commission's application, as there was a clear and adequate alternative remedy. Nevertheless, he went on to address the Tribunal's finding that it had the jurisdiction to determine whether late-filed complaints, which have already been accepted into the CHRC process, could be dismissed by a Tribunal pursuant to paragraph 41(e).

Justice Muldoon began by considering the nature of the Commission's power under paragraph 41(e) of the CHRA He concluded that this power was neither substantive nor ultimate when compared with a Tribunal's ability to conduct a full hearing under paragraph 50(2)(a). He then noted that a Tribunal fulfils an adjudicative function, while the Commission's role is merely procedural. As Muldoon J. explained, the Commission filters worthless complaints,

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[124] *Supra* note 88.

and has virtually no influence on the substantive rights of the parties. Therefore, Justice Muldoon held that the power to adjudicate on parties' substantive rights should lawfully reside in the Tribunal, even if that means varying the Commission's first- or second-stage procedural decisions.

Justice Muldoon went on to assert that paragraph 41(e) of the CHRA confers a substantive right on employers and other persons against whom complaints are made. In support of this contention, Muldoon J. relied on the recent decision of the Supreme Court of Canada in *Tolofson* v. *Jensen*.[125] In that case, La Forest J. noted that legislation, including the statute of limitations, should only be categorised as procedural where the question is beyond doubt. Otherwise, it should be categorised as substantive. Justice La Forest also explicated that the statute of limitations destroys substantive rights, and does not merely remove the plaintiff's remedy. Finally, La Forest J. referred to relevant jurisprudence that holds that the termination of a limitation period vests in the defendant an accrued right to plead a time bar. As a limitation period is a valid defence to a cause of action, according to La Forest J., it is generally viewed as substantive, not procedural.[126]

In view of the decision in *Tolofson*, Justice Muldoon held that the one year time limit in paragraph 41(e) of the CHRA accords respondents a substantive right not to be later met with a complaint. This right is only vitiated where the Commission, in a preliminary and procedural decision, overrides the limit in appropriate circumstances. Muldoon J. also asserted that a respondent can raise, in full answer and defence to a human rights complaint, a deprivation of the benefit conferred by the one year time limit in paragraph 41(e).

Justice Muldoon reasoned that the substantive nature of the right conferred upon employers by paragraph 41(e) conflicts with the notion that the Commission does not determine substantive rights, while the Tribunal does. Since the time limit, according to Muldoon J., is substantive in nature, it relates to the merits of the complaint; therefore, the time limit falls within the Tribunal's aegis. As the Tribunal deals with the complainant's case as a whole, Justice Muldoon stated that it was reasonable that the Tribunal should permit respondents to make out a defence on the basis of the one year time limit. Accordingly, Muldoon J. held that the Commission's exercise of discretion under paragraph 41(e) is subject to modification based on the Tribunal's appreciation of what is appropriate in the circumstances as they are revealed at the Tribunal's full hearing. Hence, Justice Muldoon agreed with the reasoning of the Tribunal, and concluded that a Tribunal has the jurisdiction to consider whether or not a complaint should be dismissed on the basis of the expiration of the time limit in paragraph 41(e).

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[125] [1994] 3 S.C.R. 1022 [hereinafter *Tolofson*].

[126] *Ibid.* at 1068–1071.

The Court's decision in *Vermette*[127] is presently under consideration by the Federal Court of Appeal. However, there are a number of possible defects in the Court's reasoning which suggest that the ruling may eventually be overturned.

First, it has been recognised in previous cases that the Commission, but not a Tribunal, has the authority to apply paragraph 41(e) of the CHRA[128] In *Pond* v. *Canada Post Corporation*,[129] for example, a Tribunal held that it did not have jurisdiction to decide whether or not the complaint before it satisfied the time requirements of paragraph 41(e). After the Commission renders a decision under paragraph 41(e), the Tribunal explained, either party may apply to the Court for a review of the Commission's administrative decision. A failure to do so permits the Tribunal to continue with a complaint that has been forwarded to it by the Commission. Therefore, in the absence of an application for judicial review of the Commission's decision under paragraph 41(e), the subsequent Tribunal is lawfully appointed, and has proper jurisdiction to hear evidence on a late-filed complaint.

Moreover, as an administrative body established by legislation, a Tribunal has no greater powers than those which are accorded it under its enabling legislation.[130] As the CHRA clearly places the issue of late-filed complaints within the jurisdiction of the Commission, not the Tribunal, it is questionable whether the Court can read into the Tribunal's powers the authority to apply the time limit in paragraph 41(e).

Additionally, as discussed above, paragraph 41(e) is not a true limitation period. The one year time limit is neither mandatory nor fixed, and the Commission, in its discretion, need not apply the limit where circumstances are appropriate for the acceptance of a late-filed complaint. Consequently, it may not be reasonable to characterise the time limit in paragraph 41(e) as a substantive limitation period.

The case of *Bhadauria* v. *Toronto (City) Board of Education*[131] discussed the distinction between a fixed limitation period and the statutory time limit for filing human rights complaints, as it pertains to paragraph 33(1)(d) of the Ontario *Human Rights Code*.[132] That provision, which is similar to paragraph 41(e) of the CHRA, provides a six month time period to file a human rights complaint, "unless the Commission is satisfied that the delay was incurred in good

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[127] *Supra* note 88.

[128] *Public Service Alliance of Canada* v. *Department of National Defence* (1994), 25 C.L.L.C. 16,367 (C.H.R.T.) at 17,003.

[129] (1994), 94 C.L.L.C. 16,259 (C.H.R.T.) at 17,024.

[130] *Macauley & Sprague*, *supra* note 64 at 28–42.

[131] (1987), 9 C.H.R.R. D/4501 (Ont. Bd. Inq.).

[132] R.S.O. 1980, c. 240. Now paragraph 34(1)(d) of the *Human Rights Code*, R.S.O. 1990, c. H.19.

faith and no substantial prejudice will result to any person affected by the delay."

In commenting on the effect of this provision, the Ontario Board of Inquiry stated that the statutory time limit was neither as specific nor as mandatory as a limitation period that absolutely prohibits the commencement of an action after the passage of a certain length of time, and that gives no official discretionary power, to either the courts or the tribunal applying the legislation, to waive or extend the legislated time period. The six-month time limit was simply viewed as a direction or fetter on the otherwise unlimited discretion that was vested in the Board. In view of these comments, it can be suggested that the discretionary time limits for filing human rights complaints, including the limit provided for in paragraph 41(e) of the CHRA, are not analogues to fixed limitation periods.

The Supreme Court of Canada has recently held that there are three underlying rationales to true limitation periods: evidentiary concerns, certainty, and diligence.[133] A consideration of these rationales in the context of human rights complaints also lends support to the view that the time limit in paragraph 41(e) is not analogous to a true limitation period.

The certainty rationale holds that there eventually comes a time when a potential defender should be secure in the reasonable expectation that she will not be held to account for ancient obligations. Similarly, the diligence rationale maintains that plaintiffs are expected to act diligently, and not "sleep on their rights." With regard to this rationale, Justice La Forest cited[134] the case of *Cholmondeley* v. *Clinton*,[135] wherein the Master of the Rolls asserted that the public has a great interest in having a known limit to litigation, fixed by law. Therefore, a plaintiff who fails to assert her right to commence an action within the prescribed period loses that right.

These rationales, however, are not particularly applicable to the time limit set out in paragraph 41(e) of the CHRA The federal human rights scheme does not deal with the enforcement of a right, or *lis*, between an employee and an employer. It necessarily follows, then, that the CHRA also does not permit a complainant to enforce an obligation owed by her employer. Under the CHRA, the overall remedial nature of the machinery established to protect human rights ensures that a complaint is not viewed as a litigious claim or an assertion of a right against which an employer must defend itself. The CHRA is remedial—it does not contemplate the dichotomy of obligations and rights which prevails in the civil courts.

While the CHRA does address the issue of rights, it does so in regard to the protection of human rights and the elimination of discrimination. A complain-

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133 *M.(K.)* v. *M.(H.)*, *supra* note 64 at 29–30.

134 *Ibid.* at 30.

135 *Supra* note 51 at 577.

ant may engage the CHRA's legislative mechanisms to protect his right to be free from discrimination. However, the CHRA does not provide a forum within which a complainant can assert his rights *vis-à-vis* a defendant, and a complainant cannot rely upon the statute to require his employer to fulfil an obligation owed to him. Hence, it is difficult to see how paragraph 41(e) can be viewed as a provision that both protects a potential defender from the threat of ancient obligations, and prevents a complainant from sleeping on his rights to enforce such obligations.

Indeed, the distinction between a human rights proceeding and a civil lawsuit was clarified in *West End Construction Ltd.* v. *Ontario (Ministry of Labour)*,[136] wherein the Ontario Court of Appeal held that a human rights complaint does not constitute a civil action. According to Justice Finlayson, an action is commenced as of right. Moreover, unlike a human rights complaint, a civil action is not a request for assistance; rather, it constitutes the unilateral implementation of a dispute resolution mechanism in accordance with prescribed rules. In fact, what occurs under human rights legislation does not require the invocation of the machinery of the civil process. As recognised by Finlayson J.A., the only procedures available as of right to parties to human rights proceedings come into operation after a board of inquiry or Tribunal has been appointed. It can be inferred that the act of filing a complaint does not represent the exercise of a right. This view is further strengthened by Justice Finlayson's ensuing comment to the effect that the appointment of a board of inquiry may, in fact, never happen.[137]

Moreover, in *M.(K.)* v. *M.(H.)*,[138] La Forest J. held that the certainty rationale underlying limitation periods may not be applicable or appropriate in cases of incest and breach of a fiduciary obligation. In his view, the public interest is not served in protecting perpetrators of incest from the consequences of their wrongs. This same argument may be asserted in the context of human rights legislation. The public interest is not served by preventing a potentially discriminating employer from correcting its discriminatory practices simply because the complainant has not filed her complaint within the one year time limit in paragraph 41(e) of the CHRA Indeed, it is likely that the permeability of the one year time limit manifests recognition of the fact that it is in the public's interest to have discrimination dealt with, irrespective of the possible tardiness of a complaint.

As the certainty and diligence rationales for limitation periods do not necessarily apply in the realm of late-filed human rights complaints, it may be inappropriate to treat the time limit in paragraph 41(e) of the CHRA as if it were a

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[136] (1990), 62 D.L.R. (4th) 329 (Ont. C.A.), rev'g (1986), 33 D.L.R. (4th) 285, (Ont. Div. Ct.).

[137] *Ibid.* at 340.

[138] *Supra* note 51 at 29.

fixed limitation period. Accordingly, it may not be accurate to characterise the time limit in paragraph 41(e) as being a true limitation period.

In view of the rationales underlying statutory limitation periods, it has been suggested that statutes of limitations were designed specifically to protect defendants. Indeed, as Justice Muldoon noted in *Vermette*,[139] it was recently settled in *Tolofson*[140] that the benefit which arises under a limitation period generally confers a substantive right upon a defendant against whom a time-barred claim has been brought. As expounded upon by La Forest J. in that case, the expiry of a substantive, rather than procedural, limitation period vests in a defendant an accrued right to plead the time bar in defence of the plaintiff's action. The accrual of this substantive right results in a corresponding deprivation to the plaintiff, as her substantive right to commence the action is destroyed.

In the present context, it is apparent that paragraph 41(e) of the CHRA was intended, at least to some extent, to benefit the party against whom proceedings are instituted.[141] However, while it appears that paragraph 41(e) confers upon employers the benefit of a time limit, it does not necessarily follow that this benefit amounts to a substantive right.

An employer cannot assume that the one-year time limit in paragraph 41(e) is an absolute defence to a human rights complaint. The employer is free to raise the issue of the time limit, and rely upon it, in support of its assertion that the complaint against it should be dismissed. However, unlike a true or fixed limitation period, the time limit in paragraph 41(e) does not provide a certain defence to the complaint. The most that an employer can do is seek dismissal of the complaint on the basis of the time limit's expiration; it then remains for the Commission to review the evidence on file in order to determine if the circumstances nevertheless require that the permeable time limit be treated as if it were a fixed limitation period.

Moreover, in view of the decision in *Merrick*,[142] it is not entirely clear that an employer will even be prejudiced if it is deprived of the benefit and protection afforded it by the time limit in paragraph 41(e). At most, it can be stated that paragraph 41(e) may give rise to a rebuttable presumption that an employer affected by late filing would suffer resulting prejudice. Thus, the expiration of the one year limit within which a human rights complaint can be filed does not appear to confer on an employer an accrued substantive right to plead the time bar as an absolute defence to a complaint.

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[139] *Supra* note 124.

[140] *Supra* note 125.

[141] See *e.g.*, *C.(A.G.)*, *supra* note 14 at 64.

[142] *Supra* note 37. See also *Burnell*, *supra* note 36 at 25–29; *Bernard*, *supra* note 37; and *Boone*, *supra* note 28.

Similarly, it does not appear that the expiry of the time limit in paragraph 41(e) inevitably and automatically destroys the complainant's right to appear before a non-biased decision-maker for the purpose of pursuing her claim, as occurs where a true limitation period destroys a plaintiff's substantive right to commence an action. In appropriate circumstances, a complaint will be allowed to proceed despite the expiration of the time limit. Indeed, as the preceding discussion epitomises, the time limit in paragraph 41(e) is not much of an impediment to a complainant who brings to the Commission a late-filed complaint. Furthermore, there is no guarantee that a complaint will ever make it to the third stage of the CHRC process and receive a full hearing before a Tribunal. Therefore, the passage of time is not an impermeable bar to the complainant's pursuit of a remedy, and, in any case, her pursuit of such a remedy is by no means certain or guaranteed. Hence, it can be argued that the time limit in paragraph 41(e) of the CHRA is not comparable to a fixed limitation period, as it does not deprive complainants of a right analogous to that which is lost when a time-barred action cannot be commenced in a civil forum.

The time limit in paragraph 41(e) also differs from true limitation periods in that it actually confers a benefit upon the party who wishes to initiate proceedings. In *Bhadauria*,[143] the flexible and discretionary nature of the time limit for filing complaints was seen to represent a means of better protecting both the complainant and respondent to a human rights complaint, as compared with plaintiffs and defendants who are subject to statutes of limitations. According to the court in *Bhadauria*, the absence of a fixed time bar means that the Commission can proceed with a stale complaint, to the benefit of the complainant, if it is satisfied that no substantial prejudice will result from the delay in filing the complaint.

Additionally, in *Syndicat*,[144] Madame Justice L'Heureux-Dubé, in dissent, suggested that the time limit in paragraph 41(e) of the CHRA may not necessarily exist solely for the benefit of employers at all. In this regard, she asserted that s. 41 enables the Commission to sift through complaints and remove a number of them from the time-consuming process of investigation. In her view, the power to bar certain complaints from proceeding any further, regardless of their merits, reflects Parliament's overriding commitment to considerations of administrative efficiency and to specific policy objectives. Accordingly, the statutory time limit in paragraph 41(e) may exist partly for the benefit of the Commission and the CHRC process which it regulates.

Under paragraph 41(e) of the CHRA, the Commission's decision to proceed with a late-filed complaint deprives an employer of a possible, though by no means automatic, benefit or protection against allegations of discrimination.

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[143] *Supra* note 131.

[144] *Supra* note 38 at 911.

Similarly, the Commission's decision to dismiss a late-filed complaint, pursuant to paragraph 41(e), appears only to deprive the complainant of an opportunity to bring forward a complaint which may eventually, but not definitely, proceed through the CHRC process. Upon expiration of the time limit in paragraph 41(e), the employer does not lose a right to plead a time bar as an absolute defence to a complaint, as the one year time period is permeable. Correspondingly, the complainant does not lose a right to have her complaint resolved through the CHRC process, as no complaint under the CHRA can be filed with the certitude that it will be permitted to proceed through the legislative framework established under the statute.

Accordingly, the time limit under paragraph 41(e) of the CHRA differs in many respects from a fixed limitation period. For these reasons, it may not be appropriate for the one year time limit to be treated as a true limitation period. Thus, it can be asserted that the time limit is merely procedural, not substantive, in nature. Carrying through with this argument to its logical conclusion, it makes perfect sense that it is the Commission, and not a Tribunal, that deals with the issue of late-filed complaints under paragraph 41(e). The Commission only renders procedural and administrative decisions; therefore, it is well-equipped to screen complaints in respect of a permeable time limit that neither confers nor destroys substantive rights. The fact that Parliament has actually left the matter of the time limit within the province of the Commission lends further support to the assertion that a Tribunal should not be permitted to address the issue of the time limit in paragraph 41(e).

The Court's decision in *Vermette*[145] is at odds with the regulatory scheme which was established under the CHRA for the purpose of effectively dealing with both the procedural and substantive aspects of human rights complaints. The reverse logic applied by the Court in that case is also unconvincing: it is better to argue that paragraph 41(e) of the CHRA is procedural because Parliament has expressly chosen to have the Commission screen late-filed complaints, than to assert that the time limit is substantive, and so can be dealt with by a Tribunal despite the absence of express authority, in the CHRA, to this effect. If the prescribed one year time limit for filing human rights complaints truly were substantive in nature, it would likely be mandatory and impermeable, and it probably would have been expressly placed within a Tribunal's jurisdiction. As the time limit is actually discretionary and permeable, it should not be characterised as a substantive limitation period. Thus, the time limit issue should not be swept under a Tribunal's statutory authority to consider the merits of a particular case.

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[145] *Supra* note 124.

On one final note, the Tribunal in *Vermette*[146] suggested that the following factors should be considered when deciding whether a reasonable justification exists for allowing a late-filed complaint to proceed to the second stage of the CHRC process:

(i) the period of time that elapsed between the act or omission that is the subject of the complaint and the time when the complaint was filed with or received by the Commission;

(ii) the period of time that elapsed between the act or omission that is the subject of the complaint and the time when the respondent received notice of the complaint;

(iii) the reasons for the delay in filing the complaint or notifying the respondent of the complaint;

(iv) the reasons of the Commission for deciding pursuant to s. 41 of the CHRA to proceed with the complaint notwithstanding that the complaint is based on acts or omissions the last of which occurred more than one year before receipt of the complaint; and

(v) the prejudice caused to the respondent by the delay.

On judicial review, Justice Muldoon held that the Tribunal's reasoning in this respect was sound, in accord with applicable law, and correct.

Upon a careful analysis of these five criteria, however, it is clear that factors *(ii)*, *(iii)*, and *(v)* relate to delays on the part of the complainant or the Commission which arise after a complaint has been filed. Paragraph 41(e) of the CHRA, though, pertains solely to the passage of time between the alleged discriminatory acts and the date on which the complaint is filed. The fact that the Tribunal highlighted post-complaint delays as factors to be considered in evaluating a pre-complaint delay suggests that the Tribunal may not be fully aware of the extremely preliminary determination which must be made when screening late-filed complaints under paragraph 41(e).

In conclusion, the decision in *Vermette*,[147] if upheld, would provide a Tribunal with the authority to screen late-filed complaints, thereby removing some of them from the CHRC process after they have already entered through the gates guarded by the Commission. This additional level of decision-making would provide a further means of filtering out complaints which are filed after the one year time limit in paragraph 41(e) of the CHRA has expired. However, there are a number of possible flaws in the Court's reasoning in *Vermette* which could provide possible grounds for overturning the decision on appeal. Accordingly, it

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[146] *Supra* note 124 at 16 383.

[147] *Ibid.*

is not a foregone conclusion that a Tribunal will be afforded the opportunity to dismiss late-filed complaints, pursuant to paragraph 41(e), after they have gained admittance to the CHRC process by way of the Commission's exercise of discretion. Nevertheless, if the Tribunal wishes to consider the issue of overall delay by a party once a case has reached the third stage of the CHRC process, nothing precludes it from applying the doctrine of laches in respect of post-complaint delays.[148]

V. CONCLUSION

REGARDING THE DISCRETIONARY nature of its enabling provision and its broad guidelines, the Commission is ill-equipped to halt the passage of human rights complaints which are filed more than one year after the occurrence of the acts on which they are based. While the time limit in paragraph 41(e) of the CHRA may confer a benefit on employers, there are numerous counteracting forces which impel the Commission to frequently exercise its discretion in favour of complainants, thereby allowing late-filed complaints to pass through the gates to the CHRC process.

It is likely that the Commission's lenient treatment of delayed complaints stems, in part, from its recognition of the distinction between the flexible time limit in paragraph 41(e) and fixed limitation periods which, once expired, can automatically bar a civil action. In addition, as the Commission does not address the merits of complaints when rendering first-stage decisions, it may be unwilling in many cases to dismiss late-filed complaints which could eventually be found to be meritorious. Furthermore, in frequently exercising its discretion to extend the time limit for filing complaints under paragraph 41(e), the Commission may be manifesting its view that the conferral of a benefit on an allegedly discriminatory employer thwarts the remedial nature of the CHRA, which was devised for the benefit and protection of employees. Hence, the Commission's enabling legislation and internal guidelines are relatively ineffective in preventing late-filed complaints from infiltrating the confines of the CHRC process.

As an independent body that monitors the proceedings of the Commission, by way of judicial review, the Federal Court of Canada is also part of the enforcement machinery under the CHRA Thus, it, too, plays a role in the legislative regime which regulates human rights in the federal sphere. However, while it is a diligent inspector of the Commission's decisions, the Court is so restricted by its narrow scope of review that it is limited in its ability to influence the screening process under paragraph 41(e) of the CHRA

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[148] See discussion above note 88.

The Court's review powers are circumscribed by a number of forces. In Canada, there has been a growing trend toward curial deference as the approach to be taken by courts when reviewing the decisions of expert tribunals such as the Commission. This trend prevails when the Court reviews decisions of the Commission under paragraph 41(e). Moreover, grafted onto this judicial demarcation are the statutory grounds for review set out in the *Federal Court Act*. These also apply when the Court reviews decisions rendered by the Commission pursuant to paragraph 41(e). Additionally, since the Commission acts in both an administrative and a discretionary capacity when making first-stage decisions under paragraph 41(e), the Court is restricted to a review of such decisions on three main bases: breach of the rules of procedural fairness; the Commission's failure to exercise its discretion; and lack of a reasonable basis for extending the time for filing complaints.

In view of the Commission's broad discretion to allow late-filed complaints to proceed through the CHRC process, and the Court's limited capacity to modify or overturn the Commission's decisions under paragraph 41(e), it is not surprising that, despite the huge backlog of cases at the Commission, few human rights complaints are dismissed on the basis of delay. Nevertheless, some recent judgments suggest that the Commission's authority to deal with late-filed complaints under paragraph 41(e) may be supplemented by similar powers in relation to second-stage decisions under s. 44(3) and decisions under s. 49(1). These additional powers which are granted to the Commission may, to a limited extent, help to impede the progression of late-filed complaints through the CHRC process.

Moreover, the recent decision in *Vermette*[149] suggests that a Tribunal may have the authority to screen late-filed complaints, thereby removing them from the CHRC process after they have already entered through the gates guarded by the Commission. The inclusion of Tribunals in the screening procedure would augment the number of bodies charged with regulating the passage of late-filed complaints through the process. This additional layer of defence, then, could serve to increase the potential to filter out delayed complaints, possibly resulting in greater efficiency, and reduced backlogs, at the Commission. However, as there are a number of potential defects with the Court's reasoning in *Vermette*, the decision could ultimately be overturned. In particular, there is little support for the Court's main premise that the time limit in paragraph 41(e) of the CHRA is comparable to a true limitation period that is substantive, not procedural, in nature. If the appeal in *Vermette* is eventually allowed, the Commission and its reviewing Court will remain the sole guardians at the gates to the CHRC process, and the barrage of late-filed complaints will likely continue to permeate the walls of the fortress.

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[149] *Supra* note 124.