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When Words *Can* Do Justice: Assessing the Novel Relationship Between Legislative Drafting and Access to Administrative Justice in Yukon and Canada

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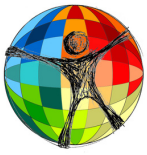

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ABSTRACT

This paper is about legislative definitions and drafting. I will explore if and how a thoughtfully drafted legislative definition of a broad concept in the law, as well as the defining process itself, may be tools for increasing access to justice, specifically in the context of administrative law. Given that access to justice strengthens the public's confidence in the administrative justice system (through transparency, predictability, the use of plain language, and the availability of meaningful due process, among other factors), its betterment will reinforce the rule of law.

While this paper begins by discussing far-reaching processes and big concepts, I narrow my analysis to focus specifically on section 12 of the Yukon *Human Rights Act*, which concerns systemic discrimination, and its operability in the territory of the Yukon. I discuss whether and how re-drafting this provision may occur through an expanded capabilities approach, inspired by Amartya Sen and complemented by the theoretical ideas of standpoint theory and legal empowerment.

The Yukon case study's teachings and provocations may apply to other situations within Canadian administrative law and beyond. Although there is literature on the place of legislative drafting within the wider Western liberal democratic framework, as well as some separate, limited commentary on the intersection of administrative law and access to justice, my piece is unique in that it combines legislative drafting in the administrative context with considerations of access to justice and the rule of law in a novel way.

CONTENTS

I. Introduction[1]

"The language of law must not be foreign to the ears of those who are to obey it"[2]

— Learned Hand

"[Academics] could only talk and write about it; … I'd lived it"[3]

— Jesse Thistle

Author of the Definition of *Indigenous Homelessness*

In both the legal and non-legal world, definitions are all around us. We see them in our governing documents, like the Constitution and the *Criminal Code*, in the literature we use to inform academic arguments and policy decisions, and in our day-to-day, as we explain situations or recount lived experiences. Despite our reliance on defined terms, we rarely consider where they came from, how they were determined, and the effect they have on our lives. Narrowing this narrative to the legal sphere, definitions play a particular role in the jurisprudential work of courts and administrative tribunals. Much like their function in the wider world, definitions are the bedrock of legislation and legal tests—they provide the substance necessary to determine, for example, if a contract is unconscionable or performed in good faith; whether a criminal act constitutes murder or manslaughter; or if unfavourable treatment may be considered discrimination as befits Section 15 of the Constitution or the "area-ground-nexus"

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[1] This article was researched and written by Garima Karia in her personal capacity. The opinions expressed in this article are the author's own, and are informed by her experiences and reflections upon completing her internship. The opinions expressed in this article do not reflect the views of the Yukon Human Rights Commission.

[2] Cynthia Adams, "The Move Toward Using Plain Legal Language" (last visited 25 August 2022), online: *American Bar Association* <www.americanbar.org/groups/young_lawyers/publications/tyl/topics/writing/the_move_toward_using_plain_legal_language/> (quoting Learned Hand).

[3] Jesse Thistle, *From the Ashes* (Toronto: Simon & Schuster, 2019) at 347.

test[4] as it applies to provincial[5] human rights legislation. However, legislative definitions may also serve as vehicles for accessing justice. Their contours and features determine, for example, whether a human rights complaint can be made, allowing citizens to seek recourse for unfavourable treatment. Despite their power in the legal realm, most actors in the profession take their existence for granted. Yet, when we look closely at the elements of a legal definition, as well as their origins, we glean that they provide a meaningful choice to claimants—the option to make an informed claim and to enter into an adjudicative process. With a clear, intelligible definition, claimants can put a name to their experience(s) and then decide, based on their agency and knowledge, whether to act on this definition in a certain way. As I will explore, however, the potential of clear legislative definitions as enablers of greater access to adjustive systems is not always realized.

My Experience

While at the Yukon Human Rights Commission (YHRC, or "the Commission"), I drafted legal memos for the Legal Counsel and Director. The subject matters of these legal memos often arose out of ongoing Commission investigations, or live matters before the Director, which made them both timely and interesting. The memos also often dealt with interpreting and potentially expanding the scope of the Yukon *Human Rights Act*. In this paper,

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[4] The "area-ground-nexus" test is a term I use throughout this paper. It refers to the legal "test" that most human rights-related administrative bodies in Canada use to accept a human rights complaint on a *prima facie* basis. The Yukon Human Rights Commission is one such body. Based on sections 7 and 9 of the Yukon *Human Rights Act*, RSY 2002, c 116 [YHRA], the "area" refers to an alleged act of discrimination that falls under an area protected by the legislation in question, such as employment or housing; the "ground" refers to the personal characteristic that are protected from discrimination by the *Act*, such as religion, physical or mental disability, source of income, etc. Lastly, the nexus implies that the complainant must establish a "sufficient link" between their protected ground and the unfavourable treatment they faced (see "What is Discrimination" (last visited 25 August 2022), online: *Yukon Human Rights Commission* <yukonhumanrights.ca/what-is-discrimination/>).

[5] To be concise, I will often use the term *provincial* as encompassing both Canada's provinces and territories.

I will highlight my findings from one of my most significant projects during the internship: a memo I drafted on section 12 of the Yukon *Human Rights Act*. In writing this memo, I conducted a survey of the definition of *systemic discrimination* in Canadian human rights legislation. I found only two provinces and one territory that even include the term, with each definition severely lacking in context and information. Yukon's *Human Rights Act* ("the *Act*") simply says, "Systemic discrimination: Any conduct that results in discrimination is discrimination."[6]

My colleagues at the Commission and I thought that this definition of *systemic discrimination* could use some work as it lacks clarity and specificity. Therefore, my task was to do a deep dive into how the term should be defined, and to propose a series of reforms to this section of to the Act that could clarify the definition of *systemic discrimination*. I considered what a "better" definition—one that addresses the complexities of the term—would look like, turning my mind to the possibility that the territorial government may one day seek public consultation on legislative reform, as it has in the past.[7] This task sparked my curiosity about the legislative drafting process—whose voices were heard and taken into consideration? Do multi-voiced processes necessarily lead to comprehensive legislative drafting? How does a certain conception of access to justice[8] fit into this matrix?

This paper is informed by the above questions; it delves into the process of defining the term *systemic discrimination* and its relationship to access to justice in the administrative legal space. Through an expanded capabilities framework, this paper assesses methods of legislative drafting and evaluates their contribution to clarifying the definition of *systemic discrimination* generally and

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[6] YHRA, *supra* note 4, s 12.

[7] As I explain in Part IV, the Commission was approached once in the past, in 2008, to provide recommendations on the redrafting of the *Act*. At that time, the Commission, as well as other consulted parties, expressed dissatisfaction with the ambiguity of section 12 and suggested alternative definitions. While their overall recommendation to redraft was adopted (albeit not as a noticeable priority) by the consultative committee, the legislature did not attempt to redraft section 12.

[8] The term *access to justice* is a complicated one in and of itself. In sections III and VI, I explain and elaborate on the kind of "access" and "justice" to which I refer in this article, and to which legislative drafting in the administrative context pertains.

specifically in the Yukon *Human Rights Act*. In Part II, I will examine the facets of defining a term in law. In Part III, I present the expanded capabilities framework through which I will analyze and assess legislative definition drafting. I also contextualize "access to justice" as it pertains to administrative law in Yukon and Canada. In Part IV, I introduce systemic discrimination as a valuable concept of study in Canada, and canvas the elements that I argue should be included in its eventual definition, as well as why their inclusion may increase access to justice. In Part V, I apply my expanded capabilities framework and thoughts on systemic discrimination to legislative drafting in the Yukon human rights context, and subsequently, in Part VI, assess whether the process of legislative drafting based on capabilities generally, and its manifestation in Yukon's systemic discrimination definition specifically, increase access to justice and bolster the rule of law. Finally, in Part VII, I share lessons that the rest of Canada may learn from Yukon's inclusion of systemic discrimination in its human rights legislation.

II. Definitions

The Importance of Definitions in Administrative Law

Professor Jeanne Frazier Price problematizes the legal profession's unhesitating acceptance of the existence and necessity of statutory definitions.[9] She asks "why define? What legislative ends are achieved by the statutory definition? And are those ends furthered by particular types or techniques of definition?". [10] Professor Price's interrogation reveals the undisputed power of definitions in law. In "conferring the authority and establishing a structure that allows the statute's normative provisions to have effect" and "informing and instructing as to how a particular outcome might be achieved or

[9] Jeanne Frazier Price, "Wagging, Not Barking: Statutory Definitions" (2013) Clev St L Rev 999 at 1001.

[10] *Ibid* at 1017.

avoided," legislative definitions wield significant potential.[11] While an unelaborated definition may not necessarily cause explicit harm, a well-crafted definition can make a sizeable difference in explaining an otherwise confusing or broad legal term, therefore enabling individuals and organizations to make use of it. A nebulous definition does not afford such possibilities, especially in the context of administrative law where legislatures use definitions to "give directions" to decisionmakers in statutes.[12]

The primary reasons legislators delegate power to administrative decisionmakers are expertise, time, and information. Legislators, as well as reviewing courts, cannot possibly have sufficient expertise or time to understand and evaluate the various detailed requirements in the vast range of areas that comprise the regulatory and welfare state.[13] Such expertise requires education and training as well as experience in dealing with administrative issues.[14] For example, when deciding issues pertaining to patenting, labour relations, or human rights, specific knowledge allows the decisionmaker(s) to make more informed and context-specific pronouncements. Moreover, legislators rarely have complete information about future applications of a statute. Legislation is therefore necessarily and unavoidably incomplete, and the discretionary power to "fill in" requirements as new information arises is left to administrative decisionmakers.[15]

Bearing these discretionary responsibilities in mind, the way in which legislators define key terms and legal tests in their statutes becomes important, as these definitions are the first place decisionmakers look when reaching their verdicts or acting on their "filling in" powers. Given that these decisionmakers must be

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[11] *Ibid* at 1002–1003.

[12] Andrew Green, "Delegation and Consultation: How the Administrative State Functions and the Importance of Rules" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed (Toronto: Emond Montgomery Publications, 2018) 308 at 309. See also France Houle & Lorne Sossin, "Tribunals and Guidelines: Exploring the Relationship Between Fairness and Legitimacy in Administrative Decision-Making" (2006) 46 Can Pub Admin 283.

[13] See Green, *supra* note 12 at 312.

[14] See *ibid*.

[15] See *ibid* at 313.

afforded broad deference by reviewing courts,[16] *how* they interpret definitions will often go unchanged by reviewing courts. Reviewing courts must pay close attention to the legislature's intent, so if definitions are imbued with clarity, these courts can more effectively respect deference and facilitate consistency in judicial review. Clarity from the legislature can also help ensure a degree of predictability in otherwise case-by-case systems like the provincial human rights adjudicative bodies in the administrative law space.

Legal scholars Colleen M. Flood and Jennifer Dolling characterize administrative law as "the law for ordinary people," partly because most people will be affected by—if not directly seek out—decisions of administrative bodies in their lifetime.[17] As such, clear directions, in the form of comprehensive definitions (among other measures), are of particular importance in administrative law, because they are accessed by a wide range of Canadians, many of whom may not have legal representation at the initial decision-making stage.

Current Problems with the Definition Drafting Process

The two main issues with legislative definitions are that they are vague or unclear, and that consultations with relevant stakeholders, including members of the public, are not adequately considered.

Approximately 65 percent of Canadians with legal problems are not certain about their rights, do not know how to manage legal problems, are afraid to access the legal system, or

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[16] See e.g. Cheryl Laura Bowman, "Presumptive Deference and the Role of Expertise on Questions of Law in Canadian Administrative Law" (2019) [unpublished, archived on Osgoode Digital Commons]; *CUPE v NB Liquor Corporation*, [1979] 2 SCR 227, 97 DLR (3d) 417; *Dunsmuir v New Brunswick*, 2008 SCC 9; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

[17] Colleen M Flood & Jennifer Dolling, "A Historical Map for Administrative Law: There Be Dragons" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed (Toronto: Emond Montgomery Publications, 2018) 2 at 3.

think that nothing can be done.[18] Bearing this reality in mind, legislative definitions ought to be comprised of simple yet thorough language that will help claimants, legal professionals, and courts easily identify if their situations align with the definition, thus alleviating some of the obscurity that often characterizes the administrative legal system.[19] Through the examples that I will present below, most notably the definition of *systemic discrimination* in the Yukon *Human Rights Act*, one can appreciate that vague definitions hinder the claimant and the courts because neither party is able to identify how the definitions may be used or interpreted. This nebulousness presents an accessibility problem in its purest sense—with an ambiguous definition, a potential claimant either cannot access it to define their claim or cannot identify that their claim may be encompassed by the definition to begin with.[20] Moreover, seeing as administrative decisionmakers wield a high degree of binding authority, it is important they make fair and consistent decisions that uphold a diverse range of needs.[21] As I will illustrate in the Yukon case, without a clear definition, courts and tribunals reach inconsistent outcomes (and conjure up haphazard definitions), which directly impinges on the predictability inherent to the rule of law.[22]

The second issue that I will explore is that when law-making bodies engage in public consultations, they do not always incorporate the suggestions of community stakeholders and members of the public. Various stakeholder groups in Yukon warned of section 12's imprecision and provided alternative

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[18] Trevor C W Farrow, "What is access to justice" (2014) 51:3 Osgoode Halle LJ 957 at 965, FN 22.

[19] For support of simple language in law, see e.g. Ian Waddell, "The Case for Plain Language Legislation" (1992) 15:4 *Can Parl Rev*; Mélanie Raymond, "Plain language: Designed to empower the users" (23 November 2018), online: *The Canadian Bar Association* <www.nationalmagazine.ca/en-ca/articles/law/access-to-justice/2018/plain-language-designed-to-empower-the-users>.

[20] See e.g. "Plain language—essential for real access to justice" (18 July 2017), online: *Office of the Chief Judge, Provincial Court of British Columbia* <www.provincialcourt.bc.ca/enews/enews-18-07-2017>.

[21] See Suzy Flader, "Alleviating the Access to Justice Gap in Canada: Justice Factors, Influencers, and Agenda for Moving Forward" (2019) [unpublished, archived at the University of Victoria] at 11.

[22] See e.g. "Understanding Effective Access to Justice" (2016) OECD Workshop Background Paper.

formulations.[23] Yet, the legislature did not heed these suggestions in 2008, when the *Act* underwent a significant reform, nor did it even solicit consultations in 2010, 2013, 2016, 2017, and 2018 when the *Act* was amended again.[24] Although significant, these two issues may be solved by ensuring clarity in definitions, and stakeholder—including the public—participation in their formulation.

Opportunities to Overcome

Drafting a clear and "usable" legislative definition may be perceived as "easier said than done" and legislatures may opt for vague definitions to prevent pigeonholing.[25] The public, administrative bodies, and the judiciary are owed discernable language as a matter of access to justice (albeit a narrow conception of it, discussed below) and, relatedly, the rule of law.[26] Without defining central concepts, claimants cannot seek recourse, and decision-makers cannot fairly assess their claims. Moreover, understanding people's legal needs and experiences when attempting to access justice provides vital insights for designing policies, or laying the groundwork for legislation.[27] Federal, provincial and territorial governments have committed to and shown that they can organize public consultation processes for

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[23] This is discussed at greater length in Section V.

[24] In 2008, a Select Committee on Human Rights was struck to lead the amendment process; no such committee was struck in subsequent amending years: see YHRA, *supra* note 4; "Select Committee on Human Rights" (last visited 25 August 2022), online: *Yukon Legislative Assembly* <yukonassembly.ca/committees/schr-32> ["Select Committee on Human Rights"].

[25] See e.g. Denise G Reaume, "Of Pigeonholes and Principles: A Reconsideration of Discrimination Law" (2002) 40:2 Osgoode Hall LJ 113.

[26] See Raymond, *supra* note 17; "Introduction to Administrative Justice and Plain Language" (last visited 25 August 2022), online (pdf): *Council of Canadian Administrative Tribunals* <ccat-ctac.org/CMFiles/Publication/CCAT-EN-new2.pdf>.

[27] World Justice Project, *Global Insights on Access to Justice: Findings from the World Justice Project General Population Poll in 45 Countries* (Washington, DC: World Justice Project, 2018) at 2.

lawmaking.[28] At the federal level, Canadians have witnessed relatively successful consultations in the Truth and Reconciliation Commission, where various calls to action, including 5, 10, and 12, which relate to parenting and educational programs, for example, require definition-based reforms which are being carried out with some success.[29] As I will explore, the Yukon government held public consultations and did solicit and receive submissions on reforming the *Act*, but ignored the various calls to re-word section 12. For public participation to be meaningful, widely-supported suggestions from the public should be taken seriously by lawmakers.

The foundational idea that more "user-friendly" definitions are best produced by those who would—or will—access them brings me to the framework that will guide my analysis of the "definition problem" and solution, outlined above. This two-pronged solution is a manifestation of Sen's capabilities approach, which I will complement with standpoint theory and legal empowerment, to provide a framework for the rest of my analysis. Briefly, in applying an expanded capabilities lens—one that is enhanced by considerations of standpoint theory and legal empowerment—I argue that the comprehensibility and actionability of legislative definitions are vital for claimants to be able to act on informed agency and engage with the meaningful choice to make a claim of systemic discrimination. If we provide clear definitions that were formulated by active public participation, we are doubly engaging in access to justice—in process and outcome. In turn, inclusion and intelligibility strengthen public confidence in administrative decision-making and the rule of law more broadly.

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[28] See Trevor C W Farrow & Lesley A Jacobs, "Introduction: Taking Meaningful Access to Justice in Canada Seriously" in Trevor C W Farrow & Lesley A Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020) at 10. See also "Policy Statement and Guidelines for Public Participation" (last visited 25 August 2022), online: *Department of Justice Canada* <www.justice.gc.ca/eng/cons/pol.html>.

[29] See "Delivering on Truth and Reconciliation Commission Calls to Action" (last visited 25 August 2022), online: *Department of Justice Canada* <www.rcaanc-cirnac.gc.ca/eng/1524494530110/1557511412801>.

III. Theoretical Framework: Expanded Capabilities Approach

The foundation of the framework in which I root my analysis is Sen's capabilities framework. Sen discusses what the capabilities approach can do for theories of justice or of human rights. In applying it to the administrative law context, and complementing it with standpoint theory and theories of legal empowerment, I propose that it can accomplish the same goals for a theory of *access* to justice.

Capability concentrates on the *opportunity* to be able to have combinations of functionings, and reflects "the alternative combinations of functionings from which the person can choose one combination."[30] Sen's example of "capability as opportunity" is the opportunity to be well nourished[31]; my example will be the meaningful opportunity to make a human rights complaint about systemic discrimination and, in so doing, to access the administrative justice system. The use of the word "meaningful" in qualifying access to justice has a specific purpose and will be addressed below, as will considerations of the particular kind of "access" and "justice" that this proposal entails. This opportunity would be one of many—one could equally address a claim of systemic discrimination through constitutional litigation (if the claim could be attributed to a particular law or government action), through one's union (if the individual experienced systemic discrimination at their workplace and is a member of a union) or through extra-legal methods (such as non-adversarial modes of justice). And, if the individual so chooses, they can also decide to do nothing at all.

A strong argument can be made in favour of an individual's having the *freedom* to do something. But Sen cautions that this freedom must not be seen as an argument in favour of pursuing that something irrespective of choice. Using Sen's framing:

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[30] Amartya Sen, "Human Rights and Capabilities" (2005) 6:2 J Human Development 151 at 154.

[31] *Ibid*.

> it's about a person's freedom to choose how she should live [including the opportunity to access justice through a particular administrative process] and it cannot be turned into an argument for that person pursuing that process in particular, irrespective of the alternatives the person has.[32]

Along these lines, bettering the definition of *systemic discrimination* so as to make the human rights complaint process more actionable and accessible should not mean that more people *should* or *must* use it as an avenue for administrative justice. Rather, doing so will give people the veritable option and *agency* to do so, and giving this character to a legal process inherently imbues it with public confidence.

Returning to the use of the word "meaningful," it is crucial that the opportunity to launch a human rights complaint cannot be a hollow one, i.e. a *de jure* but not *de facto* option. Sen agrees that "an adequate theory of normative social choice has to be alive both to the fairness of the processes involved and to the equity and efficiency of the substantive opportunities that people can enjoy,"[33] reaffirming the necessity that the opportunity be one with real chance of success. Otherwise, we risk falling into the conundrum of excessive neoliberalism, which is a common critique of the capabilities viewpoint.[34] Sen himself says that capabilities "fall short of telling us enough about the freedom of citizens to invoke and utilise procedures that are equitable," otherwise known as "process freedoms."[35] To fill the process freedoms gap, the notion of legal empowerment is useful. Legal empowerment is embodied by processes of systemic change through which the excluded "become able to use the law, the legal system, and legal services to protect and advance their rights and interests."[36]

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[32] *Ibid* at 155.

[33] *Ibid* at 156.

[34] See e.g. David A Clark, "The Capability Approach: Its Development, Critiques and Recent Advances" in Robin Ghosh, K R Gupta & Prasenjit Maiti, eds, *Development Studies* vol 2 (New Delhi: Atlantic Publishers, 2008) ch 5; Thomas Pogge, "A Critique of the Capability Approach" in Harry Brighouse & Ingrid Robeyns, eds, *Measuring Justice: Primary goods and Capabilities* (New York: Cambridge University Press, 2010) ch 2.

[35] Sen, *supra* note 30 at 156.

[36] Dan Banik, "Legal Empowerment as a Conceptual and Operational Tool in Poverty Eradication" (2009) 1 Hague J Rule of Law 117 at 120. See also Meena Jagannath, Nicole Phillips & Jeena Shah, "A Rights-Based Approach to

Although Banik focuses his conceptualization of legal empowerment of the poor and their ability to access the economic marketplace, the same logic can apply to members of the public being included in the drafting of legislation that they may access in the future when making legal claims or, in other words, when acting on their process freedoms. In Part IV, I will elaborate on the relationship between legal empowerment and access to justice as they pertain to legislative drafting and drafting processes.

What Kind of "Access" and "Justice"?

Another consideration related to "meaningful" access to justice is the broader question of the kind of "access" and "justice" to which I am referring. Sen says that we must

> view our practices *inter alia* from a certain distance; both the understanding of human rights and capabilities are intimately linked with the reach of public discussion… the viability and universality of human rights and of an acceptable specification of capabilities are dependent on their ability to survive critical scrutiny in public reasoning.[37]

Access to justice is a broad concept in and of itself, so for the purpose of this paper and its context, I will specify its meaning along with the caveat that it is but one conceptualization.

There are two approaches to framing access to administrative justice. The classical, more familiar approach "focuses on timely access to formal legal institutions such as the courts in order to secure redress for some wrongs."[38] However, we can re-imagine access to justice as "meaningful access to justice" centring instead on the idea that

> access to justice is principally concerned with people's ability to access a diverse range of information, institutions,

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Lawyering: Legal Empowerment as an Alternative to Legal Aid in Post-Disaster Haiti" (2011) 10:1 Nw U J Intl Hum Rts 7 at 9.

[37] *Supra* note 30 at 163.

[38] Jacobs & Farrow, *supra* note 28 at 7. Jacobs and Farrow frame their analysis as it concerns civil justice but the same principles may apply to administrative justice.

> and organizations—not just formal legal institutions such as the courts—in order to understand, prevent, meet, and resolve their legal challenges and problems. Meaningful access to justice measures access for a person not necessarily in terms of access to lawyers and adjudicated decisions but rather by how helpful the path is for addressing and resolving that person's legal problem or complaint.[39]

Jacobs and Farrow identify seven pillars (four main and three complementary) for understanding and measuring meaningful access to justice. Of the seven, there are three that can be viewed as reinforcing the same values as the capabilities approach:

1. Person-centred, as opposed to service provider- or system-centred. The idea is that legal processes and mechanisms which promote meaningful access to justice are "designed to serve the person in need."[40]
2. Legal consciousness. The idea underlying this pillar is legal consciousness affects when and whether people recognize their problems as legal and the decisions they made about how to address those problems.[41]
3. Acknowledgement that barriers to meaningful access to justice are often systemic injustices.[42] This pillar recognizes that even accessing processes to report situations of systemic discrimination are riddled with structural issues of access, transparency, and comprehensibility.

Within a person-centred, meaningful approach to access to justice, what matters for fair outcomes and fair processes are the paths to justice or legal journeys people take, and not so much (or only) the robustness of the legal services available to them. Innovating in civil and family—and administrative, I argue—

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[39] *Ibid*.

[40] *Ibid* at 8.

[41] See *ibid*.

[42] See *ibid*.

justice is at its core about "developing new ways to bring fairness between people."[43]

Here, the capabilities approach really shines through because it reflects the idea of agency in the legal process, and is supported by standpoint theory, notably when we consider public participation in lawmaking as a facet of access to justice. Professor Colleen Sheppard explains that standpoint theory affirms that those with less power in society—in this case, members of the public and potential claimants—have experiential knowledge that is "unavailable to those with power and authority."[44] When it comes to defining, those to whom statutes apply, the public, may be able to better inform its construction than lawmakers by themselves. As such, standpoint theory explains how public-driven legislative drafting can better meet the needs of claimants. In Parts IV and V, I will explain how standpoint theory substantiates the need for public consultation on defining *systemic discrimination*, specifically in the Yukon, to be taken seriously. From my personal experience at the Commission, while outcome is important to people, being able to be heard and feel like one has control over the speed, steps, and content of the process is just as important.

Sen's framework, enriched by considerations of legal empowerment and standpoint theory, helps us reimagine the potential power of a comprehensive and thoughtful legislative definition. Perhaps, if we define the key terms in human rights statutes in a way that their structure is alive to the needs and realities of users (i.e. through meaningful public consultation), we can endeavour to substantiate and "make tangible" human rights in a way that eschews the conventional critiques of individualism and endeavours to give teeth to human rights in a way that draws on human agency and capability. I will now apply this framework

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[43] *Ibid* at 9. See generally Sam Muller et al, *Innovating Justice: Developing New Ways to Bring Fairness Between People* (The Hague: The Hague Institute for the Internationalisation of Law, 2013).

[44] Colleen Sheppard, "Contexts of Inequality: Identifying and Remedying Discrimination" in Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal: McGill-Queen's University Press, 2010) at 67.

to defining *systemic discrimination* generally, and then in Yukon's *Act* specifically.

IV. Systemic Discrimination as a Valuable Concept of Study in Canada

Why should we be concerned with—let alone defining—systemic discrimination in Canada? When discussing systemic discrimination in Canada, it is tempting to follow the lead of media outlets and public-facing institutions across the nation who perceive it as a "new" issue. From newspapers to retailers to social media pages, Canadian actors have recently been engaging with systemic discrimination in the context of George Floyd's killing at the hands of police brutality in 2020, framing the issue as Canada's chance to "take a deeper look" at systemic racism and discrimination and grapple with the vast inequality present in our nation.[45] Yet, certain Canadian scholars and grassroots organizations have been discussing (and sounding the alarm on) systemic discrimination, both within and outside the context of the law, for much longer than a year and a half.[46] Bearing both realities in mind, systemic discrimination is due for consideration by lawmakers because increased public consciousness will likely result in an uptick of systemic discrimination-related cases in courts and tribunals.[47] Though systemic discrimination is by no means a new phenomenon, the

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[45] See e.g. Graham Slaughter, "Five charts that show what systemic racism looks like in Canada," *CTV News* (6 June 2020), online: <www.ctvnews.ca/canada/five-charts-that-show-what-systemic-racism-looks-like-in-canada-1.4970352>; Maan Alhmidi, "COVID-19 magnified systemic discrimination against Indigenous women: Bennett," *CTV News* (8 March 2021), online: <www.ctvnews.ca/politics/covid-19-magnified-systemic-discrimination-against-indigenous-women-bennett-1.5338801>.

[46] See e.g. Sheppard, *supra* note 44; Colleen Sheppard, Tamara Thermitus & Derek J Jones, "Understanding how racism becomes systemic," *The Globe and Mail* (24 July 2020), online: <www.theglobeandmail.com/opinion/article-understanding-how-racism-becomes-systemic/>.

[47] See e.g. Danielle Edwards, "N.S. top court: Judges must consider systemic racism when sentencing Black offenders," *CTV News* (23 Aug 2021), online: <atlantic.ctvnews.ca/n-s-top-court-judges-must-consider-systemic-racism-when-sentencing-black-offenders-1.5557788>.

public is arguably aware and alive to it now more than ever. Its inclusion in human rights legislation is an eventuality,[48] and therefore thinking about an ideal formulation is warranted.

Upon surveying the presence of the term "systemic discrimination" in Canadian human rights legislation and case law, I make two central observations. First, that there is no concrete, let alone consistent or operational, definition of *systemic discrimination* in existing human rights legislation or jurisprudence in Canada. Second, there are, however, common guiding themes or principles that may be drawn upon in formulating a concrete definition.

Lack of a Concrete Definition

There is currently no concrete, consistent, or operational definition of *systemic discrimination* in Canadian human rights legislation. In addition to the Yukon, Manitoba and Saskatchewan are the only other jurisdictions that attempt to define or include *systemic discrimination* in their statutes. As mentioned above, Yukon's *Human Rights Act* houses its section on systemic discrimination under the Part on "Discriminatory Practices," the section simply stating that "any conduct that results in discrimination is discrimination."[49] As it stands, this definition provides no information to decisionmakers or claimants about how to make or assess a claim of systemic discrimination within the broader human rights complaint process, nor does it acknowledge the various defining elements of systemic discrimination (discussed further below).

Manitoba's *Human Rights Code*, like Yukon's, has a specific systemic discrimination provision which provides slightly more, although still incomplete information:

> 9(3): **Systemic discrimination**
>
> Interrelated actions, policies or procedures of a person that do not have a discriminatory effect when considered

[48] As I mention in Part I and in the sub-section below, presently, only two provinces and one territory even include the term in their human rights legislation.

[49] See *YHRA*, *supra* note 4, s 12.

> individually can constitute discrimination under this Code if the combined operation of those actions, policies or procedures results in discrimination within the meaning of subsection (1).[50]

While this definition provides more guidance to help decisionmakers, claimants, and even respondents understand systemic discrimination, it is limited to two elements—"effect or impact over intent" and a pattern of continuing phenomenon resulting in significant cumulative effects. A comprehensive definition of *systemic discrimination* would include most, if not all of the common elements discussed in the next section. The Saskatchewan *Human Rights Code* (2018) does not define systemic discrimination explicitly, but it does include the term in its explanation of the duties of the Saskatchewan Human Rights Commission. The *Code* therefore empowers the Commission to prevent and address patterns of systemic discrimination of its own volition:

> 24: **Duties of Commission** The commission shall:
>
> (h) promote and pursue measures to prevent and address systemic patterns of discrimination;[51]

The Saskatchewan Human Rights Commission attributes the term "systemic advocacy" to section 24(h), explaining that the *Code*

> allows the Commission to address important human rights issues for groups of people other than through individual complain processes, traditional public education, or equity programs. Systemic advocacy is a rights-based approach to addressing discrimination that can address the concerns of a "class," or classes, of individuals to which a single complainant might belong. When the Commission considers using a systemic advocacy strategy to address an issue, it is in accordance with the Code. Put another way, this process should pertain to a current law, policy or practice which in

[50] *Human Rights Code*, CCSM 1987, c H175. Subsection (1) of the *Code* defines *discrimination*.

[51] Saskatchewan *Human Rights Code*, being Chapter S-24.2 of the *Statutes of Saskatchewan, 2018*, s 24(h).

> some manner systemically infringes upon human rights protected under the Code.[52]

While Saskatchewan's *Code* may be commended for conveying sentiments of empowerment to its Commission, this provision faces the same issues of inoperability and lack of direction as the others. Inclusion of terminology pertaining to combatting systemic discrimination is fruitless if claimants and decisionmakers are entirely unaware of how to use or interpret the terms.

Presence of Common Guiding Principles

Although existing human rights legislation does not provide much in the way of a practical definition of *systemic discrimination*, a survey of Supreme Court case law, provincial and territorial human rights jurisprudence and Commission documents, and academic commentary led me to identify six key characteristics that, if combined, would help make up a more comprehensive definition of *systemic discrimination*. These six elements are the following:

1. The **effect or impact of a policy or act, rather than its intention**, is at the crux of systemic discrimination. In other words, if a well-intentioned policy or act has the *effect* or *impact* of disadvantageous treatment of a particular protected group, it may be considered to perpetuate systemic discrimination despite its intent.[53]
2. **Facially neutral** policies or acts may cause systemic discrimination.[54]

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[52] "What is Systemic Advocacy?" (last visited 25 August 2022), online: *Saskatchewan Human Rights Commission* <saskatchewanhumanrights.ca/systemic-advocacy/what-is-systemic-advocacy/>.

[53] See e.g. *Gersten v College of Physicians and Surgeons of Alberta*, 2004 AHRC 16 at para 349; *Saskatoon (City) (Re)*, 1987 CanLII 8556 (SK HRT) at paras 31–32; *Reed v Province of Nova Scotia (Department of Environment)*, 2018 CanLII 89418 at para 39 (NS HRC).

[54] See e.g. *Commission des droits de la personne et des droits de la jeunesse (Nyembwe) c Ville de Gatineau*, 2021 QCTDP 1 at paras 183–84; *Brar and*

3. Systemic discrimination is often **subtle** or "hidden."[55]
4. Systemic discrimination is rooted in **long-standing social and cultural attitudes and norms**.[56]
5. Systemic discrimination may be embedded or detected in **patterns, series, or continuing phenomena** that have **significant cumulative effects**. In other words, "the whole is greater than the sum of its parts" when it comes to the collective effect of various instances of discrimination or differential treatment that result in systemic discrimination.[57]
6. Systemic discrimination often contains an element of **intersectionality**.[58]

I began with Supreme Court jurisprudence on matters of systemic discrimination. The authoritative case on the matter, *Canadian National Railway Co. (CN) v. Canada (Canadian Human Rights Commission)*, relies on the Abella Report on Equality in Employment for its definition on systemic discrimination, which Chief Justice Dickson characterizes as "a thorough study of systemic discrimination in Canada."[59] In the Report, Justice Abella offered the following comments on systemic discrimination:

> Discrimination … means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics …

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others v BC Veterinary Medical Association and Osborne, 2015 BCHRT 151 at para 740.

[55] See e.g. *Brome v Ontario (Human Rights Commission)*, 1999 CanLII 15060 at para 50 [*Brome*]; *University of Regina v University of Regina Faculty Association*, 1996 CanLII 17878 (SK LA) [*University of Regina*].

[56] See e.g. *Ahmad v CF Chemicals Ltd*, 2019 AHRC 5 at paras 179–81.

[57] See e.g. *Grange v Toronto (City)*, 2014 HRTO 633 at paras 25–26; *Association of Ontario Midwives v Ontario (Health and Long-Term Care)*, 2014 HRTO 1370 at para 33; *Bhindi v City of Ottawa*, 2021 HRTO 525 at para 11.

[58] See e.g. *Bear v Saskatoon Regional Health Authority*, 2011 CanLII 152484 (SK HRT) at para 33 [*Bear*].

[59] *Canadian National Railway Co (CN) v Canada (Canadian Human Rights Commission)* [1987] 1 SCR 1114 at 1139, 40 DLR (4th) 193 [*CN* cited to SCR].

> It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.
>
> This is why it is important to look at the results of a system.[60]

Justice Abella's definition features two of the central elements highlighted above: most notably that if the effect or "result" of an act, rather than its intent, is some form of disadvantageous treatment of a particular protected group, it may be considered to perpetuate systemic discrimination despite its intent. Its use of "innocently" also draws on the facially neutral nature of systems which may still cause systemic discrimination.

Based on a broad survey of jurisprudence, courts and tribunals across Canada have relied consistently on this definition.[61] In *Fraser v. Canada*, the Supreme Court's most recent pronouncement on adverse impact discrimination (another term for systemic discrimination), the majority cites the same passage from the Abella Report.[62] Although *Fraser* was a contentious decision with substantial disagreement amongst the judges, even Justices Rowe and Brown's dissenting opinion described systemic discrimination as a "a continuing phenomenon which has its roots deep in history and in societal attitudes … [which] cannot be isolated to a single action or statement,"[63] illustrating an appreciation for two additional elements of systemic discrimination—fourth and fifth on the above list. Of the elements

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[60] Report of the Royal Commission on Equality in Employment (Ottawa: 1984) at 2 [emphasis added; "Abella Report"].

[61] See e.g. *British Columbia v Crockford*, 2006 BCCA 360; *Aurora College v Niziol*, 2007 NWTSC 34, *Brooks v Vancouver Career College (Burnaby) o/a CDI College*, 2019 HRTO 137; *Taan Forest Limited Partnership v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union* ("United Steelworkers"), Local 1-1937, 2017 CanLII 5278 (BC LA).

[62] *Fraser v Canada,* 2020 SCC 28, citing Abella Report, *supra* note 60.

[63] *Ibid* at para 167, citing *Public Service Alliance of Canada v Canada (Department of National Defence (CA)*, [1996] 3 FC 789 at para 16.

that remain, human rights jurisprudence from Ontario (*Brome v. Ontario (Human Rights Commission)*), Saskatchewan (*University of Regina v. University of Regina Faculty Association*), and Alberta (*Ahmad v. CF Chemicals Ltd.*) comment on the "hidden" or insidious nature of systemic discrimination.[64] The sixth element on intersectionality, which may also be conceived of as "overlapping grounds of discrimination," appeared in one case, *Bear v. Saskatoon Regional Health Authority*, in which the judge recognized that the

> impacts of systemic racial discrimination may be experienced differently based on intersection with other grounds of discrimination such as gender, disability, place of origin, thus requiring sensitivity to the interacting and cumulative effects of discrimination on multiple grounds.[65]

However, this element is still predominantly confined to academic treatment, or by Human Rights Commissions in their materials (e.g. information on websites).[66] Bearing these six elements in mind, I turn to the task of finding a concrete and consistent definition of *systemic discrimination*.

Proposing a General Definition of Systemic Discrimination

To suggest a concrete definition of *systemic discrimination* for claimants and decisionmakers alike, two considerations must be made. The first is that the definitions must be fulsome and, as such, I would argue that each of the elements that I outline above should be included. Currently, the most cited definition (from *CN*) includes only two of the five. This first recommendation is informed by the expanded capabilities approach in that a definition with as many "entry points" as possible provides the most meaningful and empowering option to claimants who seek to exercise it. Second, I would qualify my recommendation by stating that the most effective and accessible definition would be one that is borne out

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[64] See *Brome* and *University of Regina*, *supra* note 55. See also *Ahmad v CF Chemicals Ltd*, 2019 AHRC 5 at paras 179–81.

[65] *Supra* note 58 at para 33.

[66] See e.g. "What is Discrimination?" (2008), online: *Ontario Human Rights Commission: Human Rights at Work 2008* – Third Edition <www.ohrc.on.ca/en/iii-principles-and-concepts/2-what-discrimination>.

of consultation with those for whom it is written. Access to justice ought to remain at the centre of the definition, beginning from the access to its formulation and ending with access to its meaning and operability. Two examples come to mind that will help illustrate my two-pronged argument.

First, let us briefly consider the development of the definition of "consent" in Canadian criminal law. Consent is defined twice in the *Criminal Code*, originally in section 265 and subsequently in sections 273.1 and 273.2 for further clarity.[67] Its earliest significant treatment in *R v. Ewanchuk* incited controversy about the scope and parameters of the definition that persists to this day.[68] In addition to judges and academics who disapprove of the definition, its current form has also brought about numerous additional negative externalities, such as low founding, charging and conviction rates, and underreporting of sexual assault.[69] Despite its decades-long consideration by the legislature in response to strong commentary from the judiciary and both public consultation and opinion, the definition remains far from settled.[70] Perhaps this is simply a reality for broad and significant concepts in life and law. However, decisively entrenching a definition should still be the ultimate goal, as it ensures consistency and predictability—two cornerstones of access to justice and the rule of law.

Second, I reflect on the Canadian Observatory on Homelessness's "National Definition of Indigenous Homelessness

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[67] RSC 1985, c C-46. For a detailed breakdown of the law of sexual assault's evolution in Canada, see e.g. Martha Shaffer, "The Impact of the Charter of the Law of Sexual Assault: Plus Ça Change, Plus C'est La Même Chose" (2012) 57 SCLR (2d) 337.

[68] See e.g. Don Stuart, "Ewanchuk: Asserting 'No Means No' at the Expense of Fault and Proportionality Principles" (1999) 20 CR (5th) 39; Kwong-leung Tang, "Rape Law Reform in Canada: The Success and Limits of Legislation" (1998) 42:3 Intl J Offender Therapy & Comp Crim 258 [Tang].

[69] See Tang, *supra* note 68.

[70] See e.g. *R v Seaboyer; R v Gayme,* [1991] 2 SCR 577, 83 DLR (4th) 193; Sean Fine, "Supreme Court ruling tries to clarify definitions of consent and credibility in sexual-assault cases," *The Globe and Mail* (14 May 2021), online: <www.theglobeandmail.com/canada/article-supreme-court-ruling-tries-to-clarify-definitions-of-consent-and/>.

in Canada." While the length of this definition is a paragraph, it is accompanied by a 40-page document that goes into detail about each element of the definition.[71] In order to develop this comprehensive definition, the Observatory undertook consultations with Indigenous scholars, front-line workers, community members, knowledge keepers, Elders, and those who have experienced homelessness first-hand or who work in the field of Indigenous homelessness.[72] The consultation pool consisted of over 50 Indigenous individuals and took place over a period of 18 months (from January 2016 to August 2017).[73] In the Observatory's report, its author, Professor Jesse Thistle, shares that the contributions ranged from brief suggestions to extensive input, but "all were valued."[74] Professor Thistle explains that, as the Observatory members spoke with First Nations, Métis and Inuit from across the country, 12 specific kinds of Indigenous homelessness came to the fore. In the Professor's words,

> it was apparent that each person and community had experienced degrees of homelessness, and that each had endured them in different ways. ... [T]he 12 dimensions can be layered ... to illustrate the scope and severity of an Indigenous individual's or community's homelessness, as well as to find solutions to their particular needs.[75]

This process reflects another ideal in terms of defining—a thorough and thoughtful consultation process. However, consideration of this definition is missing from federal policy and law.[76] Its absence from lawmaking discussions points to the equal importance of holding public consultations that draw upon the

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[71] For the full definition and all of its elements, see Jesse Thistle, *Indigenous Definition of Homelessness in Canada* (Toronto: Canadian Observatory on Homelessness Press, 2017).

[72] See *ibid* at 29.

[73] See *ibid* at 4.

[74] *Ibid*.

[75] *Ibid* at 29.

[76] For example, any consideration of Indigenous Homelessness is missing from the National Strategy for Housing: see Melanie Redman, "Defining and measuring an end to homelessness: Considerations for the National Housing Strategy" (last visited 25 August 2022), online: *Homeless Hub* <www.homelesshub.ca/resource/defining-and-measuring-end-homelessness-considerations-national-housing-strategy>.

benefits of standpoint theory, and then taking the testimonies and suggestions into serious account.

Together, these two examples illustrate elements to aspire to in the definition process, as well as cautionary realities to be aware of. The evolution of consent illustrates that even entrenched legislative definitions may be contested and inconsistently understood by courts if they are too broad or leave room for interpretation, and the definition of *Indigenous Homelessness* shows that a conscientiously crafted definition loses significant value if it is not considered by those with the "power," recalling Sheppard's discussion of standpoint theory, to define. Bearing these lessons as well as the elements of systemic discrimination in mind, I now turn to their specific application in the Yukon.

V. Re-drafting Section 12 of the Yukon *Human Rights Act*

Section 12 of the *Act* reads "any conduct that results in discrimination is discrimination."[77] How are claimants, YHRC staff, administrative decisionmakers, and reviewing courts meant to interpret this vague definition? As it stands, the Yukon Panel of Adjudicators (the "Panel" or "Board") has interpreted the provision inconsistently. In *Hayes v. Yukon College*, the Panel found that "this section addresses circumstances where formal or informal administrative policies or procedures result in discrimination, causing such policies or procedures to be impugned."[78] However, this definition was never again cited by the Panel. In another case, the Board found that the *Act* "empowers the Board to determine issues of discrimination based on a prohibited ground, systemic discrimination (by policy/practice), harassment, reasonable accommodation, remedy and costs."[79] Yet, the decisionmaker did not elaborate on

[77] YHRA, *supra* note 4.

[78] *Hayes v Yukon College*, 2008 CanLII 93215 at para 49 (YK HRC).

[79] *Malcolm v Yukon College,* 2011 CanLII 152503 at Appendix B (YK HRC).

how they arrived at this determination, given that the *Act* does not contain language that explicitly empowers the Board to determine issues based on systemic discrimination. In other decisions, the term *systemic discrimination* is evoked without definition.[80] Overall, since 1990, the term *systemic discrimination* has only appeared in four Panel decisions. Given the confirmed pervasiveness of systemic discrimination in Canadian society, this degree of inconsistency and underuse confirms that claimants are not bringing forward complaints of systemic discrimination because neither they nor the Commission are aware of the correct process for doing so.

The *Act* first came into force in 1986 and has since been amended eight times.[81] Section 12 remains unchanged since the original version of the *Act* was assented to in 1987.[82] In 2008, the Yukon legislature struck a special committee, the Select Committee on Human Rights, which was charged with reviewing and reporting to the Assembly its findings and recommendations regarding public opinion on legislative options for amending the *Human Rights Act*.[83] Upon conducting in-person hearings across the territory[84] and soliciting written submissions,[85] the committee released a report in which it unanimously recommended that "language in the Act be revised to reflect clarity on the issue of systemic discrimination."[86] Despite this recommendation and numerous suggestions in the form of written submissions, section 12 of the *Act* was not re-formulated in 2008 nor in any of the subsequent amending processes.

In considering how to re-formulate section 12, I wish to highlight some of the submissions the Committee received in 2008. Informed and influential groups such as the Yukon Public Service

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[80] See e.g. *Campbell v Yukon Housing Corp*, 2005 CanLII 94014 (YK HRC); *Nukon-Blake v Yukon (Justice)*, 2016 CanLII 154164 (YK HRC) at para 6.

[81] See Select Committee on Human Rights, *supra* note 24.

[82] *Ibid*. Note that the systemic discrimination provision used to be section 11 but in 1998 it was shifted to section 12.

[83] *Ibid*.

[84] See *ibid* (specifically, Press Releases).

[85] See *ibid*.

[86] Report of the Select Committee on Human Rights, 32nd Yukon Legislative Assembly, November 2008 at 17.

Commission (PSC), the Yukon Anti-Poverty Coalition, and the Public Service Alliance Equity Seeking Committee, the Yukon Human Rights Commission (which operates independently of the Panel) confirmed the lack of clarity and utility in section 12, and it proposed alternative formulations that drew on the common elements from Part III. For example, the Commission proposed a change which was consistent with the Abella Report's definition in CN[87]and the PSC provided a formulation which outlined certain facets of systemic discrimination (impact, perpetuation of disadvantage) and subsumed it under the general definition of "discrimination" set out in sections 7, 8, 9, and 15 so that it could apply under the general area-ground-nexus test.[88]

Following the logic of standpoint theory, these submissions illustrate the value that public consultation and participation bring to legislative drafting, and how in the Yukon, specifically, groups with rich experiential knowledge about the population are willing to engage in the process in order to help produce legislation that, in turn, will be intelligible and accessible to Yukoners, especially those who may face systemic discrimination.[89] It is a shame that the government refused to take seriously the Committee's recommendation, which was informed by these submissions. If the opportunity to revise this section arises again, it may be incumbent upon these groups to not only provide suggestions for legislative clarity once again, but also put pressure on the territorial government to take their suggestions to heart. If successful, Yukon may be able to derive the benefits of a complete definition from the submissions, and avoid the pitfalls faced by the definition on Indigenous Homelessness.

In assessing the potential of a new formulation of section 12 through the expanded capabilities framework, two realizations come to bear. First, if the legislature were to adopt the PSC's proposal to include systemic discrimination under general discrimination as set out in sections 7, 8, 9, and 15 of the *Act*, claimants would be able to identify a clear test to which their situation of systemic discrimination must apply in order for the

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[87] See *CN*, *supra* note 59.

[88] See Select Committee on Human Rights, *supra* note 24 ("PSC Report").

[89] See Sheppard, *supra* note 44.

Commission to accept it. Given that the area-ground-nexus test is entrenched in Yukon human rights jurisprudence and in the Commission's activities, its application to systemic discrimination should not be onerous.[90] As a result, accessing it will not be overly complicated as its logic falls in line with the complaints process that is familiar to claimants and administrative actors. Moreover, a reformed section 12 will also curtail the vastly inconsistent interpretations of the provision currently in the jurisprudence. This clarity, bolstered by the existing test, implies that the Panel and reviewing courts will likely cite the same definition consistently, and claimants will thus be able to rely, even unconsciously, on more predictable jurisprudence. The facility of associating systemic discrimination to the existing test for discrimination and the consistency that will come out of a concrete definition both lend themselves to claimants' capability and meaningful choice. A familiar test and foreseeable definition allow for complainants to engage with a more informed option when deciding whether or not to submit a human rights complaint. As a result, we may observe legal empowerment in action, as well as an increase in access to a justice system in which one can put a legislative name to an experience and seek out recourse, even if success is not guaranteed. The predictability and agency imbued in this sequence lends itself to knowledge of, and confidence in, the administrative legal system and a resultant strengthening—or at least preservation—of the rule of law.

VI. The Place of Legislative Definitions in the Access to Justice Matrix

Reprisal: What kind of Access? And what kind of Justice?

In Part III, I explored the particular "kind" of access and justice that legislative drafting can bring about. Recalling Sen's capabilities approach and its relationship to the idea of

[90] YHRC has produced educational materials about it, all employees are familiar with it and can explain it to potential complainants: see "About Human Rights" (last visited 25 August 2022), online: *Yukon Human Rights Commission* <yukonhumanrights.ca/what-are-human-rights/>.

meaningful access to justice, I now ask what *kind* of access and what *kind* of justice a re-drafting of section 12 would afford to Yukoners. In terms of access, I re-emphasize that it is a narrow variety of access. A reformed section 12—one that contains clearer descriptive elements of what exactly systemic discrimination looks and feels like in intelligible language, and one that is associated with a tangible "legal test"—would theoretically provide a meaningful "chance" at making use of the Yukon Human Rights Commission and Panel of Adjudicators.

When considering access to an administrative process like the human rights complaint mechanism as it stands, Sen's condition that "capabilities and the opportunity aspect of freedom … have to be supplemented by considerations of fair processes and the lack of violation of people's right to invoke and utilise them" remains unfulfilled.[91] While an improved legislative definition may bring the process closer to realizing this condition, it is no panacea. Although poor drafting and inoperability may be addressed by a clearer definition, other access to justice issues in the administrative space, such as delay, lack of resources, understaffing, and backlog still figure in the analysis.[92] By making the definition of *systemic discrimination* practicable, the possibility arises that more complaints will be accepted into the administrative process than is the case presently. It is unlikely that the system, in its current form, would be able to support them in a timely and thorough manner.[93] Thus, even if an improved definition becomes a real option for potential claimants, other structural improvements need to occur in order for the definition

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[91] See Sen, *supra* note 30 at 157.

[92] See e.g. David Stratas, "Decision-makers under new scrutiny: sufficiency of reasons and timely decision-making" (Paper presented to the CIAJ Roundtable, Toronto, 3 May 2010) [published on CIAJ website]; Terence Ison, "Administrative Law—The Operational Realities" (2009) 22 Can J Admin L & Prac 315; Paola Loriggio, "Experts say staffing shortage compounds COVID-19 delays at human rights tribunal," *Global News* (27 August 2020) online: <globalnews.ca/news/7302183/covid-19-human-rights-tribunal-ontario/>.

[93] For further discussion on the pervasiveness of delay in administrative proceedings across Canada, see e.g. *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29; Frank Nasca, "Jurisdiction and Access to Justice: An Analysis of Human Rights Tribunal of Ontario-issued Notices of Intent to Dismiss," OBA Annual Update on Human Rights Law, May 25, 2022.

reform to be meaningful. If a more systemic overhaul does not accompany this change in definition, the drafting reform could, in a sense, cause more harm than good.

The methods that I propose relate to "accessing" a state-created system that functions based on a limited statute. This access requires engaging with the narrow confines of the territorial human rights adjudicative system, and the justice that it serves is of a specific kind: the result of the Yukon human rights complaint process is either a settlement or Panel-ordered damages which can take the form of financial compensation, specific performance (such as an apology or reinstatement), or some combination of the two.[94] Although the proposal at hand deals with a very particular kind of access to a narrow conception of justice, it does stand the test of Sen's public scrutiny because it is but one of many options, and wielding the power of choice is fundamental to the capability approach. When put together, the nature of the access to justice available to claimants as a result of a reformed section 12 draws on principles of legal empowerment.

Although the argument for re-drafting section 12 does not pertain solely to legal empowerment of the poor, it draws on Banik's reference to "civic agency" and, broadly, ensuring that those who may be subject to ("victims" of) systemic discrimination can access mechanisms for seeking recourse and advancing their interest(s) in being heard or pursuing justice in this forum. Banik frames legal empowerment as the poor having protection against exploitation (among other harms) and offering them equal opportunity to access economic opportunity. We can apply the same logic of "access" to administrative justice instead of to markets.[95]

In fact, Banik himself writes that access to justice and the rule of law are considered the "fundamental and enabling framework" that enables the realization of other pillars of legal empowerment, namely property, labour, and business rights. This "core bundle" of rights cannot be fully effective unless there is a realistic option of enforcing them, which brings us back to the notion of "meaningful" access to justice.[96] Only through an intelligible and

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[94] See *YHRA*, *supra* note 4; "About Human Rights," *supra* note 39.

[95] See Dan Banik, "Legal Empowerment as a Conceptual and Operational Tool in Poverty Eradication" (2009) 1 Hague J Rule of Law 117 at 124.

[96] See *ibid*.

knowable system can legal empowerment—through agency and capability—be realized. Putting this theory into practice, a clearer and more operational definition of *systemic discrimination*, necessarily crafted by Yukon-based stakeholders who are part of the community, draws on the interrelationship between human capability and empowering those who may not currently be able to access the human rights adjudicative system.

To support this argument, I point to a parallel area where a clear legislative definition has helped increase access to justice (within the limited context outlined above). One example is the codification of the definition of *strategic lawsuits against public participation* (SLAPPs) in Ontario and Québec. SLAPPs refer to judicial practices of an enterprise or institution going to tribunals in attempt to neutralise or censure individuals, social groups, or collectives engaged in public denunciation of their activities.[97] When corporate actors began to use SLAPPs to intimidate smaller parties who wanted to draw attention to their practices, the two provincial governments codified comprehensive definitions of the practice and how to identify it in their respective civil procedure statutes.[98] As a result, both the courts and parties can now easily identify the constitutive elements of a SLAPP in each province, and ambiguity on the matter is essentially eliminated. However, much like with the definition of *systemic discrimination*, codification is the first step. Upon entrenching a practical and comprehensive definition, the next challenge is educating the public on its existence and use. This next step warrants in-depth research of its own, and I do not wish to skim over it in this paper, whose sole focus is the codification and accessibility of legislative definitions.

The codification of SLAPPs provides an illustration of how doing so increases knowability and use by claimants and courts. Once legal actors are aware of a concrete legislative definition, they may use it to label an act or experience and choose to act on it by means of an administrative or legal proceeding. As such,

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[97] See e.g. Gouvernement du Québec, "Les poursuites stratégiques contre la mobilisation publique: les poursuites-bâillons (SLAPP)" (2007); Pamela Shapiro: "SLAPPs: Intent or Content? Anti-SLAPP Legislation goes International" (2010) 19:1 RECIEL 14.

[98] See *Courts of Justice Act*, RSO 1990, c C-43, s 137.1; *Code of Civil Procedure*, C-25, arts 51, 54.

the process and result of "defining" finds its place in the access to justice matrix by imbuing meaningful choice, derived from lived experience and knowledge, into the statutes which govern us.

VIII. Concluding Thoughts: Lessons Canada Can Learn from the Yukon

In exploring legislative defining in the Yukon, I believe that the rest of Canada can learn from the Yukon, a territory arguably ahead of its time in enshrining a provision on systemic discrimination in its human rights legislation as early as 1987. Although I have spent many words arguing that the Yukon's definition of *systemic discrimination* requires re-drafting, I must acknowledge that the territorial government has taken steps towards more inclusive human rights legislation than other provinces in our country, namely Ontario, British Columbia, and Québec, who have not. The law has a reputation for being slow to adapt, but the Yukon illustrates that it does not have to be this way. While there is no doubt that section 12 of the *Act* has a long way to go before it can qualify as a practicable, comprehensive, and accessible provision for combatting systemic discrimination, there is something to be said for its mere presence in the *Act*, as well as the community's awareness of and desire to repair its flaws. While Canadians often look to the populous provinces as a "model" for governance, this case study illustrates that the nation can learn something from its Northern territories.

The story of systemic discrimination in the Yukon *Human Rights Act* is one of promise and potential. Its existence is the prerequisite for a lesson to be learned about the importance of legislative drafting and definitions. In defining comprehensively, practically, and by virtue of community consultation, we can draft human rights legislation that gives potential claimants the chance at a meaningful and well-informed choice to engage in human rights adjudication. This choice is a powerful one. It is representative of accessibility, agency, and trust in the administrative system, without which the rule of law would falter.

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