

**B.C. Human Rights Tribunal  
Rules of Practice and Procedure**

**Recommendations for Change  
Submitted by:**

**The B.C. Human Rights Coalition  
March 31, 2004**

The Law Reform Committee of the Board of Directors of the B.C. Human Rights Coalition, advocates in the Human Rights Clinic, and staff of the Coalition make the following recommendations with regards to the Tribunal's Rules of Practice and Procedure. A year into the new human rights system we have a clearer understanding of the role of all parties to a human rights complaint, and believe that the respondent community would agree that absent a human rights investigation there is a greater responsibility on the parties to develop each side of a complaint through the Tribunal process. The result of this is that there is a much greater reliance on proper and early disclosure. We believe that some of the rules have an adverse impact on complainants, and are simply unfair. Others give respondents an unfair advantage, and make proper representation of complainants somewhat more difficult and cumbersome. With these things in mind, we make the following suggestions:

**Part 3 – Making a Complaint and Responding to a Complaint**

**Rule 13 – Responding to a Complaint**

Under “Time limit for responding if early settlement meeting”, Rule 13 (4)(a) & (b) states:

- (4) The Tribunal will extend the time limits under this rule for filing the respondent's Response to the Complaint if:
  - (a) the complainant has stated an interest in an early settlement meeting in section M of the Complainant Form; and
  - (b) the respondent has advised the tribunal within the time allowed by the tribunal that they are interested in an early settlement meeting.

We believe that postponing the time limit for responding to a complaint until after an early settlement meeting has an adverse impact on a complainant and on complainant representation. We are aware that this model was originally designed by the U.B.C. Mediation Project in conjunction with the B.C. Human Rights Commission. This model attempted early mediation regardless of the merits of the complaint before the complaint was determined as within the jurisdiction of the *Code*. It was intended to be interest based only, rights rarely entered into it. It also contemplated a human rights officer as the mediator. This human rights officer was not as restricted as a Tribunal Member within the scope of the mediation. In addition, the complainant was rarely represented.

In the current system, the effect of postponing the time limit to respond to a complaint, is that the early settlement meeting is unfair. This occurs because the complainant has put forth particulars of allegation, has been accepted into the process, has stated an interest in settlement, but has no knowledge of the response to the initial complaint. This can result in ineffective early settlement meetings. In addition, the fundamental difference between the Commission and the Tribunal system requires, and we think rightfully so, that all representation in a settlement and/or mediation should be a mix of interest and rights based debate.

We recommend that Rule 13 (4) be removed, although we agree that the parties should be able to engage in an early settlement meeting at any time, if they both consent.

#### **Part 4 – Management and Streaming of Complaints**

##### **Rule 18 – Standard Stream Complaints**

**Pre-hearing conference preparation (9).** We submit that the word “final” should be added to this rule in order to clarify which pre-hearing conference this requirement applies to. If accepted the rule would read, in part, “At least 14 days before the **final** pre-hearing conference ...”.

#### **Part 6 – Applications**

##### **Rule 24 - Applications**

Under “Schedule for submissions”, Rule 24 (5) states:

- (5) When a completed Application Form is filed, the Tribunal will set a schedule for submissions, if required.

Under the current application process, the applicant submits their application Form 8 to the tribunal and delivers a copy to the other party. In cases where the tribunal determines that submissions are necessary, the tribunal sets a schedule for submissions by which the respondent to the application receives approximately 10 days to make their submission in response to the application. The applicant then receives approximately 5 days to respond to the respondent’s submission.

We believe that this process adversely impacts the respondent to the application because it essentially gives the applicant two opportunities to make their arguments and/or to submit evidence. Frequently the applicant, when responding to the respondent’s submission, will raise new arguments and/or submit new evidence. Since the application process ends here, there is no opportunity for the respondent to the application to address the new arguments and/or evidence.

We recommend that both the applicant and the respondent to the application be provided with equal opportunities to make submissions. The respondent to the application would

then be provided with the final opportunity to respond to any new argument and/or evidence raised by the applicant in their response to the respondent's submission.

Under this same rule, the tribunal sets the schedule for submissions. If any of the parties require an extension to these dates, they are required to apply under Rule 24. At times, the parties require an extension of only a few days while the application process often takes much longer than this to conclude.

We recommend that in the event that one of the parties require a brief extension to make their submission, they first inform the case manager assigned to the file. The case manager can then assess whether the requested extension is reasonable and adjust the schedule for submissions or request that the parties apply for an extension if the extension they are seeking is a substantial one.

## **Rule 26 – Deferral or Dismissal of Complaints**

### **Time Limit for Dismissal Application**

- (2) If a respondent wants the tribunal to dismiss all or part of a complaint under section 27 of the *Code*, the respondent must apply under rule 24:
- (a) at the time the Response to Complaint Form is filed: or
  - (b) within 30 days from the date on which the information or circumstances that form the basis of the application came to the respondent's attention.

Under Section 27 of the *Code* the criteria are set out by which a tribunal member may dismiss all or part of a complaint:

- (a) the complaint or that part of the complaint is not within the jurisdiction of the tribunal;
- (b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this *Code*;
- (c) there is no reasonable prospect that the complaint will succeed;
- (d) proceeding with a complaint or that part of a complaint would not
  - (i) benefit the person, group or class alleged to have been discriminated against, or
  - (ii) further the purposes of the *Code*;
- (e) the complaint or that part of the complaint was filed for improper motives or made in bad faith;
- (f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;
- (g) the contravention alleged in the complaint or that part of the complaint occurred more than 6 months before the complaint was filed unless the complaint or that part of the complaint was accepted under section 22 (3).

We believe that in order to properly show that any one of these criteria exist, each criteria should be attached to either Rule 26 (2)(a), or 26 (2)(b). In other words, some of the criteria speak to the initial jurisdiction of the Tribunal and whether a *prima facie case* exists, whereas other criteria require some evidence and are more appropriate to an application to dismiss following disclosure.

We submit that it would be fairer to the complainant if an application to dismiss at the time the Response to the Complaint Form is filed could only rely on 27 (a) (b) (d) (f), (with evidence) and (g) of the *Code*. In addition, we submit that only following disclosure by both parties should an application to dismiss be able to rely on 27 (c) and (e) of the *Code*. We elaborate more on these points below.

Closely connected to the timing of preliminary dismissal applications, is the extent of the disclosure requirements imposed on the parties at these different stages. If in the first instance, where a respondent is applying to dismiss a complaint at the time of responding to the complaint, the pre-hearing schedule form and all processes it activates should be delivered to the parties only after the decision on the preliminary application has been made. This would ensure that disclosure dates are suspended until a jurisdictional/prima facie decision has been issued. In addition, we strongly believe that the use of affidavits is highly inappropriate at this stage for the following reasons:

1. Affidavits at this stage are discretionary and selective in terms of what they choose to either include or exclude;
2. Relying on affidavits necessarily imports a weighing of the evidence which is inappropriate in the types of preliminary applications contemplated by section 27 (a) (b) (d) (f), and (g) of the *Code*.

In the second instance, where a respondent is applying to dismiss a complaint within 30 days<sup>7</sup> of the complainant's disclosure, our concerns are as follows. Currently, there is a possibility that the submission process for the application procedure could conclude prior to the complainant receiving the respondent's disclosure. This creates an unfair advantage for the respondent who may have the benefit of both the complainant's submissions and evidence, whereas the complainant may not be afforded the same benefit. We therefore submit that the timing for this opportunity should change to within 15 days of the respondent's disclosure. To ease representation issues for both parties we submit that the parties and the tribunal should revisit any set dates after the decision on the preliminary application has been issued.

We encourage the tribunal to extend its effort to better inform respondents of their right to seek dismissal and how best to go about doing so. If the intent of the process is to be considered user friendly enough for parties to participate without formal representation at the early stages, we submit that more specific communication would facilitate a more effective process.

**Rule 27 – Adding Parties**

Under “Adding a Respondent”, Rule 27 (2) differs significantly from the application process outlined in Rule 24 as it requires the complainant to serve the respondent with what is essentially a complaint against them. The current process is more in line with the process for filing a complaint with the exception of service. In this case, it is up to the complainant to serve the respondent with the complaint and to provide the tribunal with an affidavit of service. We believe this requirement is awkward, and places a negative onus on the victim of discrimination which could potentially cause harm. In addition, we note that many complaints occur in small and rural communities where process servers are not easily available. Furthermore, the current practice of the Tribunal in not considering these applications without the other parties’ position is procedurally and substantively unfair.

We recommend that the process for adding a respondent be more consistent with the process for filing a complaint in that the complainant files the Form 8B with the tribunal and the tribunal serves the complaint on the respondent. In addition, we suggest the tribunal lift the requirement to seek the position of the other parties on these applications.

**Part 8 – Post-Hearing Matters****Rule 36 – Decisions and Orders**

Currently the tribunal has no process available for parties to raise technical errors made in their written decisions, or to request corrections to be made to those decisions.

We recommend that the tribunal develop a rule that provides the parties with such a process.

**Other Matters**

Our front line staff has raised some issues for consideration that have arisen in their work to assist parties in filing complaints and responses to the tribunal. We submit these comments should you be contemplating revisions on your complaint forms.

Form 1 -- Complaint Form

Section B. Who is the complaint against?

A large number of callers have difficulty in filling out this section causing their complaints to be returned by the tribunal a number of times.

Section C & D.

In what area did the alleged discrimination happen? On what grounds did the alleged discrimination happen?

Many people are confused about how to properly fill out these two sections.

Section E.

What are the details of the alleged discrimination?

Many callers want to know whether they should be including evidence, witness statements, documents as attachments, etc. to this section.

In summary, we hope that the Tribunal finds these suggestions useful and will give consideration to implementing them. If you have any questions or concerns, please don't hesitate to contact us. Inquiries can be directed to either Susan O'Donnell or Terri Kennedy at our office.

Respectfully submitted,

B.C. HUMAN RIGHTS COALITION