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CANADIAN HUMAN RIGHTS ACT REVIEW

SUBMISSION TO THE REVIEW PANEL

OCTOBER 25, 1999

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The B.C. Human Rights Coalition wishes to thank the Review Panel for this opportunity to share our thoughts on such an important issue. We applaud the Canadian Human Rights Commission and the Government of Canada for undertaking this review and welcome the changes that have already been made to the *Act*. As will be seen from the observations that follow, the Coalition believes that there is still much work to be done so that human rights protections and enforcement are in keeping with the needs of all Canadians.

INTRODUCTION TO B.C. HUMAN RIGHTS COALITION

The B. C. Human Rights Coalition is a charitable non-profit community based organization which was formed in 1982 with the very broad mandate to promote and strengthen human rights throughout B.C. and Canada. It has 75 member groups from across the province. The Coalition's general overall purpose can be found in its constitution as follows:

- (1) To provide an opportunity for better understanding of human rights issues among organizations and individuals with an interest in those issues;
- (2) To encourage dialogue on human rights matters from different points of view, and thus to educate members and the public about human rights problems encountered by different groups and individuals;
- (3) To educate and assist people in British Columbia with respect to human rights issues;
- (4) To provide assistance and mediation services for people in British Columbia with respect to their human rights under the provincial and federal legislation and the Canadian Charter of Rights and Freedoms, including the right not to be discriminated against for reasons of race, religion, national or ethnic origin, colour, age, sex, sexual orientation, marital status, family status, disability and other analogous grounds;
- (5) To encourage cross-interest awareness and involvement between and among the members of the public.

The Coalition's services integrate information, education, consultation, mediation, research and advocacy. The Coalition has assisted employers, unions and institutions throughout the province in developing policies on human rights, as well as training them in the administration of those policies. We also conduct investigations for internal complaints on a contract basis. Advocacy services assist clients from Intake to Hearing. The Coalition also assists the private bar in its representation of clients through preparation for hearings and legal research. In addition, the Coalition mediates, negotiates and settles many complaints.

THE COALITION'S INVOLVEMENT WITH COMPLAINTS UNDER THE *CANADIAN HUMAN RIGHTS ACT*

Each year the Coalition provides formal assistance for about 300 complaints. Of these, less than 5% are under federal jurisdiction. There are several reasons why our experience with the *Act* is limited but the major one is that we don't believe we can provide effective advocacy within the Commission's structure.

Because the Commission has carriage of all complaints, it is used to dealing with complainants directly. Commission's staff are accustomed to advancing the complainant's position and some of the staff have a difficult time letting go of this role. The Commission will not use the particulars of allegation which the Coalition submits on behalf of clients. It does not disclose respondent submissions, a digest is provided. It is difficult to be an effective advocate without first-hand information. Investigators often contact our clients without making arrangements with their advocate. In one instance we requested a legal explanation for the Commission's position on a jurisdictional question. The response we received was:

"You asked for a legal opinion regarding these matters, and I said I would look further into your request. The Commission does not, however, share legal opinions in these circumstances."

We don't mean to imply that there is anything sinister about this state of affairs but it seems to us that the Commission's enforcement system is not designed for complainants who have an advocate. It assumes that the Commission's staff will present the complainant's point of view.

We are also not suggesting that those complainants who don't have an advocate should be left to their own devices. Many of the Commission's procedures assist unrepresented complainants.

ISSUES RAISED BY THE REVIEW PANEL CONSULTATION PAPER

- **SCOPE OF THE ACT**

1. Purpose, Language and Primacy

The Coalition believes that the current purpose is too narrow. It should include reference to Canada's commitments under the *International Declaration of Human Rights*; the *International Covenant of Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*.

In British Columbia for example, one of the purposes in the *B.C. Human Rights Code* is:

To foster a society ... in which there are no impediments to full and free participation in the economic, social, political and cultural life ...

The Coalition believes that the *Canadian Human Rights Act* should include the following recommended preamble which is based on the *Manitoba Human Rights Code*:

WHEREAS Canadians recognize the individual worth and dignity of all persons and their right to full and free participation in the economic, social, political and cultural life of Canada and this principle underlies the *Universal Declaration of Human Rights*, the *International Covenant of Economic, Social and Cultural Rights*, the *International Covenant on Civil and Political Rights*, the *Canadian Charter of Rights and Freedoms*, and other solemn undertakings, international and domestic, that Canadians honour;

AND WHEREAS Canadians recognize that

(a) *implicit in the above principle is the right of all individuals to be treated in all matters solely on the basis of their personal merits, and to be accorded equality with all other individuals;*

(b) *to protect this right it is necessary to restrict discrimination against individuals, including discrimination based on stereotypes or generalizations about groups with whom they are or are thought to be associated, and to ensure that reasonable accommodation is made for people who experience inequality ;*

(c) *in view of the fact that past discrimination against certain groups has resulted in systemic disadvantage to members of those groups, and therefore it is important to provide for employment equity programs and other special programs designed to overcome this historic disadvantage;*

(d) *much discrimination is rooted in ignorance and education is essential to its eradication, and therefore it is important that human rights educational programs assist Canadians to understand all their fundamental rights and freedoms, as well as their corresponding duties and responsibilities to others; and*

(e) *these various protection for the human rights of Canadian are of such fundamental importance that, except for the Constitution, they merit paramount status over all other laws of the country;*

NOW THEREFORE HER MAJESTY, by and with the advice and consent of the Parliament of Canada, enacts the following to uphold these principles.

Is the Act consistent with the Supreme Court of Canada's view of the purpose of equality rights as outlined in the *Charter*?

While on its face the *Act* is consistent with s. 15 of the *Charter*, its application does not always conform with the *Charter* analysis which the Courts use. Hopefully this will change in light of the decision in *B.C.(Public Service Employee Relations Commission v. BCGSEU* ([1999] S.C.C., unreported September 9, 1999), where the Supreme Court unanimously affirmed that the analysis the Courts give to *Charter* claims should be applied to human rights complaints.

Should the Act clearly state that discriminatory statutes and regulations can be challenged or should this be the role of the courts?

The *Act* should allow the Canadian Human Rights Commission to initiate *Charter* challenges.

The *Act* should also stipulate that Tribunals can consider complaints of discrimination which are caused by statutes and regulations. Tribunals should be able to decide constitutional questions if they involve government rules and regulations which have not been enacted by Parliament. Tribunals should not decide the constitutional validity of laws enacted by Parliament. The Courts should retain jurisdiction to strike or amend laws which are deemed to be unconstitutional.

2. Grounds

Sex discrimination

While there have been some positive developments in case law, people who identify as transsexual, transgender, or transvestites are not clearly identified under the category of "sex discrimination." Pregnancy-related discrimination also continues to be widespread, particularly the denial of disability and sickness employment benefits to pregnant women. We recommend that sex discrimination explicitly include, but not be limited to, transsexual, transvestite, transgender, gender-based stereotypes, pregnancy, the possibility of pregnancy, or circumstances related to pregnancy.

Criminal Record

The current definition of "conviction for which a pardon has been granted" is too narrow. It should not matter if a pardon has been granted or not. A person's criminal past should only be considered if there are bona fide reasons that justify the denial of employment, service or accommodation. We recommend the term "conviction" be broadened to include "a criminal charge, conviction, or discharge which is unrelated to the intended employment, service or accommodation".

Social Condition

A number of jurisdictions in Canada extend protection from discrimination on the basis of income source or social condition. For example, British Columbia and Manitoba includes "source of income" in their list of prohibited grounds; Saskatchewan and Ontario provide protection for people in receipt of public assistance.¹ Quebec is the only province to include "social condition" as a protected characteristic.

¹ B.C.'s & Ontario's protections are limited to tenancy and do not apply to employment or services

We recommend the inclusion of "social condition" as a new prohibited ground of discrimination. Social condition includes but is not limited to discrimination on the basis of "source of income." The term "social condition" has the potential to extend human rights protection to people who are living in temporary circumstances² which do not neatly fit into other protected grounds of discrimination. "Social condition" may also capture the circumstances of people who are disadvantaged because of a number of factors, i.e., those individuals and groups who may otherwise fall through the cracks. Domestic workers employed in the Foreign Domestic Workers Program, for example, experience discrimination from a variety of sources and factors.

We endorse the position taken by Quebec Tribunals that social condition must be interpreted with a purposive approach, in a manner which protects socially disadvantaged groups, and which takes into account stereotypes and historical disadvantage.³

Political Belief

We support the inclusion of political belief as one of the enumerated grounds. We would add a cautionary note however about how this ground might fit under the hate provisions of the *Act*.

3. Exceptions in the *CHRA*

(a) *Bona Fide Occupational Requirement & Bona Fide Justification*

The word "justification" can be open to interpretation. The term *bona fide requirement* could be used instead of *bona fide justification*.

(b) Mandatory Retirement

The wording of sections 9(2) and 15(1)(c) is vague. The term "normal age of retirement" is very broad. The word "mandatory" does not appear in the wording of either section. Both these sections should specify that employees "have reached age 65 and retirement is mandatory for all employees who have reached this age". The way the *Act* is currently written, some employees can continue to work if they are older than other workers who are forced to retire.

We are aware that some groups of employees have a retirement age below 65. There should be an additional clause which allows for a younger retirement age that relates to a *bona fide* occupational requirement, that the majority of the workers affected have voted to approve the age of retirement and the employer has an adequate pension plan in place.

² See the recent Quebec Tribunal decision *D'Aoust v. Vallieres* (1994) 19 C.H.R.R. D/322 which held that unlike other grounds of discrimination, a social condition may be temporary.

³ *Quebec c. Gauthier* (1994) 19 C.H.R.R. D/313.

(c) Pensions and Benefits

The Coalition does not understand the reasons why sections 40(7) and 62 were enacted.

We are aware of one decision⁴ where it was held that the *Act* does not apply to the Canada Pension Plan because it was established before March 1, 1978. The same Judge also quashed four Tribunal referrals of complaints involving same sex benefits under the C.P.P. We do not know what the Commission has done following this decision but, in our opinion, the lower Court's interpretation of s. 62 is not in keeping with the Supreme Court's analysis in *B.C. (Public Service Employee Relations Commission, supra)*.

We are currently assisting an individual who has been denied survivor benefits under the C.P.P. because his partner of 22 years was a man. When the Coalition contacted the Commission about this matter we were told that our client should wait until the Canada Pension Plan is amended. It is submitted that this is not the way the *Canadian Human Rights Act* should be enforced.

An interpretation of the exemption clause for B.C. plans under s. 13 (3) of the *B.C. Code* [s. 8(3) of the previous *Act*] was provided in *O'Neil v. C.P.U.* (28 C.H.R.R. D/24 - B.C. Council of H.R.). It was determined that the exemption only applied if it could be demonstrated that a term or condition relating to the operation of a pension plan was *bona fide* and not discriminatory. The Member Designate concluded her analysis at p. D/29 by writing:

[34] ... In summary, the appropriate test to be applied in interpretation and applying the exemption set out in s. 8(3)(b) of the *Act* relating to the operation of a *bona fide* pension plan is that set out in *Zurich Insurance*.

In light of the fact that all provincial plans are captured by the *B.C. Code*, there does not appear to be any reason why all federal plans are not covered by the *Act*. The provisions related to pension and benefit plans established prior to March 1, 1978 should be repealed immediately.

(d) *Indian Act Exception*

The Aboriginal community needs to be consulted about this topic. The Coalition believes that all Canadians should be covered by the *Act* unless there is an agreement in place between the Government of Canada and First Nations Government.

(e) Other

Childbirth or Child Care Leave Exception

S. 15(1)(f) of the *Act* frames this subject in a defensive way. Case law has evolved since this part of the *Act*

⁴ *Magee v. Attorney General of Canada* (F.C. Trial Div. September 8, 1998, unreported)

was written and it is now deemed to be discriminatory if pregnant women and parents are not accommodated. We believe that a positive right to leave and other benefits for the caring of children should be included in the *Act*.

Exemptions for Affirmative Action Programs

Sections 16, 17 & 18 contain a lot of words. These sections could be shortened. We suggest that the Review Panel look at s. 42 of the *B.C. Code*.

The Coalition supports the notion that plans which are approved by the Commission should not be subject to complaints under the *Act*.

4. Hate Messages

The *Act* should be broad enough to deal with hate messages on the internet. In addition, radio and television broadcasts should be covered.

5. Parliamentary Employees

The conduct of all federal employers should be covered by the *Act*. A Member of Parliament, as an employer, should be included. If political belief is added to the *Act*, an exemption for Members of the House or Senate should be created for this particular ground.

6. Successor Employers or Service Providers

The Coalition has dealt with one B.C. case where this has been a problem. It has not been resolved and a Tribunal may be considering this question in the near future.

The *Act* should specify that a successor employer is liable for human rights complaints involving employees that still worked for the company at the time of purchase.

A successor employer may have a valid argument if a complaint is filed after it bought a company and the allegations involve conduct which took place before the purchase and the employees involved no longer worked for the company.

7. Contractors

The Coalition is not able to give an informed opinion on this subject. We can only note that no one should be able to contract out of human rights protections in any jurisdiction.

8. Who may file a complaint?

Unions and Organizations

The *Act* should allow for complaints to be filed by third parties. S. 40(2) requires the Commission to insure that a victim consents to a complaint in his or her name. The *Act* should also contain a provision which allows the Commission to determine whether or not a representative complaint is in the interest of the group or class on behalf of which the complaint is made.

Complaints from outside Canada by individuals applying for landed status.

The Commission should have the power to challenge regulations made in Canada if they have discriminatory provisions which are applied to people outside the country.

The Commission does not have enough resources to adequately handle complaints made by people already in the country. Immigration law is unique and involves consideration of issues which are outside the expertise of the Commission. There is a danger that people who wish to come to Canada for economic reasons, will try to use the Commission as a form of appeal should their applications be denied. We do not recommend that the *Act* be extended to individuals who's applications for landed status are rejected from outside the country.

Employment complaints where the victim can't be identified.

The Commission should have the power in to decide if proceeding with a representative complaint is in anyone's interest.

9. Harassment - More Definitions?

It is submitted that the case law on harassment is sufficiently developed and that more definitions are not needed. Definitions can hinder a broad purposeful approach. Specific definitions tend to be interpreted very narrowly and increase the likelihood of each ground being interpreted in a static, compartmentalized manner.

Mandatory Policies & Commission Audits

This would require more staff resources and yet another complex set of rules and regulations. The Coalition believes that having such a provision could lead to the privatization of human rights. Employers will argue that a complaint, which has been dealt with under an approved policy, cannot proceed further because it has already been decided under a provision of the *Act*.

Most major employers already have policies in place. The Coalition believes that if the Commission has

effective enforcement procedures, employers and service providers will implement policies in order to limit their liability.

10. Retaliation

The Coalition has dealt with many complaints of retaliation but few of them have been in federal jurisdiction. This is due in part to the fact that before the recent changes to the *Act*, complaints of retaliation were treated as criminal matters and dealt with by the R.C.M.P. Few complaints went forward because of the criminal burden of proof.

The Coalition's experience in B.C. is that if a complaint has been served on a respondent and retaliation takes place, most complaints are accepted. Difficulties do arise however for individuals who are retaliated against before a complaint is actually served on the respondent. People who assert their rights under the *Act*, assist others with asserting their rights or refuse to violate the *Act* have a difficult time seeking protection against retaliation. It has been an uphill battle to get the B.C. Commission to take a broad purposeful approach when looking at acts of retaliation.

The Current wording in the *Act* is confusing. S. 14.1 refers to "retaliation" after a complain "has been filed". S. 59 however refers to individuals who have been "threatened, intimidated or discriminated against" because a complaint has been filed or someone "proposes" to file one. The effectiveness of these provisions depends on which section is used and how the word "proposes" is interpreted.

The Coalition believes that this part of the *Act* can be a powerful tool when it comes to preventing discrimination. We suggest the wording be broadened to include protection for those who "assert their rights under the *Act*, assist other in asserting their rights and/or refuse to violate the *Act*".

B. PROCESS

11. Current Canadian Human Rights Commission Functions

(a) Processing of Complaints

While the Coalition has concerns about the small number of complaints that are referred to a Tribunal, we believe that the Commission could devote more resources to screening at the intake stage.

While the Coalition believes that the Commission should take a broad purposeful approach when deciding to pursue a complaint, we are concerned that the Commission is not doing enough work during intake. Many individuals contact the Coalition for assistance with complaints that have been accepted by the Canadian Human Rights Commission. These individuals believe that their complaints have merit and that some form of redress under the *Act* will be available to them. When we review the particulars of allegation, we often have to provide negative opinions about their chances of success. These individuals get quite upset when we

advise them that, in our opinion, they have not established *prima facie* case.

Like other Commissions, the Canadian Human Rights Commission does not apply a sophisticated analysis during intake. It is submitted that the Commission could better utilize its resources if it took a more substantive approach during the initial stages of a complaint.

Another aspect to be considered is the fact that most intake is done over the phone or by mail. If the Commission had properly staffed regional offices, there would be more opportunity to meet with complainants in person and go over their particulars in some detail. We find that personal interviews are essential to knowing the facts. A few hours spent doing intake could save months of time for all parties down the road.

(b) Investigations

From an advocates point of view, the Commission's Investigation procedures can be a challenge. Complainants do not get to see the evidence or argument which respondents provide to the Commission. They are given a summary of the respondent's submission which reflects the views of Commission staff. It is not clear to us if respondents face the same dilemma.

It is submitted that the Commission's approach to disclosure is not in keeping with the rules of procedural fairness as outlined in *Syndicat des employes de production du Quebec et de l'Acadie v. Canadian Human Rights Commission*, [1989] 2 SCR. 879 (11 C.H.R.R. D/II). At p. D/14 para 24, Sopinka J adopted the comments of Lord Denning MR in *Selvarajan v Race Relations Board* ([1976] 1 All ER 12, at p.19) and quoted the following:

... the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it...

The Coalition recommends that after a complaint has been served, the Commission disclose all submissions that are made during the course of an investigation.

Due to downsizing, the Commission's staff has been in a state of flux for a number of years. It is not unusual for 3 or 4 different investigators to be assigned to a complaint. It is frustrating for complainants to have one investigator whom they find helpful and/or sympathetic replaced by another one who takes a more sceptical view of their complaint. It is also questionable how a final report can be properly written by someone who may not have spoken to any of the witnesses and has to rely upon another investigator's notes.

Because most investigations are conducted from Ottawa, there is little work done on the ground. Investigations are carried out by phone or by mail. As with other aspects of the complaint process, we believe that personal contact is essential. Most respondents to complaints are large organizations with legal counsel or experienced staff who can provide sophisticated argument. Many complainants lack the ability to articulate their position. This results in an imbalance which is hard to correct.

From an outsider's point of view, there does not appear to be any reasonable explanation for the length of time many investigations take. In some cases an investigation may not be required because a complaint involves questions related to credibility or legal issues which only a Tribunal can answer. Why spend two or more years on something which should be mediated or referred to a Tribunal? The Commission should have the discretion to refer complaints to a Tribunal without an investigation.

Responding to an investigation report also poses difficulties for complainants who are unrepresented. They often may not know that there are legal questions which the Investigator failed to notice. They may lack the ability to communicate effectively or are so upset by the report that they focus more on the process than on the content. The Commission is also inconsistent in the time it allows for responses to reports. Some complainants are told they have 15 days, others are given 30. After waiting several years for a report, 15 days seems unreasonable. The Coalition recommends that all parties be given at least 30 days to respond to investigation reports.

Should there be different rules for different types of complaints such as sex harassment and race complaints?

The Coalition submits that there are already different standards used. It is not uncommon for investigators or others to point to the fact that a visible minority person was hired and therefore could not experience discrimination by an employer who hired him or her. This tautological argument is also made for complaints involving other grounds. This question is hardly ever raised in sex harassment complaints.

Different sensitivities are needed depending on the nature of the alleged ground of discrimination but the same standards should be used.

(c) Screening

As noted previously, the Coalition believes that screening is an important function. The Commission must use its resources prudently.

There is a difference however between making sure that a complaint has some basis before accepting it and dismissing a complaint that has merit because a complainant will not accept a settlement offer.

One of our clients had her complaint dismissed by the Canadian Human Rights Commission because she would not take \$250. The Investigator had recommended that the complaint be referred to a Tribunal. The respondent was a major employer that answers many complaints each year. It knows the system. Individual complainants do not. Large federal employers will not enter into meaningful settlement discussions if they know there is a chance that the Commission will dismiss a complaint if they make insignificant offers.

The Commission's structure is problematic when it comes to the disposition of complaints. Our understanding is that Commissioners meet once a month and decide the fate of at least 100 complaints. Six of the Commissioners are part-time. Although the Commissioners are given information before their meeting, it is difficult to imagine how anyone can thoughtfully consider so many cases in this way. The Commissioners are busy people with other commitments in their personal lives. It makes sense that most Commissioners would tend to rely on the two full-time Commissioners or other staff at the Commission for guidance. This is a cumbersome process.

The fact that Commissioners are involved in deciding the merits of complaints also poses potential conflicts for Commissioners who become public advocates for human rights issues.

The Coalition believes that the structure of the Commission needs to be changed but is not sure if this can be accomplished under the current *Act*.

The Coalition believes that effective mediation is the only way to deal with most complaints. If a settlement is not achievable and the complaint has some chance of success, it should be referred to a Tribunal. Respondents tend to get serious about settlement discussions at the Tribunal stage. In B.C. for example, about 85% of all complaints that are referred to the B.C. Human Rights Tribunal are settled through mediation. The Coalition believes that B.C. has the highest number of complaints that are referred to hearing each year.

Appealing decisions

From a complainant's point of view, the most pressing need for an appeal mechanism is when his or her complaint has been dismissed without a hearing. The Commission does not give reasons for its dismissal decisions. Complainants never know how the Commissioners view their responses to investigation reports. We believe that complainants are entitled to written reasons for a decision to dismiss without a hearing. The Coalition also believes that when there are procedural, legal or factual reasons for doing so, complainants should have the right to an independent review of a decision to dismiss. One possibility for appeal would be for a Tribunal member to review the dismissal and determine if it was properly decided.

Although this is anecdotal, if one reads the Canadian Human Rights Reporter on a regular basis it appears that the Commission is involved in more cases before the Courts than before the Tribunal. Respondents are spending a great deal of money (much of it tax dollars) appealing decisions. With a permanent Tribunal in place, decisions should become more uniform as the decision makers gain experience applying human rights law. Hopefully the new Tribunal will make decisions which are sound enough to withstand judicial review.

(d) Conciliation

The Coalition believes that the current conciliation model which the Commission uses should be changed. The Commission makes conciliation mandatory in many cases and its model is based on legal precedent which is too restrictive. The Commission's Conciliation process places absolute control in the hands of the Conciliator. The Conciliator determines what type of settlement proposals can be made and eliminates those which, in his or her opinion, do not follow previous decisions. This approach produces low settlements. We have been told by senior Commission staff that conciliation awards have been going down. It is submitted that most settlements should be higher than Tribunal awards - not lower.

The problems that complainants face during conciliation are exacerbated by the fact that most if not all of the respondents deal with the Commission's Conciliators on a regular basis. Respondents know how to use conciliation to suit their purposes. Most complainants are unrepresented. They may not have any understanding about conciliation or what is an appropriate remedy to ask for. Complainants should be entitled

to informed and independent advice during any settlement discussions.

The Coalition is a strong believer in effective mediation. Any mediation must be voluntary as the parties have to be committed to making it work. Mediation can only be effective when the power relationships are balanced. A way must be found for this to happen.

If the Commission's Conciliation Branch were dissolved, it could be replaced by a Mediation division which could develop a roster of effective mediators in all parts of the country. From the Coalition's experience, a professional mediator is not required for every complaint. In some instances, the resolution is straight forward and all that is required is good will. If a settlement seems possible during the intake or the investigation stage, Commission staff should be able to resolve the matter. If mediators were used as they were needed, this could result in savings and help minimize the problems of over-familiarization which is inherent in the current system.

(e) Legal Representation

The Coalition believes that complainants are entitled to independent legal representation before a Tribunal. Canadians should be able to assert their constitutional rights under section 15 without cost.

There can be fundamental conflicts between a complainant's interest and the Commission's objectives. Tensions can arise if a complainant has become defensive toward the Commission because of events which may have happened during the investigation or conciliation stages of the complaint. The Commission's legal staff have no choice about which cases they represent. They must take what comes along. This does not necessarily lead to inspired representation all of the time. We also believe that the Commission does not have to be involved in every hearing. Two lawyers is not the answer. Lawyers can disagree on what is the best approach to take in any one case. Focus can get lost. The Commission should be able to intervene as a third party if it believes that there is a systemic or public interest issue in a complaint.

The Coalition understands that in order for these suggestions to be implemented, substantial changes to the *Act* need to be made.

There are a variety of mechanisms that can be set up to ensure that complainants have proper legal representation before a Tribunal. The Commission or a branch of Government could develop a reasonable fee schedule to pay members of the private bar. Lawyers from across the country could decide if they were prepared to take on a local case at the suggested rates. Those who express an interest in taking on human rights hearings should be screened to ensure that they have adequate skill and experience in this area of law. Referrals could also be made by the various institutions which handle legal aid. In addition, contracts to represent complainants could be negotiated with various community organizations that provide legal services. Respondents who demonstrate a financial need should also have assistance with legal representation.

Some of the costs for complainant representation would be absorbed from a decrease in the need for legal staff at the Commission. Savings would also be realized because local counsel would not have travel and accommodation expenses.

(f) Audit

The Coalition has little first hand experience with complaints under the *Employment Equity Act*.

C. PREVENTION

12. Ways of Preventing Future Discrimination

(a) Regulatory and Compliance Scheme

The *Employment Equity Act* is a tool which can be used to measure the progress of equality in employment but it should be strengthened so that there are ways to ensure that employers comply with it. The current *EEA* assumes voluntary compliance.

(b) Education

The Coalition believes that education is essential. This is why we have suggested that it should be specifically mentioned in any preamble to the *Act*. Section 27, which outlines the powers and duties of the Commission, makes reference to "information programs" but the word "education" is not mentioned.

We believe that the Commission should have a strong mandate to carry out educational programs and to engage in media campaigns if circumstances warrant it.

(c) Guidelines (d) Advisory (e) Approval

The Coalition is not able to provide an informed opinion about this area of the Commission's work.

(f) Reporting

The *Act* should include a provision (similar to section 8 of the *B.C. Ombudsman Act*) which would allow the Commission to make a special report to Parliament when it does not have the resources to fulfil its duties.

(d) International Role

This part of the Commission's work is not well known. The Commission's Annual Report appears to be the primary source of information about the Commissions' involvement in international issues.

13. Conflict in Roles and Independence

As noted previously, conflicts might arise from the fact that Commissioners decide the merits of complaints and also might speak out on public issues.

The fact that Commissioners are appointed by the government of the day also raises political questions. There are ways to minimize these concerns. Delegating the selection process to a third party is one of them.

D. DECISION MAKERS

14. The Commission

Section 36(1) of the *Act* allows the Chief Commissioner to establish divisions. It is not clear if this section is only meant to apply to the administrative structure of the Commission or if it allows for a division of powers between the Commissioners.

We believe that there should be a Chief Commissioner who can oversee all aspects of the Commission's work. The other Commissioners could be assigned to different divisions such as:

- Intake and Investigation;
- Mediation;
- Education;
- Systemic Discrimination and Employment Equity.

If all Commissioners were full-time, the number could be reduced.

15. Tribunal

Orders/Awards

There should be no upper limit on the amount a Tribunal can award for damages.

Tribunals should have full power to order special measures including employment equity plans.

Costs

In order to ensure that the Tribunal's resources are not used unnecessarily, we believe that it should have the power to award costs in certain circumstances. The Coalition recommends that the Review Panel consider a measure similar to s. 37(4) of the *B.C. Code* which reads:

"The member or panel may award costs against a party to a complaint that, in the opinion of the panel or member, has engaged in improper conduct during the course of the investigation or the hearing of the complaint."

Mediation

We assume that by the time a complaint reaches the Tribunal, settlement possibilities would have been explored by the Commission. The idea that the Tribunal would send the parties back to the Commission for further mediation may not work. The Coalition believes that the Tribunal should conduct any mediation once the complaint has been referred to it. This would preserve the neutrality between the two bodies and allow for a fresh approach to mediation.

Consent Orders

The Coalition believes that Tribunals should be able to make consent orders.

Settlements - Public Disclosure

The Coalition believes that the terms of all settlements should be public but recognizes that it is sometimes difficult to achieve settlements if the parties know that the terms will be made public. In order to minimize this problem, the terms of settlement could be made public on the understanding that this will be done in such a way that the parties are not identified.

Tribunal Hearings without going through the Commission

The Coalition does not support this idea. If a complainant can afford to retain legal counsel outside of the Commission process, he or she should ask the Courts to consider the case⁵. The Tribunal should be reserved for those complaints that have been screened by the Commission. Complainants should not have to pay the costs of legal representation if it is determined that a Tribunal is warranted.

FINAL COMMENTS

As will be seen from the foregoing, the Coalition believes that the Act requires substantial change. We feel that the Commission should not be a party to all complaints but should investigate and attempt to settle most of them from a neutral position. The Commission should be able to add itself as a party to complaints which are systemic in nature or raise substantive public interest issues.

Care must be taken however to ensure that unrepresented complainants have some means to properly advance their complaints. We also strongly believe that complainants should be provided with independent advice during any settlement discussions and be represented by independent legal counsel before Tribunals at no cost to them.

The Coalition believes that the Commission's regional offices should be restored and that they should have sufficient staff to do intake and investigations. As we have also noted, centralizing the Commission's intake

⁵ *Perra et al. v. Attorney General of Canada* (Fed. C. A. March 31, 1998)

and investigation work in Ottawa weakens its ability to properly screen complaints and to conduct full investigations.

The centralization of the Commission also has an effect on how the public views this institution. As the Review Panel is no doubt aware, the public perception of human rights enforcement is becoming increasingly negative. Whether real or imagined, many people do not believe that human rights agencies are serving the public interest. Many people are upset when they contact the Commission and want to meet with someone in person. When people call a local office and are transferred to Ottawa, they find it alienating. It is hard to relate to an individual over the phone thousands of miles away. Caring about people and their rights is the central reason for the Commission's existence. It has to have more substance than a toll free number. It is submitted that the Government must do all it can to maintain public confidence in such an important organization. If the Commission does not have an effective community presence, it may have difficulty mustering the support needed to defend itself against those who seek to have it disbanded altogether.

The Coalition thanks the Review Panel for considering this submission. Your task is not an easy one and we wish you well in your deliberations. We look forward to seeing the results of your important work.

Note: A summary of our suggestions and recommendations is attached as Appendix 'A'

APPENDIX 'A'

SUMMARY OF THE RECOMMENDATIONS AND SUGGESTIONS WHICH ARE CONTAINED IN THE SUBMISSION BY THE B.C. HUMAN RIGHTS COALITION TO THE CANADIAN HUMAN RIGHTS REVIEW PANEL

1. That following preamble be added to the Act:

WHEREAS *Canadians recognize the individual worth and dignity of all persons and their right to full and free participation in the economic, social, political and cultural life of Canada and this principle underlies the Universal Declaration of Human Rights, the International Covenant of Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Canadian Charter of Rights and Freedoms, and other solemn undertakings, international and domestic, that Canadians honour;*

AND WHEREAS *Canadians recognize that*

(a) implicit in the above principle is the right of all individuals to be treated in all matters solely on the basis of their personal merits, and to be accorded equality with all other individuals;

(b) to protect this right it is necessary to restrict discrimination against individuals, including discrimination based on stereotypes or generalizations about groups with whom they are or are thought to be associated, and to ensure that reasonable accommodation is made for people who experience inequality ;

(c) in view of the fact that past discrimination against certain groups has resulted in systemic disadvantage to members of those groups, and therefore it is important to provide for employment equity programs and other special programs designed to overcome this historic disadvantage;

(d) much discrimination is rooted in ignorance and education is essential to its eradication, and therefore it is important that human rights educational programs assist Canadians to understand all their fundamental rights and freedoms, as well as their corresponding duties and responsibilities to others; and

(e) these various protection for the human rights of Canadian are of such fundamental importance that, except for the Constitution, they merit paramount status over all other laws of the country;

NOW THEREFORE HER MAJESTY, *by and with the advice and consent of the Parliament of Canada, enacts the following to uphold these principles.*

2. That the Act allow the Canadian Human Rights Commission to initiate charter challenges.

3. That the *Act* stipulate that Tribunals can consider complaints of discrimination which are caused by statutes and regulations. Tribunals should be able to decide constitutional questions if they involve government rules and regulations which have not been enacted by Parliament. Tribunals should not decide the constitutional validity of laws enacted by Parliament. The Courts should retain jurisdiction to strike or amend laws which are deemed to be unconstitutional.
4. That sex discrimination explicitly include, but not be limited to, transsexual, transvestite, transgender, gender-based stereotypes, pregnancy, the possibility of pregnancy, or circumstances related to pregnancy.
5. That protection against discrimination based on "a criminal charge, conviction, or discharge which is unrelated to the intended employment, service or accommodation" be included in the *Act*.
6. That social condition be added to as one of the enumerated grounds under the *Act*.
7. That political belief be added as one of the enumerated grounds under the *Act*.
8. That the term *bona fide requirement* be used instead of *bona fide justification*.
9. That the definition of mandatory retirement be changed to specify that retirees "have reached age 65 and retirement is mandatory for all employees who have reached this age" and that there be provisions which allow for an earlier age of retirement provided that there is a *bona fide* occupational requirement, the majority of the employees affected have voted to approve the age of retirement and the employer has an adequate pension plan in place.
10. That the exclusions of pension schemes established before March 1, 1978, as outlined in sections 40(7) and 62 of the *Act* be repealed immediately.
11. That the Aboriginal community be consulted about the *Indian Act Exceptions*.
12. That a positive right to leave and other benefits for the caring of children should be included in the *Act*.
13. That the exemptions for Affirmative Action Programs be streamlined and that s. 42 of the *B.C. Code* be examined as a potential model.
14. That Affirmative Action Programs which are approved by the Commission should not be subject to complaints under the *Act*.
15. That the Hate provisions of the *Act* include the internet plus radio and television broadcasts.
16. That Senators and Members of Parliament, as employers, should be captured by the *Act* and if political belief is added to the *Act*, an exemption for Members of the House or Senate should be created for this particular ground.
17. That the *Act* be amended so that a successor employer is liable for human rights complaints

- involving employees that still worked for the company at the time of purchase.
18. That the *Act* contain a provision which allows the Commission to determine whether or not a representative complaint is in the interest of the group or class on behalf of which the complaint is made.
 19. That the *Act* allow the Commission to challenge regulations made in Canada if they have discriminatory provisions which are applied to people outside the country.
 20. That the *Act* not be extended to individuals who's applications for landed status are rejected from outside the country.
 21. That case law on harassment is sufficiently developed and there is no need to add more definitions.
 22. That a mandatory requirement for harassment policies not be included in the *Act*.
 23. That the retaliation provisions in the *Act* be broadened to include protection for individuals who "assert their rights under the *Act*, assist other in asserting their rights and/or refuse to violate the *Act*".
 24. That the Commission devote more resources to screening at the intake stage by using a more substantive approach.
 25. That after a complaint has been served, the Commission should disclose all submissions that are made during the course of an investigation.
 26. That investigations be conducted by staff in regional offices and that every effort be made to interview the complainant and other witnesses in person.
 27. That the *Act* be amended to allow the Commission to refer complaints to a Tribunal without an investigation.
 28. That all parties be given at least 30 days to respond to investigation reports.
 29. That depending on the ground of discrimination, different sensitivities are needed but the same standards should be used for every complaint.
 30. That the Commission's structure for deciding complaints be changed so that conflicts are minimized.
 31. That if a settlement is not achievable and a complaint has some chance of success, it should be referred to a Tribunal.
 32. That complainants be provided with written reasons for a decision to dismiss a complaint without a hearing.
 33. That when there are procedural, legal or factual reasons for doing so, complainants should have the

- right to an independent review of a decision to dismiss a complaint without a hearing.
34. That the current Conciliation process which the Commission uses should be replaced by a Mediation division which could develop a roster of effective mediators in all parts of the country.
 35. That all mediation be voluntary and the power relationships between the parties be balanced.
 36. That in limited circumstances, if a settlement is achievable during the intake or investigation stage, Commission staff should assist the parties to resolve the matter without mediation.
 37. That complainants be provided with independent legal representation before a Tribunal without cost.
 38. That the Commission be able to add itself as a third party to complaints when it believes that there is a systemic or public interest issue in a complaint.
 39. That the Commission or a branch of Government develop a fee schedule to pay members of the private bar to represent complainants.
 40. That lawyers who agree to represent complainants be screened to ensure that they have adequate skill and experience in this area of law.
 41. That the Commission enter into contracts with community organizations, that provide legal services, to represent complainants.
 42. That respondents who demonstrate a financial need should also have assistance for legal representation before a Tribunal.
 43. That the *Employment Equity Act* be strengthened so that there are ways to ensure that employers comply with it.
 44. That the *Act* be amended to give the Commission a strong mandate to carry out educational programs and to engage in media campaigns if circumstances warrant it.
 45. That the *Act* include a provision which would allow the Commission to make a special report to Parliament when it does not have the resources to fulfil its duties.
 46. That the task of choosing new Commissioners be delegated to a neutral to a third party.
 47. That the structure of the Commission be changed so that there is a Chief Commissioner who can oversee all aspects of the Commission's work and other Commissioners assigned to different divisions such as Intake and Investigation; Mediation; Education; Systemic Discrimination and Employment Equity.
 48. That there be no upper limit on the amount a Tribunal can award for damages.

49. That Tribunals be given the power to order special measures including employment equity plans.
50. That Tribunals be given the power to order costs if in the opinion of a Tribunal, a party to a complaint engaged in improper conduct during the course of the investigation or the hearing of the complaint.
51. That the Tribunal conduct any mediation after a complaint has been referred to it.
- 52.** That Tribunals be given the power to make consent orders.
53. That the terms of all settlements be made public in such a way that the parties are not identified.
54. That complainants not be allowed to go directly to a Tribunal without going through the Commission.
56. That the Commission not be a party to all complaints but should investigate and attempt to settle most of them as a neutral third party. (As noted in #38 above, the Commission be able to add itself as a party to complaints which are systemic in nature or raise substantive public interest issues.)
57. That complainants be provided with assistance to properly advance their complaints.
58. That complainants be provided with independent legal advice during any settlement discussions.
59. That the Commission's regional offices be restored and have sufficient staff to do intake and investigations.