COMMITTEE FOR THE ADVANCEMENT OF HUMAN RIGHTS

RESPONSE TO HUMAN RIGHTS REVIEW
A Background Paper for the Administrative Justice Project

We wish to thank the Administrative Justice Project for the opportunity to provide our thoughts on the Background Paper on Human Rights.

GENERAL OBSERVATIONS

We believe that the vast majority of British Columbians support equality rights. Our response to the Review is rooted in the First Principles that we articulated in our previous submission. We hope that our thoughts will help create an enhanced human rights enforcement system that will safeguard all of the citizens of this province. We know that a fair, effective and efficient delivery model can be achieved through a "fundamental rethinking of the human rights process" which is a goal of the Review (Executive Summary p ii).

Collectively, our Committee has years of expertise in the human rights arena. We have pleaded scores of cases before human rights tribunals and have advanced a number of them to the Supreme Court of Canada. The Coalition has provided direct advocacy to more than 1,000 clients who have filed complaints with the B. C. Human Rights Commission and helped more than 2,400 clients present their cases to the former B.C. Council of Human Rights. While it is true that most of our work involves complainant representation, we also assist respondents. We believe that our combined experience gives us a unique voice that can augment the Review in that its mandate did not allow for an examination of specific cases (p. 136).

The Review makes reference to commentary from the respondent community that conveys an impression that they are beleaguered by complainants who are using a multiplicity of forums and that the *Code* does not have sufficient mechanisms to allow the Commission or the Tribunal to deal with the deluge of claims. Although they are not named, some respondents indicate that drastic measures are called for. We have carefully read the Background Paper and aside from frustrated assertions, we cannot see any evidence to suggest that the human rights enforcement system is more vexatious toward respondents than any other statutory regime.

In 1994/95 there were 1,298 investigations initiated under the provisions of previous *Human Rights Act*. In 2000/01 there were less than 600 cases being investigated under the *Code*. The Commission's dismissal rate after investigation went from 11.2% in 96/97 to 48.8% in 00/01 and the dismissal rate without an investigation went from 10.5% in 96/97 to 19.3% in 00/01 (p.129). We argue that these figures do not support the notion that the human rights enforcement system is creating undue hardship for the respondent community.

We agree that there are problems with the enforcement system. CAHRTS presented its view of

these shortcomings to the Review. We are concerned however that the Review has placed considerable emphasis on criticisms that are impressionistic.

Alternative Models

We have provided specific comments on many of the issues raised by the Review but we feel that it is important to begin our response by commenting on the models that are outlined in it at page 145 to page 152.

Model 1 Traditional Commission with Efficiency Modifications

There is no indication in the Review that this model is favoured by anyone.

Model 2 Existing structure with efficiency modifications.

- Investigations would be the exception rather than the rule. Systemic complaints primarily.

We agree that any enforcement system must be able to deal effectively with systemic complaints. With a Human Rights Clinic, a Tribunal with full disclosure powers and a Centre for Excellence, we believe that systemic complaints can be effectively dealt with without the need for a Commission investigation.

- Investigations supplanted by a supervised discovery process.

If every complaint had a discovery meeting with the Commission, this would require considerable staff time. CAHRTS proposes that the Tribunal deal with discovery issues. Why do this twice?

- Commission would only carry systemic complaints. Legal aid system to continue. Tribunal could order Commission to participate in hearing or Commission could intervene.

The Commission does not carry any complaints at this time. Our research indicates that between January 1997 and December 2001, the DCC appeared as a party in 30 separate complaints where the Tribunal has made some sort of decision (an average of 6 per year). The Commission's budget would have to be increased if it became counsel of record for the limited number of complaints that the DCC has intervened in. This would be a more costly model.

In 2000/2001 the Tribunal resolved 126 complaints. There were 37 hearing decisions and 89 complaints were resolved through mediation or other means. All of these cases were funded by legal aid. The money that is budgeted for legal aid is about equal to the amount allocated to the

D.C.C.

If the costs associated with legal aid and the DCC were blended into a model that included a Human Rights Clinic and Centre for Excellence, cost efficiencies would be achieved.

- Give Tribunal more flexibility to dismiss complaints without adjudication (*Res judicata*, refusal of reasonable offer etc.) and the power to award costs.

The Tribunal currently has the power to dismiss complaints that come before it if they have already been fully and fairly dealt with.[1] The number of these type of cases appears to be very small. The Background paper indicates that in the past 4½ years only one complaint, where an investigation was deferred because of another proceeding, was referred to a hearing (footnote 130 p. 101).

The issue of dismissing a complaint without a hearing because the complainant may have refused a reasonable offer is more complex. Most offers are made on a without prejudice basis and often come with terms that prohibit disclosure. There is nothing in the current *Code* that precludes parties from asking a Tribunal to decide what might be an appropriate remedy without holding a full hearing. If a respondent does not wish to make certain admissions or the parties cannot agree on a statement of facts, a hearing may be required. If a Tribunal finds that a complainant has acted improperly it currently has the power to award costs in favour of the Respondent. In addition, under the current *Code* a respondent does not face a cost award if a complaint is upheld.

- Limitation period to be shortened.

We do not see any need to reduce the limitation period. From 1984 to 1997 the limitation period was 6 months. In 95/96 the old Council received 2,138 complaints which is more than double the number the Commission dealt with last year under a 12 month limitation period.

Model 3 Direct Access similar to the one recommended by the La Forest Report.

- Commission role limited to intervention for important complaints.

- Complainants would have access to legal aid to advance their own complaints.

This appears to be a variation of Model 2.

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[1] One of the authors of the Background Paper decided *Axton v. B.C. Transit* (28 C.H.R.R. D/337) which is a leading case on the question of issue estoppel and *res judicata*. In that case it was decided that *res judicata* did not apply but the case was not heard due to issue estoppel.

Model 4 Direct Access with a Tribunal that is "inquisitorial" and has "active oversight and intervention" in cases (p.149).

- Mandatory settlement conferences similar to small claims.

CAHRTS proposal includes this feature.

- More active HRT would "alleviate concerns about inadequate legal representation" (p. 149).

Implicit in this proposal is that all parties would represent themselves. We do not believe that this type of model would be fair or efficient. Some complainants are unsophisticated, have literacy/language problems or have disabilities that preclude them from representing themselves. Hearings take longer if one or all of the parties are not represented. A Human Rights Clinic and a Centre for Excellence can provide the advice and assistance required to ensure all parties get proper advice on the best way to proceed with their case.

Model 5 CAHRTS PROPOSAL

We would like to clarify the Review's summary of our proposal.

The Review states that "human rights advocacy and education functions should focus principally on complainant, not respondent, interests" (p. 151). This is not what we propose.

The Human Rights Clinic's services would not be restricted to complainants. Members of our Committee have represented respondents before the Commission and the Tribunal. It is probably true that the clinic will represent more complainants than respondents but this is due to the fact that more individuals will contact the clinic for advice about initiating a complaint. If the clinic advises a complainant first, it cannot assist the respondent as well. In addition, our proposal does not indicate that it will provide full representation to every complainant. The clinic will have to develop intake guidelines and direct its resources where they will be most effective.

If there is a conflict with the clinic, unrepresented respondents can use the Centre as a resource. It would also provide research and expertise for systemic issues. The Centre for Excellence would provide research and education for all sectors of society. We envision that the respondent bar would use its services and that anyone who requires education or policy advice would have access to it.

We also indicated that consideration could be given to "a nominal "filing fee" for an individual who wishes to file a complaint with the Tribunal, provided programs are put in place to provide exemptions for the indigent."

The Review also states that our proposal would require "further study and justification" because

advocacy and education would be publicly funded and "operate independent of government" (p. 151). Advocacy and education are currently publicly funded and the Commission has autonomy. We believe that any organization that receives public funds should be accountable for the money it receives. The Clinic will have a Board of Directors and we assume that it will have to provide government with full reports about its finances and services. The Centre for Excellence will also have a structure that ensures that it is accountable to government. The true test for any model is the quality of service that is provided for its users.

Models 6 and 7

- Human Rights Court or Direct claim with the Courts.

We submit that this type of enforcement system would be more expensive than a Tribunal model.

GENERAL COMMENTS ON ISSUES RAISED BY THE REVIEW

CHAPTER IV: SUBSTANTIVE SCOPE OF THE CURRENT CODE

Lack of Certainty in Human Rights Law under the Code

The Review recommends that serious consideration be given to amendments that include definitions for terms such as 'Disability', 'Discrimination' and 'Harassment' (p. 59).

Definitions may not help create certainty because any definition is open to interpretation by tribunals and the courts. What constitutes a disability and where the duty to accommodate begins or ends has become a challenge for everyone who works in the human rights field. In March 2001, the B.C. Human Rights Commission held consultations with representatives from the Disability Community, the Insurance Industry, the Canadian Bar Association, Business, Labour and others to see if they could reach some consensus on how to approach disability issues. There are a myriad of case decisions that have created new and complex legal issues. Ontario and other jurisdictions have disability definitions in their legislation but those provinces face the same difficulties that exist in B.C. Some human rights concepts, direct versus indirect discrimination for example, take time for the Courts to sort out. We believe that human rights law is evolving and with time, clarity will emerge.

CHAPTER V: STRUCTURAL ISSUES WITH CURRENT SCHEME

In addition to outlining some of the criticisms that CAHRTS raised in its submission, the Review notes:

> "Others who represent employers and businesses also indicated that the investigation process does not generally add value to, or assist in, the resolution of

> a complaint. They expressed support for a direct access model but stressed the importance of proper statutory criteria for summary dismissal of complaints." (p. 68)

It appears that the complainant and the respondent communities support a direct access model.

Legal Representation and Legal Aid

As we have argued previously, we believe that a Human Rights Clinic and a Centre for Excellence will ensure that human rights enforcement is fair and efficient.

The Review cites *CJC v. Collins* as an example of a costly hearing and notes that the respondents said that they paid over $200, 000 in legal costs (p.70). All parties paid their own costs in that case (the Complainant sought a retraction and an apology), nothing came out of legal aid funds. According to the Legal Services Society, there were only two cases in the last two years where fees exceeded $5,000.

Processing of Complaints

The Review points out that respondents object to the Commission asking them for settlement proposals before a complaint is served. What respondents may not realize is that this is also one of the first things that the Commission asks of complainants. Complainants are asked to put forward the remedy they are seeking before respondents are served or even asked if they are interested in settlement.

Respondents are also concerned about having to disclose more than complainants because they must disclose their personnel files while complainants are not required to disclose their medical files. Under the CAHRTS model, a Tribunal would have the power to decide what type of information parties must disclose. In *Watt v. Foster/Hestia* 2001 BCHRT 20 the respondent sought pre-hearing disclosure of the complainant's medical records. Because of the circumstances of that particular case, the respondent's request was granted.

Referral/Dismissal

The Review states that when a complaint is referred to a hearing, legal counsel for the respondents find it difficult to explain the referral to their clients because there are no reasons given (p.69) there is also concern because the Code has a statutory obligation to provide reasons for dismissal of complaints but does not require reasons for referral to a Tribunal (p. 143).

There is an investigation report which contains an analysis and recommendation. Most decisions simply state that the decision makers agrees with the investigation report's analysis and recommendation. Most decisions do not contain reasons for referral or dismissal if the Decision Maker agrees with the report. If the Decision Maker does not agree with a report's recommendation to dismiss or refer, the decision letter will contain an explanation as to why the

decision to dismiss or refer was made.

The Review notes that CAHRTS has questioned the Commission's reconsideration process and concludes that the *Code* does not confer any statutory basis for it. At p. 62 it is noted that there were 60 reconsideration requests in the year 2000/01 and five or six were granted. Two Coalition clients who were denied reconsideration applied to the Court for Judicial Review. After their petitions were filed, legal counsel for the Commission did not dispute their cases and signed Consent Orders that included all costs. These were costly and time consuming exercises over decisions that were patently unreasonable.

The review also notes that the respondent community is concerned because the Commission does not have the power to protect them from future complaints if they institute systemic changes due to a settlement and that this is a "disincentive" to negotiating systemic changes. It is not clear what this is referring to but probably has something to do with adopting an internal human rights policy as part of a settlement. The Review mentions s. 21(1) of the Manitoba *Co*de whereby a person can apply for an advisory opinion about a program and could be granted an exemption against complaints. S. 21(1) of the *Manitoba Code* is similar to s. 42 of the B.C. *Code*. S. 42 (4) reads "Any program or activity approved under subsection (3) is deemed not to be in contravention of this *Code*." What the respondent community probably wants is a guarantee that if it deals with a complaint under a private policy, the individual should not be allowed to file a human rights complaint under the *Code*.

CHAPTER VI: PARALLEL OR MULTIPLE PROCEEDINGS

Overlap in a Workplace Setting

At p. 81 it is noted that 77% of the complaints that were closed by the Commission were employment related. Even if some of these cases duplicated another proceeding, they did not get very far. No law can stop someone from trying to file a complaint even if it has been fully heard elsewhere or is without merit. In addition, 81% of the complaints that were referred to the Tribunal were employment related. At p. 101, footnote 130, the Review indicates that only one case that was deferred because of another proceeding was referred to a hearing. The Review does not contain any evidence to suggest that multiple proceedings in a workplace setting are creating havoc for respondent employers.

Employment Standards Act

The Review indicates that on November 6, 2000, the Commission and the Employment Standards Branch signed a Memorandum of Understanding on ways to minimize duplication and cites the fact that 81 pregnancy cases were accepted by the Commission in 2000/01 (p.87).

Although the *Employment Standards Act* allows for payment of lost wages and reinstatement for pregnancy claims it also stipulates that a woman must make a written request for maternity leave

4 weeks before the leave is expected to begin. The Coalition has dealt with quite a few clients who have filed human rights complaints because of pregnancy discrimination and very few of them have made formal requests for leave. Women who lose their jobs because of a pregnancy but do not make written requests for leave, cannot file an employment standards claim. In addition, the Branch makes determinations about the merits of claims without holding hearings and credibility is often an important factor. The *E.S.A.* also does not provide compensation for hurt feelings and insult.

If an employee is terminated for discriminatory reasons that do not involve pregnancy, the Branch has no authority to order reinstatement, lost wages, or damages. All it can do is ensure that employees gets proper severance for length of service up to a maximum of 8 weeks after 8 years of service.

Wage Discrimination

The Review concludes that the Courts have decided that a person may file a s. 12 complaint and initiate court action for wage discrimination (p. 88). There is not a single case cited where this has happened.

Wrongful/Constructive Dismissal

The Review states that an employee can file a claim for discriminatory termination with the Courts, the Human Rights Commission and the Employment Standards Branch (p.89).

With respect, this conclusion is not quite correct. An employee can file a claim for lack of notice with the Employment Standards Branch but if they do, they waive their right to take civil action. The Courts seem to be clear that litigants cannot come to them if they also go to the Commission. The Courts or the Employment Standards Branch cannot order reinstatement. A Tribunal can award: lost wages for the period it takes the complainant to find work; expenses such as counselling costs; compensation for hurt feelings and insult; reinstatement.

Workers Compensation Act

The Review indicates that WCB is "not required to take into account the types of factors that inform an employer's duty to accommodate disabled workers" and as a result an employer may face a human rights complaint if they follow WCB's advice (p. 89). In *Pannu v. Skeena Cellulose and Worker's Compensation Board* (2000 BCHRT 56) the Tribunal held that it had jurisdiction to examine whether or not WCB violated the *Code* while in the process of carrying out its legitimate legislative mandate. If WCB fails to consider human rights law when making decisions about disabled employees, the Board could become a co-respondent.

Internal Employer Anti-Discrimination Policies and Procedures

There are very few human rights complaints filed by employees while they are still working for

the employer they are complaining against. Many employees quit because the company's internal procedures were not adequate. The last thing most employees want to do is file a human rights complaint against their current employer. If a company has a policy that its employees respect, they will use it and not file a formal complaint.

Discrimination by Trade Unions

Although the Review mentions others who say they fear that an overlap could *develop* between s. 12 complaints under the *Labour Code* and s. 14 complaints under the *Human Rights Code*, this is speculative. As footnote 117 (p. 92) indicates the LRB will defer a s. 12 complaint if it involves allegations of discrimination and will leave it up to the Commission to deal with the matter first.

Human Rights Complaint or Section 15 Charter Challenge?

At page 95 the Review states:

> "There are an increasing number of complaints that raise broad systemic discrimination issues relating to the provision of educational, health and human resources services by governmental bodies. The subject matter of these complaints can also form the subject matter of equality actions in the courts based on s. 15 of the *Charter*. Questions have arisen about the appropriateness of deciding constitutional and other broad public policy questions in a human rights tribunal forum."

While it is probably true that the provincial government and public institutions are the largest respondent grouping when it comes to complaints of discrimination in services, why should human rights law be changed so that public institutions are not accountable for discriminatory actions? Public policies are subject to a complaint only when they create a discriminatory outcome for individuals.

Human Rights Codes predate the *Charter* and are derived, in part, from Canada's commitments to a number of international instruments such as the *Universal Declaration of Human Rights*. S. 15 of the *Charter* guarantees the equality rights of all Canadians. It is doubtful that the Courts would sanction any amendment to the *Code* that would allow complaints against private institutions but somehow limit the types of complaints that can be made against public ones.

Thousands of people use large public institutions. The entire population comes into contact with government in one way or another. The *Human Rights Code* is the only practical way for the citizens of British Columbia to access their equality rights. The public's confidence in government would be undermined if it amended the *Code* to insulate itself from liability for discriminatory conduct.

Code Mechanisms for Addressing Duplication Issues

If the Commission learns that the issues that are the subject of a complaint have been fully and fairly decided in another forum, it has the power to dismiss and exercises this power on a regular basis. Members of our Committee see this being done all of the time. There is an impression given that the Commission will accept any complaint without question. This is simply not so. If the staff of the Commission make a mistake and fail to dismiss a complaint that has been fully and fairly decided in another forum, a Tribunal can correct the error. On application, the Tribunal may prevent an issue in a complaint from being re-litigated; the effect of such an Order would be that that part of a complaint would not proceed.

CHAPTER VII: FORUM MULTIPLICITY OPTIONS - SPECIAL CONSIDERATIONS

At page 105, the Review suggests that other dispute mechanisms "may provide very satisfactory (albeit not perfect) complaint resolution" and cites an article by Professor Philip Bryden in support of this proposition. Prof. Bryden also stated at p. 3.2.15 of the same article:

> " I believe that a more promising approach would be to modify the labour law principles governing the relationship between a union and an employee when there is a human rights dimension to the complaint the employee is raising about his or her treatment in the workplace, and to ensure that arbitrators have adequate remedial authority to address all aspects of the complaint.
>
> " This approach is not free from practical problems. Care would be needed in constructing an appropriate balance between a union's ability to manage its resources and an individual employee's ability to pursue a complaint. Moreover, unions may well believe that their members ought to be entitled to at least some measure of the public subsidization of human rights complaints resolution that would exist if these individuals were pursuing their complaints through the mechanisms of the *Human Rights Code*. Finally, more consideration needs to be given to the structure for review of labour arbitration decisions that have a human rights component. In my view, however, searching for ways to address these problems would be more promising than trying to refine the current scheme of restricted concurrent jurisdictions."

CHAPTER IX: IMPROVEMENTS IN PROGRAM AND SERVICE DELIVERY

Early dispute resolution project

At p. 131 the Review notes that 70% to 80% of the complaints filed with the HRC are being referred to its early mediation project. At p. 138, the Review indicates that the project is "yielding promising results" and yet there are no figures provided as to how many complaints the

project has mediated successfully. When the Commission made a presentation to the CBA's Human Rights Subsection on November 26, 2001, those present were advised that there were no numbers for the project because of computer problems. The project is being evaluated by UBC and a full report will be completed when the project is over.

At page 132 of the Review it is noted that Complainants are advised that they are entitled to legal aid representation during mediation *if* the respondent is represented by legal counsel. What this fails to take into account is that many respondents who attend mediation without counsel, get legal advice and are well armed before they go in. If uncertainties arise during mediation, many unrepresented respondents will ask for time to consult with their lawyer. Many complainants are totally uninformed. In addition, the legal aid tariff provides for one hour of preparation time for mediation plus the actual time spent in mediation. The tariff does not allow legal counsel to bill for any work that might have to be done to finalize any settlement agreement.

Almost all users of the human rights system agree that alternative dispute resolution is the best way to resolve complaints. With a human rights clinic in place, advice about appropriate settlement proposals can be available to all complaints and respondents. Properly trained paralegal staff can be used for most cases where direct representation at mediation is needed. Many settlements can be achieved by parties exchanging written proposals. A meeting is not required to settle every complaint.

An examination of the Current System

Although specific examples are not cited, the Review concludes:

> " The DCC has been instrumental in achieving systemic changes in a number of cases including some which have been settled prior to hearing." (p. 138)

We applaud the DCC's efforts but we believe that systemic changes can be achieved under a different model. We know that the DCC has contributed resources to significant cases but this type of assistance can be provided by a Centre for Excellence without the need for several lawyers to advance a complaint before the Tribunal. Members of our Committee who have initiated complaints in which the DCC has intervened, know that their clients would not have been satisfied if systemic changes were not provided for in the remedy that was achieved.

The DCC's current budget is about $500,000. The Review points that each year, the DCC does not intervene in more than 17 of the 60 to 70 complaints that are referred to it by intake staff at the Commission (p.61). The Report indicates that the DCC has participated in more than 75 hearings as of March 31, 2001 (footnote 68 p. 62). Our research of Tribunal decisions however indicates that between January 1997 and December 2001, the DCC appears as a party in 30 cases

(an average of 6 per year) [2]. As it is not a full party, the DCC does not have to do the kind of preparation work that complainant counsel must do. Last year, the Commission referred 120 cases to the Tribunal. If the DCC or the Commission had carriage of complaints, its legal budget would have to be increased substantially.

At p. 140 the Review states:

> "It may make sense, in terms of the efficient allocation of resources, to confer responsibility on one body (e.g. the HRC) to assume carriage of complaints that raise systemic issues of public concern to obviate the need for separate legal aid funding for the complainant.
>
> "It might also be more efficient than the existing system in this province to transfer responsibility to the HRC for carriage of all individual and systemic complaints referred to hearing."

At page 141, the Review points out that the Commission is now spending $500,000 for legal aid and notes that the Commission would have more budgetary control if "it had a broad discretion to determine which complaints to carry forward to hearing and used in-house or *ad hoc* counsel to assume the carriage of selected complaints." It goes on to state: "The remainder of complainants would face the prospect of pursuing complaints without the assistance of funded legal counsel."

We submit that a total rethinking of the complaint process must take place. As the Review points out, the traditional commission model is not working across the country. In some respects, B.C.'s current model is more efficient than those in other jurisdictions. Why not improve upon it instead of moving backwards?

We submit that CAHRTS' proposed model can deal with more complaints, including systemic ones, for less money than a Commission model can achieve.

FINAL COMMENTS

We are somewhat dismayed by an increasing public cynicism towards human rights enforcement. The media in particular tends to cover human rights decisions in a manner that trivializes complaints of discrimination. An allegation of religious discrimination is boiled down to a dispute about flowers. An allegation of sex harassment becomes a crusade for academic

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[2] 1997 - *Canadian Jewish Congress*, *Chipperfield, Miele, Poirier*, *Abrams;* 1998 - *Shannon*, *McLaughlan*, *Sheridan*, *Gold*; 1999 - *Abrams*, *Dhillon*, *Ferris*, *Honey*, *Hussey*, *Mamela*, *McLoughlin*, *Bonneau*, *Cook*, *DeLeon*, *Hunter*, *Murphy*; 2000 - *Tozer*, *Miele*, *Nixon*, *Briggs*, *Hughson*, *Kennedy*, *Rogal*, *Cook*, *Shannon*; 2001 - *Rojas*, *Hutchinson*, *Abrams*, *Gill et al*.)

freedom. Two complaints about the dissemination of hate by one newspaper columnist are perceived to be an attack on democracy and our rights to freedom of speech.

While there may be problems with the enforcement system, we urge government not to loose perspective. It wasn't that long ago that significant equality rights issues centred on a seat on a bus or the use of a drinking fountain. We believe that equality is something we all must continue to strive for.

In order to preserve public confidence in human rights law we need an enforcement mechanism that everyone respects. We urge government to take a bold and visionary approach and create a human rights process that is accessible and inspires trust. We believe that our model will achieve this result.

Submitted by CAHRTS, February 15, 2002.

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