

SUBMISSION TO THE B.C. HUMAN RIGHTS COMMISSION
REGARDING RECOMMENDATIONS TO AMEND THE B.C. HUMAN RIGHTS CODE AS
PROPOSED IN ITS DISCUSSION PAPER:

HUMAN RIGHTS FOR THE NEXT MILLENNIUM
September 29, 1997

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. 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.

QUESTIONS POSED BY THE COMMISSION

1. Do you believe that the recommendations will improve human rights protections in British Columbia?

Yes. The Coalition believes that most of these recommended changes are long overdue. Except for sexual orientation and the inclusion of age and family status in tenancy, the current grounds of discrimination have remained unchanged since 1984. In its submission to the Black Review, the Coalition suggested most of the changes which are contained in the Commission's discussion paper.

While we welcome the Commission's initiative and support almost all of its recommendations, we feel that there are additional substantive changes to the *Code* which require immediate consideration by government.

Discrimination in purchase of property

We are currently assisting an individual who has a complaint of discrimination on the basis of a physical disability against the Strata Corporation for the building in which he owns an apartment. This individual attended the Commission's Vancouver office and spent an hour telling his story. Although staff at the Commission were very sympathetic to his situation, our client was advised that section 9 only applies to Strata Corporations at the point of purchase and the *Code* does not apply to the ongoing conduct of Strata Corporations. He eventually contacted the Commission's office in Victoria. The Victoria office also indicated that there was a problem with the wording of section 9 but thought that a complaint might be accepted under section 8 - accommodation customarily available to the public.

We do not think that section 8 captures Strata Corporations and have argued that wording of section 9 is sufficiently broad enough in that it refers to a "term and condition of purchase". Membership in a Strata Corporation is a term and condition of purchase. In addition, if a Strata Corporation's rule discriminates against a current owner, this rule would apply to anyone trying to buy into it. Although the previous Council accepted

complaints by owners against their Strata Councils (Polson v. Strata VR 855 - 910814), the Commission has taken a more narrow view.

Condominium ownership is fast becoming the only form of home ownership which most British Columbians can afford. If the Commission feels that the wording of section 9 is too limited, then the *Code* must be amended. If the Commission's interpretation of section 9 is final, any discriminatory conduct by a Strata Council toward an owner is not protected.

Disability

The term disability has been interpreted through case law to mean a condition which is involuntary, has some degree of permanence and impairs a person's ability in some measure to carry out the normal functions of life [Boyce v. New Westminster, (B.C. Council H.R.) 24 C.H.R.R. /D441].

The Coalition frequently receives calls from individuals who have been fired because they were injured at work. If the injury is a temporary one, these individuals have no protection under the *Code*. In addition, most employers ask potential employees to disclose previous WCB claims on their applications for employment. If a previous claim is disclosed the individual may not be hired because of it. If an employee withholds information about a previous WCB claim, no matter how minor or old it might be, and the employer finds out later, they face termination for lying on their application form [Dhalliwal v. Westcost (B.C. Council of H.R.) unreported June 23, 1995]. Although some injured workers might try to file a complaint on the basis of a perceived disability, they rarely get past the Commission's screening process.

The *Ontario Human Rights Code* includes the following wording in its definition related to disability:

“an injury or disability for which benefits were claimed or received
under the Worker's Compensation Act”

We believe that British Columbians should have similar protection and urge the Commission to recommend that the above wording be added to the *Code*.

Discrimination on the basis of 'sex'

We believe that the word 'sex' as a ground of discrimination throughout the *Code* should be replaced by the term 'gender'. In our opinion, discrimination on the basis of gender is more encompassing than sex.

For one thing, the term gender might help lessen the confusion which appears to exist in some quarters between discriminatory conduct which is sexual in nature and discriminatory conduct toward men and/or women which is based on gender prejudice. We firmly support continued protection against sexual harassment under the **Code** but believe that it is but one form of discrimination based on gender. In our opinion, the word 'sex' should be replaced with the term gender and that the following definition should be added to section 1:

“Gender” includes: sex; sexual harassment; gender identity; gender based stereotyping; pregnancy, the possibility of pregnancy or circumstances related to pregnancy.

Adding “gender identity” as a new ground (recommendation #7)

We have some concerns about adding gender identity as a distinct ground of discrimination. We worry that individuals who are biologically male or female but were born with some traits of the other gender, will be forced into a category which they may not relate to. The Coalition has a number of clients who have complaints of discrimination as a result of the fact that they were born transsexual. Our clients insist that their complaints have arisen because of their true gender and not because of questions related to their identity.

As noted previously, we believe that this subject can be better dealt with if the term 'sex' was replaced with the term 'gender' and “gender identity” was specifically included in a definition under section 1.

Discriminatory Publications

When the provisions contained in section 7 were first introduced by government and in our June 1994 submission to Mr. Black, the Coalition urged that s.7(2) be changed. We believe that the wording of this exemption is unnecessary and unhelpful. This provision should be repealed and replaced with a general civil rights clause which explicitly provides that nothing in s. 7 restricts the rights to free speech under the law. We see two problems with the term “private communications”. In *Canada v. Taylor* (13 C.H.R.R. D/435) the Supreme Court of Canada referred to private communications in the context of telecommunications which are within federal, not provincial jurisdiction. Secondly, “private communications” is a vague term which can potentially be given a very broad interpretation.

Source of Income

We wholeheartedly agree that although the *Residential Tenancy Act* has a deeming provision which adds source of income to section 10 of the *Code*, it should be included in the wording of the *Code*. Individuals who read the current *Code* would not know that this protection exists unless they also happen to have a copy of the *R.T.A.*

We wonder about the addition of the words “lawful income” as this could apply to situations where people are earning a few extra dollars and are being paid lower than minimum wage. Perhaps a more precise limitation could be achieved by using the words “income from any criminal activity”.

We also support the recommendation that this ground be added to other sections of the *Code* but we would go one step further. We believe that source of income is too narrow a term and should be replaced by the term “social condition”.

Social condition is a term which is contained in the *Quebec Charter of Human Rights and Freedoms* and includes but is not limited to source of income. In *Quebec c. Gauthier* (19 C.H.R.R. D/313) a Tribunal held 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.

Employment Equity

We believe that the *Code* should be amended to include provisions for mandatory employment equity programs and reporting. Such a provision could provide necessary statistical information to facilitate investigation of systemic discrimination complaints.

The subjects of employment equity programs need to be flexible and not preclude the addition of other disadvantaged groups if evidence supports the need for other groups to be included in employment equity or special programs. However, a flexible, open-ended approach may inadvertently undermine the objectives of employment equity by opening the door for groups who are not historically disadvantaged to argue they should be included in employment equity or similar initiatives. A flexible, yet limiting provision, could allow for additions to the listed subjects of employment equity programs through regulations.

Equal Pay for Work of Equal Value

We strongly feel that section 12 of the *Code* needs to be amended to incorporate the concept of equal pay for work of equal value. At page 161 of his report, Mr. Black wrote:

“It is recommended that the *Human Rights Code* include provisions similar to those of the *Canadian Human Rights Act* incorporating the principle of equal pay for work of equal value for female and male employees. Regulations should provide guidance as to the application of this provision”;

Commission structure

Although the Commission has been in place for less than a year and most of its new policies and procedures have been developed in the past few months, we see a trend emerging which we feel we must address.

Most of our concern stems from the responsibilities which have been given to the Commissioner of Investigation and Mediation under Part 3 of the *Code* and the limitations which section 15(8) imposes on the Chief Commissioner and Deputy Chief Commissioner with respect to matters related to the enforcement and interpretation of the *Code*.

We had always envisioned a Commission which would take a holistic approach to human rights matters in British Columbia. The existing Commission structure however may hinder such a possibility.

Section 15(8) of the *Code* appears to prevent the Deputy Chief Commissioner from intervening in a situation where a decision by the Commissioner of Investigations and Mediation might be in conflict with established human rights law or the purposes of the *Code* or has negative ramifications for a class of persons. Section 15(8) may also prevent the Chief Commissioner from developing public education programs or publishing materials which contain information which is at odds with a legal interpretation of the *Code* which has been made by the Commissioner of Investigations and Mediation.

We worry that the Commission could begin to experience some of the structural problems which the previous *Act* created for the B.C. Council of Human Rights. Because of the way the old *Act* was written, no individual Member of the Council was able to have an overview of its decision making and the Council's ability to participate in public debate was limited by its adjudicative functions.

The Chief and/or Deputy Commissioners could be in violation of section 15(8) if either of them were to engage in public debate about an interpretation of the *Code* which was not in harmony with the Commissioner for Investigations and Mediation.

Although the Deputy Chief Commissioner is provided with a copy of all decisions under sections 26 and 27, the *Code* appears to prohibit him (unless he happens to have been a party before the decision was made) from providing any direction to the Commissioner of Investigation and Mediation. While there is nothing in the *Code* which prevents the Deputy Chief Commissioner from sharing information with the Chief Commissioner, there is no mechanism in the *Code* which allows the three Commissioners to reach some form of consensus on matters related to the statute.

Because we deal with individual complaints on a day to day basis, we are able to monitor Part 3 activities of the Commission. In addition we are in contact with members from the Private Bar who also share their knowledge with us. In our opinion, the Commissioner for Investigations and Mediation and/or some of her legal advisors are applying the *Code* in a legally narrow and mechanical way. Our workload has mushroomed because of the number of submissions we have to make because of the way section 26 and 27 decisions are being made. The Courts have long espoused a liberal and purposeful approach to the interpretation of human rights law. It is our view that this approach is missing from many Commission decisions and in fact, the law is applied incorrectly in some of them.

This state of affairs is compounded by the fact that the review provisions under section 28 have not been proclaimed. There is no independent third party who can oversee the work of the Commissioner for Investigations and Mediation and the Chief Commissioner and/or the Deputy Commissioner are barred from intervention.

The only recourse left to complainants and respondents is Judicial Review. While the Coalition might be able to convince a community law office to bring one or two Commission decisions before the Courts, the number of dismissals under Part 3 which we believe need to be reviewed has become overwhelming.

While we believe that each Commissioner should be given the room to carry out his or her responsibilities without undue interference, it is our view that the *Code* gives the Commissioner of Investigation and Mediation too much substantive power. We believe that section 15(8) should be amended to allow all of the Commissioners to provide each other with advice and opinion on any matter related the *Code*.

2. Do you have any concerns if the recommendations are accepted by the Minister, passed by the Legislature and become part of the *Code*?

The first concern which comes to mind is whether or not the Commission has the resources to deal with any increase in the number of complaints which these amendments might generate. In our opinion, the Commission's resources are already over-extended.

The Coalition is comfortable with most of the recommendations however we feel that it is important to make the public and the media more comfortable with the provisions contained in section 7. We feel that our proposal regarding a "free speech" provision will help achieve this purpose.

3. What could we do to address those concerns in order to make you more comfortable with the recommendations?

No response required.

Final Comments

Except for our views on 'gender' protection and our concerns about the Commission's structure, all of our suggested changes to the *Code* are currently contained in other provincial or federal human rights statutes. This holds true for many of the other recommendations which are contained in the Commission's discussion paper. At the very least, we feel that British Columbians should have the human rights protection which other Canadians enjoy.

The Commission's recommendation to add a 'reasonable cause' provision to the *Code* mirrors the open-ended Equality Provisions contained in section 15 of the *Canadian Charter of Rights and Freedoms*.

Like the Commission, we believe that the British Columbia Government should take a leadership role in the area of human rights law by amending the *Code* so that it provides all citizens of this province with the most comprehensive protection in Canada.

We thank the B.C. Human Rights Commission for allowing us this opportunity to present our views and look forward to ongoing discussions on these and other matters.

British Columbia Human Rights Coalition