Annual Report

2008-2009

British Columbia Human Rights Tribunal

Suite 1170 - 605 Robson Street
Vancouver BC V6B 5J3

Phone: 604-775-2000
Toll Free: 1-888-440-8844
TTY: 604-775-2021
FAX: 604-775-2020
Internet: www.bchrt.bc.ca

July 3, 2009

Honourable Michael de Jong
Attorney General
Province of British Columbia
Room 232
Parliament Buildings
Victoria, BC V8V 1X4

Dear Attorney General:

It is my pleasure to present the sixth Annual Report from the BC Human Rights Tribunal, covering the period April 1, 2008, to March 31, 2009.

This report has been prepared in accordance with section 39.1 of the *Human Rights Code*.

Yours truly,

HMacNaughton

Heather M. MacNaughton
Chair

HM/ll

Enclosure

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Message from the Chair

I am pleased to present this annual report on the Tribunal's activities in 2008-09.

As the pages which follow indicate, the year was a very busy one and it resulted in a number of key decisions, some not without controversy. Throughout, the hard work and dedication of our administrative staff and the professionalism and competence of our members was apparent.

Tribunal Mandate and Purposes

The Tribunal is an independent quasi-judicial body created to fulfil the purposes set out in section 3 of the *Human Rights Code*:

a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;

b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;

c) to prevent discrimination prohibited by this *Code*;

d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this *Code*;

e) to provide a means of redress for those persons who are discriminated against contrary to this *Code*.

The Tribunal was established in 1997. It was continued as a standing adjudicative body pursuant to March 31, 2003 amendments to the *Code*, which instituted a direct access model for human rights complaints. Its authority and powers are set out in the *Code*.

The direct access model is complainant driven. The Tribunal does not have investigatory powers. Complaints are filed directly with the Tribunal. It is responsible for all steps in the human rights process. The complaint is reviewed to see that the information is complete, the Tribunal appears to have jurisdiction over the matters set out in it, and the complaint is filed within the six-month limitation period. If so, the Tribunal notifies the respondents of the complaint and they file a response to the complainant's allegations of discrimination. Unless the parties settle the issues, or a respondent successfully applies to have the complaint dismissed, a hearing is held.

The Tribunal's office and hearing rooms are located in Vancouver, but the Tribunal conducts hearings and settlement meetings throughout the Province. The Tribunal manages its staff, budget and physical facilities, and engages its own consultants and specialists. Pursuant to the *Code*, the Tribunal developed rules to govern its practice and procedure. Its registry function is managed by the Registrar who is a lawyer.

Some complainants and respondents may access government-funded legal assistance to participate in the human rights process. The provincial government allocates funding to other organizations to provide these services.

Member Recruitment

2008-09 was a year in which the Tribunal experienced significant staff changes, particularly in our complement of adjudicators who are called Tribunal members.

Three members' appointments expired in July 2008. Two left us then and a third remained under a Chair's appointment until her retirement in January 2009.

To fill our vacancies, the Tribunal ran two members' competitions in which participants were required to write two decisions based on representative fact patterns, attend a situational interview with a panel,

including a representative of the Board Resourcing and Development Office, meet with the Chair, and undergo thorough reference checks.

After these processes, two members were appointed for five-year terms and a third is currently serving a six-month term under a Chair's appointment.

The skill of the Tribunal's members as mediators and in the hearing process, is essential to meeting the Tribunal's statutory mandate in a professional, competent and efficient way.

Tribunal Workload

Members

The Tribunal continued to have a significant workload. We released 477 decisions. 399 of these decisions were preliminary decisions, many of which finally determined the issues in the complaint. The number of final decisions released was 72, a significant increase from 2007-08. Six supplemental decisions were released following a decision on the merits and dealt with remedial issues.

The trend of parties to our proceedings participating without the benefit of legal counsel continues. It results in the need for additional resources at all levels of processing of a complaint and longer hearings.

At the start of the year, the Tribunal had 765 active cases in its inventory. By the end of the year that number had decreased to 706 despite the fact that there were 1,141 new complaints filed, up more than ten percent from the previous year. Active cases do not include cases deferred or stayed at the request of the parties pending the outcome of another proceeding, those settling, or cases where petitions for judicial review have been filed after a final decision.

Last year, the *Code* was amended to remove the upper age limit of 64 in the definition of age in the *Code*, thereby ending mandatory retirement in British Columbia. Age was also added as a prohibited ground of discrimination in the area of servies. These changes resulted in a small increase in the number of complaints filed, which did not affect our ability to process complaints in a timely way.

Legal Counsel

Most of the Tribunal's legal counsels' time and attention is spent appearing on behalf of the Tribunal on judicial review of its decisions. Unfortunately, the statutorily defined standards of review in the *Administrative Tribunals' Act*, which were intended to simplify the judicial review process, have not had that effect. Further, two Supreme Court of Canada decisions, *Dunsmuir v. New Brunswick*, 2008 SCC 9 and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, dramatically changed the common law landscape for judicial review of administrative decision-making. It is still unclear what impact these decisions will have in BC in light of the *Administrative Tribunals' Act* but we can expect more litigation in the future.

Settlements

The Tribunal's settlement meeting services continue to be heavily used.

We encourage participation and provide the option of a tribunal-assisted settlement meeting before the respondent files a response to the complaint, and at any later stage in the process. Each member schedules an average of six settlement meetings a month, and the Tribunal continues to use contract mediators as needed. Many complaints settle as a result of these efforts and creative solutions are achieved which could not be ordered after a hearing.

Message from the Chair

The Tribunal conducted 273 early settlement meetings (before a response to the complaint is filed) and 120 settlement meetings (at any point after a response to the complaint is filed and prior to the commencement of a hearing). In addition, the Tribunal provided settlement assistance to the parties in ten cases in the midst of hearing. The parties were able to resolve their disputes in over 70% of all cases in which the Tribunal provided assistance. In addition, some cases settle without the Tribunal's involvement.

Because settlement meetings are usually a confidential process, the Tribunal does not publish the results. In many cases, the settlement meeting resolves other aspects of the parties' relationship and has transformative impacts without the adversarial process of a hearing. Many cases resolve on the basis of an acknowledgement that there has been a breach of the *Code* and an apology. In others, the mediated solution results in systemic change and awards greater than those that might be obtained after a hearing.

The *Code* provides for the Tribunal to make mediation mandatory. For policy reasons, the Tribunal has continued to keep mediation as a voluntary process although parties may find themselves ordered to attend a mediation where, in the Tribunal's view, they will benefit from the assistance of a Tribunal member.

The Coming Year

We have had great success this year in reducing the time that complaints are in our system primarily by focussing our efforts on decision release. Those efforts will continue.

The Tribunal is not immune from the fiscal challenges facing all agencies of government. Most of the Tribunal's budgetary expenditures are for salaries and rent. On the salaries front, as the organization chart that appears later in this Annual Report indicates, we are a very lean organization. The Tribunal's rent is fixed pursuant to a five-year lease on accessible and purpose built premises. Our next biggest expenditure is in travel. The Tribunal is attempting to monitor and reduce its travel budget. Four initiatives are underway. First, parties outside of driving distance from Vancouver and Victoria will be asked to participate in telephone mediations. Second, we are scheduling settlement meetings in block dates in certain regions of the province and participants are being told that to use our services, they must be available in that block. Third, unless a party's accommodation needs indicate otherwise, to the extent possible we are conducting settlement meetings and hearings in regional centres. Finally, we are investigating our ability to access government video conferencing facilities.

We will continue to work on our case management system and our website to integrate available technology and improve our processes.

My Thanks

The achievements of the Tribunal, about which you will read in this report, are the result of all those who work at the Tribunal. I am most fortunate to be surrounded by individuals of such a high calibre.

Heather M. MacNaughton
Chair

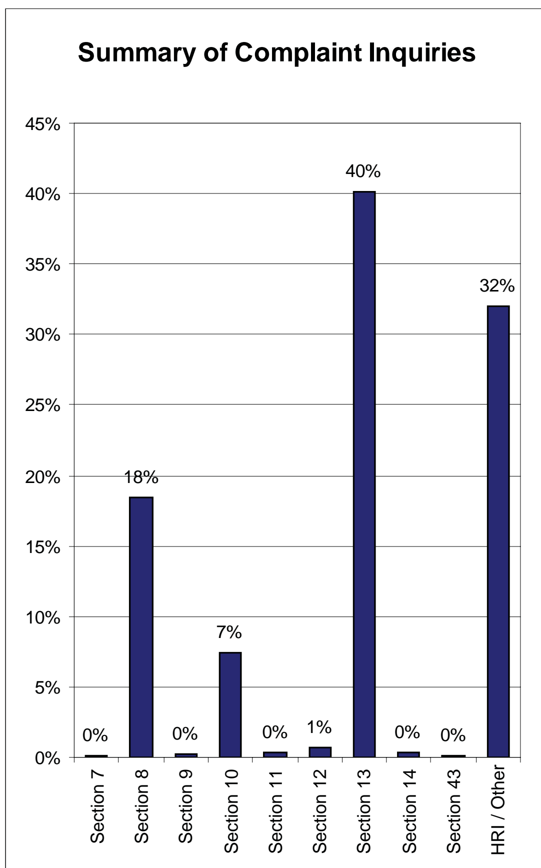
BC Human Rights Tribunal Operating Cost
Fiscal Years 2008-09 and 2007-08

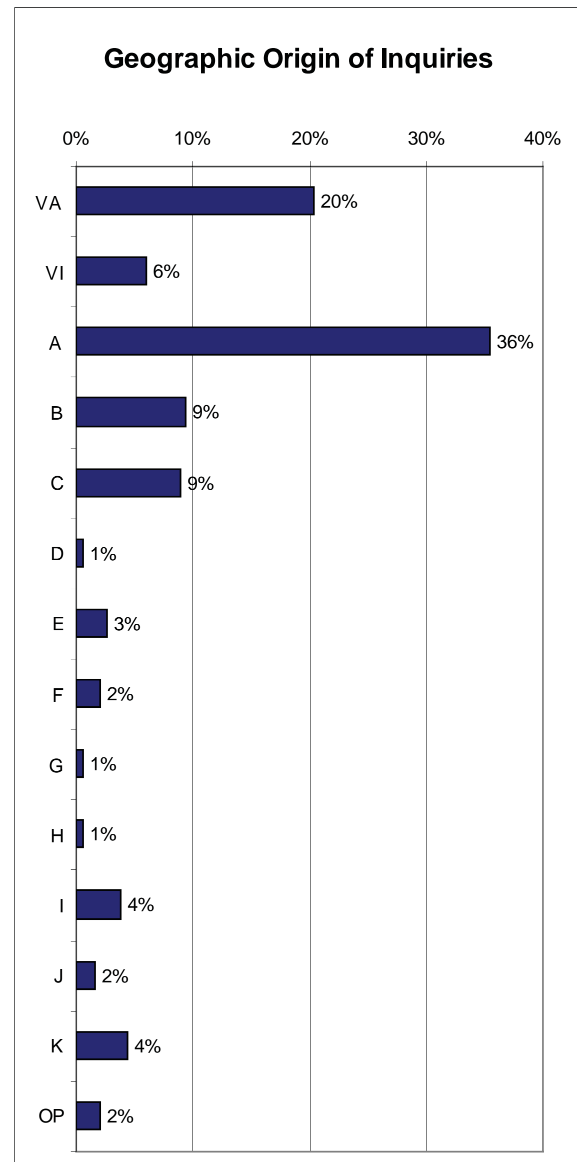
Category	2008-2009 Expenditure	2007-2008 Expenditure
Salaries (Chair, Members, Registry and Administration)	$ 2,234,406	$ 1,990,739
Employee Benefits	$ 527,195	$ 473,675
Retired Members – Fees for Completing Outstanding Decisions	$ 2,100	$ 1,863
Travel	$ 87,034	$ 116,210
Centralized Management Support Services	$ 0	$ 0
Professional Services	$ 62,070	$ 63,691
Information Services, Data and Communication Services	$ 2,810	$ 12,013
Office and Business Expenses	$ 111,233	$ 99,028
Statutory Advertising and Publications	$ 4,933	$ 4,430
Amortization Expenses	$ 45,244	$ 45,244
Building Occupancy and Workplace Technology Services	$ 600,891	$ 521,169
Total Cost	**$ 3,677,916**	**$ 3,328,062**

General inquiries about the Tribunal process are answered by two Inquiry Officers. The Inquiry Officers also provide basic information about the *Code* protections and refer callers to appropriate resources. They answered 11,045 inquiries this year, averaging 44 calls daily.

The highest percentage of complaint inquiries, 40%, related to employment (s. 13 and 14 of the *Code*). Inquiries relating to services (s. 8), represented 18% of the total inquiries, and those relating to tenancy (s. 10) represented 7%.

A toll-free number enables callers throughout the province to access the Inquiry Officers. The geographic origin of inquiries indicates that 20% originated from Vancouver, 36% from the Lower Mainland (excluding Vancouver), 6% from Victoria, and 34% from elsewhere in the province.





Legend

VA .... Vancouver
VI .... Victoria
A .... Lower Mainland (Excluding Vancouver)
B .... Vancouver Island & Gulf Islands (Excluding Victoria)
C .... Okanagan
D .... Rocky Mountains
E .... Squamish / Kamloops
F .... Kootenays
G .... Sunshine Coast
H .... Cariboo
I .... Prince George Area
J .... Skeena
K .... Northern BC
OP .... Out of Province

Complaint Statistics

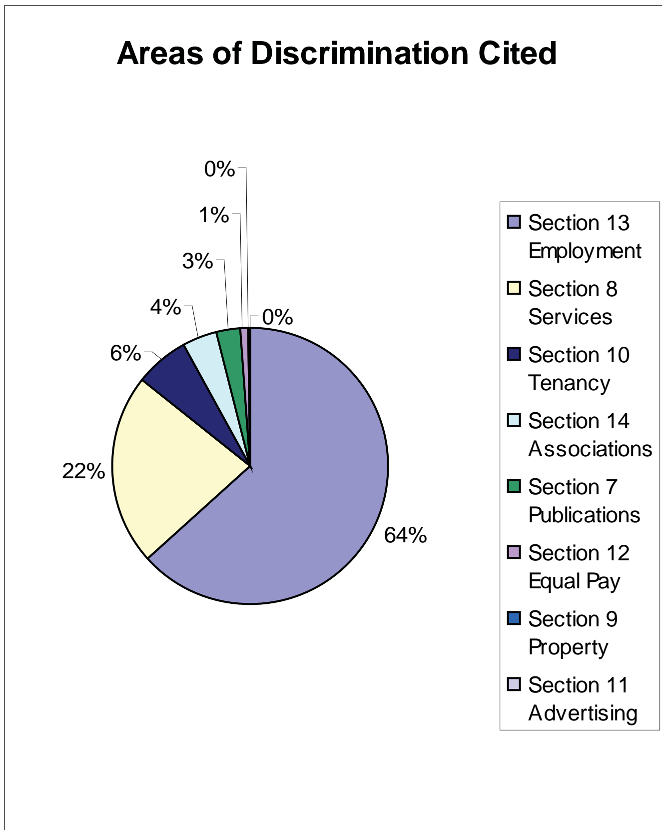
New Complaints

There were 1,141 new complaints filed at the Tribunal, of which 366 were screened out at the initial screening stage.

Areas of Discrimination

The *Code* prohibits discrimination in the areas of employment, employment advertisements, wages, services, tenancy, purchase of property, publication and membership in unions and associations. It also forbids retaliation against a person who makes a complaint under the *Code.*

Complainants cited the area of employment most frequently (64%), followed by services (22%), tenancy (6%), and membership in unions and associations (4%).

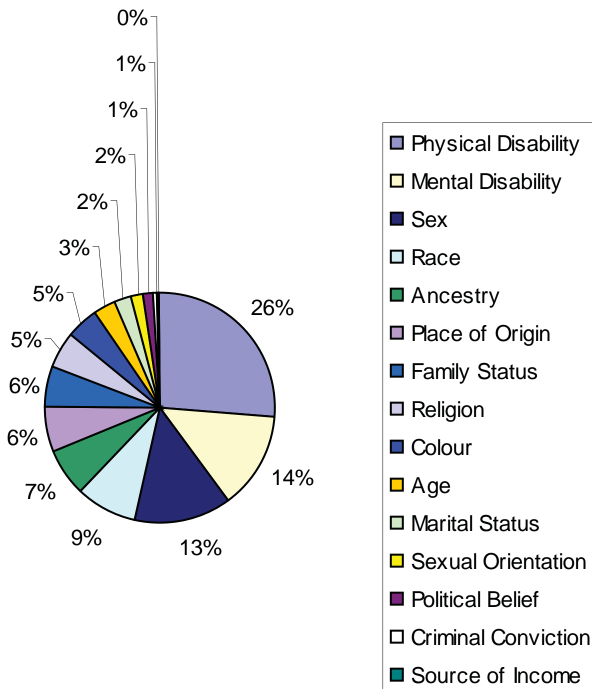


Grounds of Discrimination

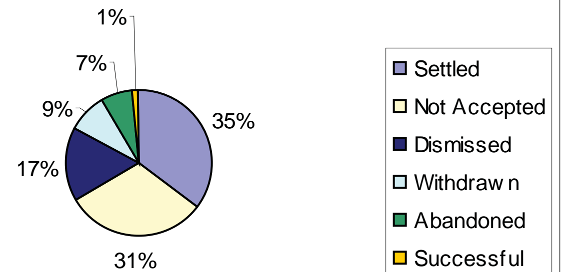
There are 15 prohibited grounds of discrimination: age (19 and over), ancestry, colour, family status, lawful source of income, marital status, place of origin, physical and mental disability, political belief, race, religion, sex (including harassment and pregnancy), sexual orientation, and unrelated criminal conviction. Not all grounds apply to all areas.

Some complaints cite more than one area and ground of discrimination. For instance, a complainant with a race-based complaint may also select grounds of ancestry, colour and place of origin.

As can be seen from the chart on the next page, the most common ground cited was physical disability (26%), followed by mental disability (14%), sex (including harassment and pregnancy) (13%), race (9%), and ancestry (7%). Place of origin and family status were at 6%, followed by religion and colour (5%), age (3%), and marital status and sexual orientation (2%). Criminal conviction and political belief were at 1% and source of income was at less than 1% (two cites). Retaliation was cited in 5% of complaints. As a result of a BC Supreme Court decision in *Cariboo Chevrolet Pontiac Buick GMC Ltd. v. Becker*, 2006 BCSC 43, the ground of retaliation only applies after a human rights complaint has been filed.



The Tribunal has changed the way that it records complaints which are the subject of judicial review applications. This may marginally affect some of the statistics reported in this year as compared to earlier years.



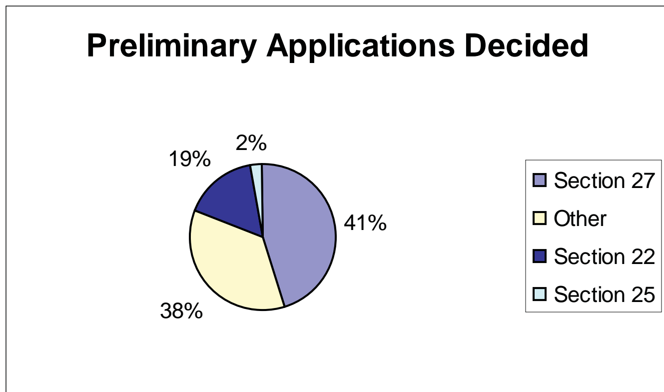
CLOSED CASES

The Tribunal closed 1,188 cases this year. Cases are closed when they are not accepted at the initial screening stage, withdrawn because they have settled or otherwise, abandoned, dismissed, or a decision is rendered after a hearing. This year, 366 complaints were not accepted at the initial screening stage, 105 were dismissed under s. 27, 47 were dismissed under s. 22, and 72 decisions were rendered after a hearing, of which 26 were successful and 46 were dismissed. Due to administrative timing, some of these cases may not be closed in the same fiscal year as the decisions were rendered. The balance (607) were settled, withdrawn or abandoned.

Preliminary Decisions

Preliminary Decisions

Of the 477 decisions rendered this year, 399 (84%) involved preliminary applications. Although called preliminary, many of these decisions finally decide the human rights issues. Preliminary decisions related to applications respecting the six-month time limit for filing complaints (s. 22 and s. 27(1)(g)), applications to defer a complaint (s. 25), to dismiss a complaint without a hearing (s. 27), and for other procedural orders such as disclosure, adjournment, and limits on publication.



Time Limit Applications

The *Code* requires that a complaint must be filed within six months of an act of discrimination, or the last instance of a "continuing contravention" of the *Code*. The Tribunal may accept late-filed complaints if it is in the public interest to do so and no substantial prejudice will result to anyone.

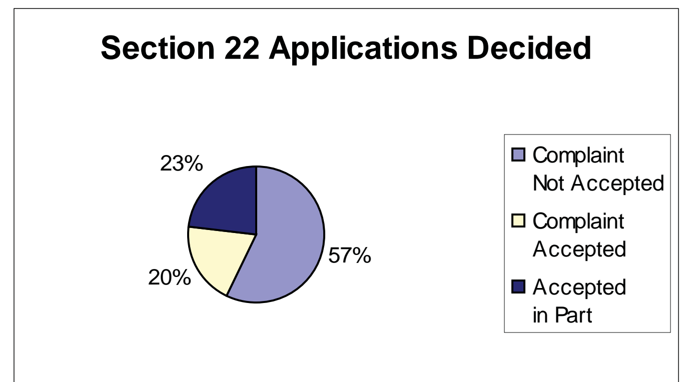
The Tribunal decided 91 time limit applications this year. In 19, the complaint was found to have been filed in time, including 11 which were found to be continuing contraventions. Of the late-filed complaints, 10 were accepted and 56 were not. Six complaints which were initially accepted were dismissed on applications by a respondent under s. 27(1)(g).

Continuing Contravention

Many time limit decisions consider whether there is a "continuing contravention" under s. 22(2) of the *Code*. They do not include cases where there are continuing effects or consequences of a discriminatory act.

This year the Tribunal determined that the following circumstances amounted to continuing contraventions:

- A school's alleged failure to accommodate the complainant's disability in regard to several courses. (*Pettipas v. BCIT*, 2008 BCHRT 313)
- Allegations relating to the complainant's injury, its impact on her employment, efforts to accommodate her, and the role the alleged disability and its accommodation had on her performance and termination. (*Wladichuk v. Cowell Motors and others*, 2009 BCHRT 109)



Public Interest

Whether it is in the public interest to accept a late-filed complaint pursuant to s. 22(3) depends on all of the facts and circumstances of the case. Relevant factors include the length of the delay, the reason for it, the significance of the issues raised in the complaint, and fairness in all of the circumstances.

The Tribunal found it was in the public interest to accept a late-filed complaint where:

- Parts of a tenancy complaint were in time, including an allegedly discriminatory eviction, which formed part of a continuing contravention. The complainant was homeless for several months and could not focus on filing a complaint. (*McPherson v. BC Housing Management and others*, 2008 BCHRT 381)
- A complainant filed a complaint five years after he was fired and told it was due to restructuring. In unrelated civil proceedings, he learned that one respondent said he was fired because of his disability. It was in the public interest to accept the late complaint because the complainant did not discover the discrimination until the later civil proceedings. The respondents were not prejudiced by the delay. (*Mair v. Wilson and Wilson's Nursery*, 2008 BCHRT 290)
- The complainant's lawyer miscalculated the time limit, and the complaint was filed 4 days late. (*Larsen v. Opel Financial & Investment Group and others*, 2008 BCHRT 300)
- The complainant tried to access the employer's internal resolution processes, but had difficulty accessing them and found them ineffective, and the respondents did not offer a valid reason not to grant the extension. (*Jules v. United Native Nations Society and Johnson*, 2009 BCHRT 115)

The Tribunal found it was not in the public interest to accept a late-file complaint where:

- The complainant waited until his grievance was withdrawn before filing his complaint five months late. The *Code* contemplates that a complainant may file both a grievance and a complaint concurrently. (*Allen v. Kruger and CEPU*, 2008 BCHRT 153)
- The complainant believed that he did not have sufficient evidence to file a complaint and waited for over a year to do so. Insufficiency of evidence could be addressed later in the Tribunal's process, including through disclosure. (*Rodrigue v. Pax Construction and Ackerson*, 2008 BCHRT 208)
- The complainant did not consult a lawyer quickly, and did not specify what her counsel did that resulted in the delay in filing, other than to express dissatisfaction with the lawyer's lack of progress. Despite consulting a second lawyer, and being advised to file a complaint even if it was late, the complainant still did not do so quickly. (*Poe v. London Drugs*, 2008 BCHRT 294)
- The complaint is moot. The practice of requiring diabetic drivers to pay for medical examinations required by the Office of the Superintendent of Motor Vehicles had ended 19 months before the complaint was made. (*Jenkins and Jenkins obo Diabetic Drivers of BC v. B.C. (Ministry of Public Safety and Solicitor General)*, 2008 BCHRT 445)
- The complaint was filed more than three months late. The potential deterrent effect of a successful complaint alone is not enough to warrant a conclusion that it is in the public interest to accept the complaint. (*Diep v. Subway Restaurant and Navarro*, 2009 BCHRT 118)
- The complainant was depressed and dealing with his father's estate, but his doctor's letter did not explain the history of his disability over the time period and how it contributed to the 20-month delay. Also, while there were discussions between the parties, they were not a complete explanation for the delay. (*Francis v. Weyerhaeuser Company*

and others, 2008 BCHRT 311)

- The fact that a complaint has little chance of success is a factor weighing against accepting a late-filed complaint. (*Gray v. Northwest Community College and others*, 2009 BCHRT 26)

SUBSTANTIAL PREJUDICE

If it is in the public interest to accept a late-filed complaint under s. 22(3), the Tribunal must decide whether substantial prejudice will result to any person because of the delay. It concluded that there was actual prejudice to the respondents here because one witness had died. Prejudice will be presumed after a lengthy period of time (here, eight years), as witnesses' memories will have faded. (*Montesi v. Port Alice Motel Campground operating as Ozzieland Restaurant and Vezina*, 2009 BCHRT 119)

APPLICATIONS TO DEFER OR STAY A COMPLAINT

The Tribunal may defer a complaint under s. 25 of the *Code* if there is another proceeding capable of appropriately dealing with its substance, or it may stay a complaint in certain circumstances. Of 12 applications to defer, 12 were granted. Of six applications to stay, four were granted.

A complaint was deferred where the parties agreed that it should be and the Tribunal decided the grievance process could appropriately deal with the substance of the complaint. (*Kelly v. Providence Health Care and another*, 2008 BCHRT 310)

The Tribunal did not defer a complaint where there was a BC Supreme Court action involving the same events, but not alleging discrimination, and the trial date was a year away. (*Nand v. Fasteel Industries*, 2008 BCHRT 145)

The Tribunal did not defer until the resolution of a Provincial Court wrongful dismissal action. The focus of the Provincial Court action was whether there was just cause for dismissal. The complainant had remedies available under the *Code* that were not available in Provincial Court, and no trial date was set. (*Flores v. Duso and Duso Enterprises*, 2008 BCHRT 254)

As granting a deferral until the completion of a grievance process is not necessarily consistent with a timely and fair resolution of a complaint, the Tribunal deferred it until the date the arbitrator's decision was released, the date the grievance was resolved by other means, or by a stated date, whichever was earlier. (*Manning v. B.C. (Ministry of Health Services) and others*, 2008 BCHRT 180)

LIFTING A DEFERRAL ORDER

The tribunal lifted a deferral where there was considerable delay with the grievance and the complaint issues appeared more expansive. (*Boehler v. Canfor Pulp (No. 2)*, 2008 BCHRT 130)

STAY APPLICATIONS

In the test for granting a stay, the applicant must demonstrate that there is a serious issue to be tried, they will suffer irreparable harm (which either cannot be quantified monetarily or would be uncollectible) if the stay is not granted and the balance of convenience favours a stay. In this case, the respondent did not establish this. (*Pruss v. Irwin and Paramount*, 2008 BCHRT 319)

The Tribunal refused to stay proceedings until the release of a reserved court decision on another complaint. While the court decision might be instructive on one of the legal issues in the complaint, other issues would be unaffected. Also, the court decision might be appealed or referred back to the Tribunal, leading to further delay. The legal issue that might

be affected by the court decision was not factually complex and could be dealt with by an agreed statement of facts, extra hearing days or written submissions. (*Carano v. B.C. (Ministry of Public Safety and Solicitor General)*, 2008 BCHRT 207)

Applications to Dismiss a Complaint

A complaint may be dismissed under s. 27(1) with or without a hearing, but generally applications under this provision are decided based on written submissions. Section 27(1) allows dismissal of complaints that do not warrant the time or expense of a hearing on the merits. For reasons of efficiency and fairness, the Tribunal's Rules anticipate that applications to dismiss be brought early in the process.

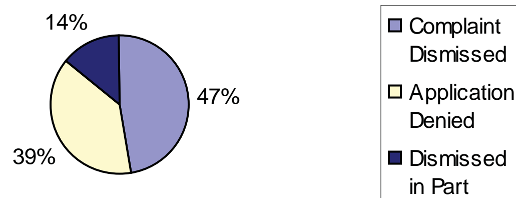
Section 27(1) provides seven bases for dismissing a complaint:

- no jurisdiction;
- no contravention of the *Code*;
- no reasonable prospect of success;
- proceeding would not benefit those allegedly discriminated against or further the purposes of the *Code*;
- complaint filed for improper motives or in bad faith;
- complaint appropriately dealt with in another proceeding; and
- complaint filed out of time.

Many applications to dismiss under s. 27(1) rely on more than one bases for doing so.

Applications to dismiss under s. 27(1) accounted for 56% of the preliminary decisions this year. Of 224 decisions under s. 27(1), 105 (47%) were dismissed and 32 (14%) were partially dismissed. Eighty-seven (39%) applications to dismiss were denied.

Section 27 Applications Decided



Section 27(1)(a) - No Jurisdiction

The Tribunal may dismiss a complaint for lack of jurisdiction against a federally-regulated company, if the conduct alleged is outside British Columbia, if the activity involved comes under the federal government's domain, or if the alleged area or ground of discrimination does not apply to the circumstances.

Activities Outside British Columbia

In an application to dismiss a complaint, on the basis of jurisdiction, where the employment was outside British Columbia, the information required to make a decision was contested. The Tribunal held an oral hearing on jurisdiction prior to a hearing on the merits. (*MacLeod v. Ravenspur Developments and Watson*, 2008 BCHRT 306)

Federally-Regulated Undertakings

The Tribunal dismissed complaints against federally-regulated respondents:

- a radio station; (*Mack v. CFUV FM Radio and Gelling*, 2008 BCHRT 178)
- a trucking company - interprovincial and international shipping was a small but usual part of the respondent's business, which made it a federal undertaking within the meaning of s. 92(10)

of the *Constitution Act, 1867*; (*Battu v. Cheetah Transport and others*, 2009 BCHRT 8)
- a private sector contractor providing medical services to a military base (*McKeen v. Jones and others*, 2008 BCHRT 264)

The Tribunal did not dismiss a complaint against a company operating a component repair and overhaul facility for helicopters. While aeronautics is within federal jurisdiction, the repair of engine parts is generally within provincial jurisdiction. Companies servicing and repairing aircraft are federally-regulated, but the respondent repaired and overhauled "component parts". Without more information, it was not clear that this business was "a vital, essential, or integral part" of the aeronautics industry. (*Lylyk v. H-S Tools & Parts Inc.*, 2008 BCHRT 116)

Societies Providing Services to Aboriginal People

The Tribunal has jurisdiction over the activities of a society that provides education, training and job opportunities to Aboriginal people. Citing *NIL/TU,O Child and Family Services Society v. BCGEU*, 2008 BCCA 333, the test is whether "the operations of the Society touch upon the 'core of Indianness' – a core made up of matters integral to aboriginal or treaty rights, aboriginal culture, or Indian status", and the "primary provincial jurisdiction over labour relations is not ousted simply because enterprises engage the interests of aboriginal groups, or provide services in a manner that is culturally sensitive." (*Lanza v. VanASEP*, 2008 BCHRT 398)

The Alleged Area or Ground Does Not Apply

Employment

The complainant named her employer and its client as respondents. The individual argued that because he was not the employer, the Tribunal did not have jurisdiction over him. The Tribunal concluded that s. 13 prohibits discrimination by a "person" not by an "employer" and if the alleged discrimination is respecting employment it has jurisdiction. (*Peacock v. Pacific Equine Clinic and Marino*, 2008 BCHRT 362)

The Tribunal dismissed complaints where the area of employment was not involved:

- An elected trustee of an improvement district was not an employee of the District. It did not exercise control over her work. Her monthly honorarium was not determined by her work performed nor could the respondent discipline or discharge her. (*Roth v. Beaver Creek Improvement District and Sopow*, 2008 BCHRT 133)

- The Tribunal had no jurisdiction over a complaint by a business consultant who provided services as an independent contractor. He had a limited number of hours to complete the contract, but flexibility in how, when and where to do the work. He was free to run his own businesses, and consult for others, at the same time. The Tribunal concluded that he was not an employee. (*Steel v. Rahn and another*, 2008 BCHRT 220)

Workers' Compensation Board

The complainants alleged that the Workers' Compensation Board's policies on chronic pain awards discriminated against them. The WCB argued that the Tribunal does not have jurisdiction over Canada Post employees. The Tribunal decided that the subject matter of the complaint is WCB's policy, and the organization is within the Tribunal's jurisdiction. That two complainants are employees of federally-regulated Canada Post does not alter the nature of the subject matter before the Tribunal. It also rejected the argument that the complaint was within the exclusive jurisdiction of the WCB. The WCB

succeeded on its judicial review of the Tribunal's decision not to dismiss the complaint where the WCB had decided one of its policies was not discriminatory. An appeal has been filed. (*Figliola and others v. Workers' Compensation Board (No. 2)*, 2008 BCHRT 374)

Denial of Membership in a Non-Profit Society

The complainants alleged that they were denied membership in a non-profit society because of their caste, even though they regularly participated in its religious, cultural and social events without discrimination. The Tribunal held that it had no jurisdiction over the complaint as access to membership in an organization that is purely social, religious or cultural was not a service customarily available to the public and also dismissed it under s. 27(1)(b) because s. 41 of the *Code* provided a complete defence. (*Sahota and Shergill v. Shri Guru Ravidass Sabha Temple*, 2008 BCHRT 269)

Complaint Against Residential Tenancy Branch

A complaint that the Residential Tenancy Branch failed to accommodate a complainant's mental disability was not dismissed pursuant to s. 27(1)(a)(b)(c), but the Tribunal amended the complaint from the area of tenancy to services. The Tribunal has a duty to ensure that vulnerable people have access to its process. (*Carline v. B.C. (Ministry of Forests and Range and Minister Responsible for Housing*), 2008 BCHRT 141)

Retaliation

The complainant had filed a previous human rights complaint, which was dismissed. She then filed a retaliation complaint, which the respondents applied to dismiss on the basis that it was outside the Tribunal's jurisdiction because the previous complaint had been dismissed. The Tribunal found that its jurisdiction was not limited only to the period during which the earlier complaint was active, and declined to dismiss the retaliation complaint. (*Smith v. Salt Spring Island Parks and Recreation Commission and Gibbon*, 2009 BCHRT 89)

Section 27(1)(b) - No Contravention of the *Code*

The Tribunal can dismiss a complaint under s. 27(1)(b) if the acts or omissions alleged do not contravene the *Code*. There may be overlap with s. 27(1)(a): if the facts alleged are not related to an area or ground of discrimination, the complaint may be dismissed either because no contravention is alleged or the Tribunal does not have jurisdiction over the matters raised in it.

The Tribunal dismissed a complaint about a training program, where the complainant did not describe any conditions of employment to bring it within s. 13 of the *Code*. She did not say she was hired or dismissed by the respondents or that they paid her or provided her with benefits. (*Preston-Scott v. Above the Underground and Ford*, 2008 BCHRT 132)

A casual employee asked for family leave days when her daycare provider was unavailable. Her employer refused because the benefit was only for permanent staff. When she refused three shifts, her employer reduced her seniority. The Tribunal declined to dismiss the family status complaint under s. 27(1)(b) as there was an adverse impact on her. (*Haggerty v. KSCL and others*, 2008 BCHRT 172)

The complainant alleged that her union failed to adequately pursue an employment accommodation for her. The Tribunal dismissed the complaint against the union. An allegation that a union has not done a good enough job representing a member can only ground a complaint under s. 13 of the *Code* in exceptional circumstances. (*Schmitz v. Haida Inn and BCGEU (No. 2)*, 2008 BCHRT 383)

Section 27(1)(c) - No Reasonable Prospect of Success

Complaints are dismissed under s. 27(1)(c) where the Tribunal concludes, based on all the material before it, that there is no reasonable prospect of proving the allegations. Examples include:

Because the complainant had no reasonable prospect of proving that her pregnancy was a factor in the decision to terminate, the respondent demonstrated that it had decided to restructure the workplace, and end the complainant's employment, before it knew she was pregnant. (*Mason v. University of British Columbia and others*, 2008 BCHRT 159)

The complaint alleged discrimination in the area of services on the ground of physical disability when the respondent denied her a second extension for a training course. However, there was no reasonable prospect the complainant could show that the denial was discriminatory, as she had already completed the program. The service, a 12-week training program, had been provided to her, there was nothing else available, and others needed to access the program. (*Preston-Scott v. Ford (No. 2)*, 2008 BCHRT 206)

The complainant alleged sexual harassment at work. She had filed similar complaints to the RCMP and her professional college, which, after investigation, were found to be groundless. The Tribunal was not bound by the other findings; however, the fact that the professional college investigated the same complaint and found it unsupported led to the conclusion that she had little prospect of proving the complaint at the Tribunal. (*C. v. R.*, 2008 BCHRT 211)

A complainant of Chinese origin alleged that ICBC discriminated against her, on the basis of race, ancestry and place of origin, in the course of its investigations into a damage claim. The Tribunal found that although, in our increasingly diverse society, racism is less likely to be overt and more likely to be subtle, the complainant made bald allegations without reference to conduct from which to infer that her race and ancestry were factors in the alleged adverse treatment. (*Jonassen v. ICBC and others*, 2008 BHCRT 312)

The complainants filed an individual and group complaint alleging that the British Columbia Teacher's Federation and two individual respondents discriminated against them on the grounds of marital and family status and religion contrary to s. 7 of the *Code*. The publications in issue were a letter to the Premier, a news release and a petition to encourage the government to address allegations of sexual exploitation in the Bountiful community and discriminatory teaching in its independent schools. The complaint was dismissed as there was no reasonable prospect that the publications could be held to indicate discrimination or an intention to discriminate. It was not the *Code*'s purpose to stifle public comment and democratic political action on matters of legitimate public interest, or to prevent a request to government to investigate. (*Palmer and Palmer v. BCTF and others*, 2008 BCHRT 322)

The Tribunal dismissed a complaint against the Residential Tenancy Branch where a complainant alleged discrimination in regard to a hearing disability because he did not arrange for assistance or advise the Branch of his hearing difficulty and request an accommodation. (*Egan v. B.C. (Ministry of Forests and Range) and Simpson*, 2008 BCHRT 340)
In other cases, the Tribunal found there was no reasonable prospect of success because the allegations were unlikely to contravene the *Code* even if proven.

Workplace "Stress" Not a Disability

The complainant informed her employer that she was suffering from "stress". Stress in itself is not a

disability for the purposes of the *Code*. Workplace stress resulting from an investigation of alleged performance problems, or from a problematic relationship with a supervisor does not, on its own, constitute a disability under the *Code*. (*Matheson v. School District No. 53 (Okanagan Similkameen) and Collis*, 2009 BCHRT 112)

Belief in Rights Protected by the Code Are Not "Political Belief"

The complaint alleged she was dismissed from her employment for her political belief. She argued that political belief is more than involvement with a political party or platform and includes beliefs in the right to be free from discrimination and to stand up for oneself in the face of discrimination. The Tribunal found that it would stretch the concept of protection on the basis of political belief beyond any recognizable meaning to include this concept. (*Smith v. Salt Spring Island Parks and Recreation Commission and Gibbon*, 2009 BCHRT 89)

Membership in a Union: Application of Section 14

Section 14 is involved where a complainant alleges that a union has discriminated against a member as a member, rather than as an employee. It includes situations where the union discriminates against a member in respect to its internal operations and may also include where a union discriminates in representing a member on an issue arising from their employment. The Tribunal dismissed the complaint under s. 27(1)(c) where the allegations against the union were about the conduct of two co-workers in their role as employees, rather than as shop stewards. (*Kruse v. Western Pacific Marine and BCGEU*, 2008 BCHRT 440)

The Tribunal declined to dismiss the complaint under s. 27(1)(c) in the following cases:

Family Status May Include Status of Losing a Stillborn Child or a Child Who Dies Shortly After Birth

An employee's benefits included bereavement leave for the death of an immediate family member. Leave was denied when an employee's child was either stillborn or died shortly after birth on the basis that the benefit did not extend to these circumstances. The Tribunal decided that the employer's abstract legal arguments ignored the actual lived experience of the employee and his family, contrary to a broad and purposive approach to interpretation of the *Code*. (*Mahdi v. Hertz Canada*, 2008 BCHRT 245)

Prayers at Strata Meetings and Religious Content in a Strata Newsletter

The complainant lived in a strata built by a Baptist church and administered by a partly church-owned company. The Tribunal dismissed the part of the complaint relating to his attempts to purchase another strata unit, but not the parts regarding prayers at council meetings or the distribution of a newsletter that contained both strata and religious information. Because of the on-going relationship and the potential divisiveness of a hearing, the Tribunal ordered the parties to mandatory mediation. (*Smith v. B V Administration and another*, 2009 BCHRT 79)

Treatment of Mandarin Speaking Employee: Dismissed in Part

A complainant of Chinese ancestry alleged discrimination by her employer when she was told not to speak Mandarin, denied an opportunity to apply for a position based on her perceived lack of qualification, and fired. While the *Code* does not prohibit language discrimination *per se*, in some circumstances, it may amount to discrimination on the basis of race, colour, ancestry or place of origin. The Tribunal dismissed

only the part of the complaint dealing with the denial of an opportunity to apply for a position as she did not have the necessary qualifications and there was no reasonable prospect she could show that the requirement was imposed in a discriminatory way. (*Lee v. Marpole Oakridge Family Place and Melenka*, 2008 BCHRT 318)

Section 27(1)(d)(i) - Proceeding With the Complaint Would Not Benefit the Person, Group or Class Alleged to Have Been Discriminated Against

A complainant alleged that not being allowed to participate in a dog obedience training class because of concerns about wheelchair accessibility was discrimination in services on the basis of physical disability. The Tribunal could not conclude that proceeding would not benefit the complainant because of disputes about the reasons for the denial and the way they were communicated. (*Tripp v. Vancouver Dog Obedience Training Club and Baker*, 2008 BCHRT 309)

The Tribunal dismissed a complaint against a Strata Corporation where the complainant wanted approval to renovate her suite to accommodate a disability. The Tribunal found that proceeding with the complaint was premature under s. 27(1)(d)(i) and under s. 27(1)(c) as she had not followed the procedure provided in the strata bylaws. (*Calderoni v. Strata Council Plan No. K6*, 2009 BCHRT 10)

Section 27(1)(d)(ii) - Proceeding With the Complaint Would Not Further the Purposes of the *Code*

Complaint Premature

The Tribunal dismissed a complaint in the area of tenancy on the ground of physical disability because it was premature. The complainant lived in subsidized housing and asked for a different suite to accommodate her disabilities. She rejected other potentially appropriate suites and was now first on the waiting list for the suite she preferred. The purposes of the *Code* would be better fulfilled by allowing the ongoing accommodation process to proceed. The Tribunal offered the parties a mediator to assist them to resolve the outstanding issues. (*Eastwood v. Capital Regional Housing Corporation*, 2008 BCHRT 219)

Conduct of Complainant

The Tribunal dismissed a complaint because it would not further the purposes of the *Code* to proceed with it where the complainant's communications with the respondents, their counsel, the Tribunal and its staff were vitriolic, incendiary and threatening. The Tribunal also ordered costs of $1,000 payable to each of the three respondents. (*Miller v. Treasure Cove Casino and others*, 2009 BCHRT 126)

Substance of Complaint Adequately Addressed

The Tribunal found that proceeding with a complaint would not further the purposes of the *Code* where the substance of the complaint had already been adequately addressed. (*Lal v. Home Depot and others*, 2008 BCHRT 326; *Pollock v. TDK Holdings and others*, 2009 BCHRT 103; *Priegnitz v. Pacific Pallet and others*, 2009 BCHRT 108)
Where an accommodation was made in a reasonable time, the fact that the complainant felt that she was treated disrespectfully was not enough to justify a hearing, considering broader public policy issues, such as the efficiency and responsiveness of the human rights system. (*Deo v. Bell and others*, 2008 BCHRT 237)

A complainant who had difficulty using stairs, complained that bus operators were reluctant, or refused, to lower a lift for her. The company gave her a lift

pass authorizing access and followed up with individual drivers to ensure the policy application. The complaint's underlying issues had been addressed and proceeding with the complaint would not improve on the steps already taken by the company. (*Borutski v. Coast Mountain Bus Company*, 2008 BCHRT 291)

A nursing mother complained that staff told her to breastfeed in a fitting room so as not to offend others. This was not the retail clothing store's policy and management apologized to the mother, responded to media and public inquiries, attended personally at a "nurse in" protest at the store, and ensured that all of its employees were educated about its policy. The Tribunal's ability to further the purposes of the *Code* are harmed when its resources are used where a respondent has dealt with matters appropriately. (*Valle v. H& M*, 2008 BCHRT 456)

Conduct of Both Parties Considered

It is appropriate under s. 27(1)(d)(ii) to consider how both parties conducted themselves during and since the incident complained of. In this case, the bus company dealt with the complainant's concern about his treatment promptly and responsibly and gave him a comprehensive apology. The complainant made inflammatory, offensive and unsubstantiated allegations against several people involved. The Tribunal concluded that nothing would be gained by the complaint proceeding to a hearing. (*Ting v. Coast Mountain Bus Company*, 2008 BCHRT 450)

Valid Settlement Agreement

In the absence of public policy considerations, the purposes of the *Code* are not furthered by proceeding in the face of a settlement agreement intended by the parties to resolve the human rights complaint. (*Kreutzer v. British Columbia Lottery Corporation (No. 2)*, 2009 BCHRT 87)

Section 27(1)(e) - Complaint Filed for Improper Purposes or in Bad Faith

The complainant alleged that she was sexually harassed and received a lower rate of pay for doing the same work as male employees. The respondent's unsuccessful application to dismiss alleged that she filed the complaint in bad faith or for improper purposes, after it refused to provide a letter to her bank in support of her loan application and because of events at a Tribunal mediation but they did not submit any materials on which the Tribunal could reach that conclusion. (*Pruss v. Irwin and Paramount (No. 2)*, 2008 BCHRT 321)

Section 27(1)(f) - Complaint Appropriately Resolved in Another Proceeding

The Tribunal found that the complainant's wrongful dismissal action, which was dismissed by the Court, appropriately dealt with the substance of her human rights complaint. The Court decision addressed her allegation that she had not been accommodated in the context of her constructive dismissal claim. (*Gillette v. Sisett and another (No. 3)*, 2009 BCHRT 67)

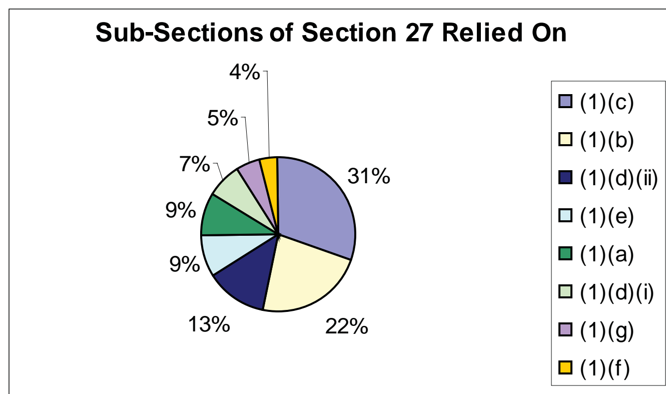
Under the terms of its policy, an insurer refused to pay LTD benefits to a mentally disabled person while he was in custody. He alleged discrimination in services because his mental illness was a factor in his commission of a criminal offence and the reason for his incarceration. The insurer argued the Tribunal was without jurisdiction as the issue of the complainant's mental health in relation to the offence had already been decided by the Court. The Tribunal found that it had jurisdiction as the questions answered by the Court were different from whether the insurer had discriminated. (*D v. Manulife Financial and CAW Local 2002 Disability Trust Fund*, 2009 BCHRT 18)

Section 27(1)(g) - Alleged Contravention Outside the Time Limit

Decisions on applications to dismiss a complaint under s. 27(1)(g) are reviewed under time limit decisions (s. 22), discussed above. There were 27 applications which resulted in six complaints being dismissed in whole or in part.

Abuse of Process

The Tribunal may also dismiss a complaint if proceeding with it would be an abuse of its process. The Tribunal dismissed a five year old complaint that had been adjourned four times by the parties and stayed for over a year. The length of the delay, and the unforeseeable length of a future delay, would lead to a breach of the duty of fairness and be an abuse of process if the complaint were to proceed. (*Zhang v. Victoria Police Department (No. 5)*, 2008 BCHRT 227)



Other Preliminary Decisions

During the processing of a complaint, the Tribunal may be asked to decide ongoing procedural issues. Simple preliminary procedural applications, such as for adjournments and extensions of time, may be dealt with by oral submissions and may not result in formal reasons. For more complex procedural issues, such as disclosure of documents and adding or substituting parties, a schedule for written submissions is set and a written decision is issued. Some examples of the Tribunal's procedural decisions this year follow.

The Tribunal dismissed applications to introduce polygraph evidence, and bar certain witnesses from testifying. The parties may object to the relevance of specific evidence at the hearing. (*Harvey v. FIC Investment and others (No. 2)*, 2008 BCHRT 126)

Disclosure

The tribunal denied a disclosure application for medical records where the respondent applied after the complainant testified, and to allow it might result in delay and procedural difficulties. The documents, while arguably relevant, were not necessary. (*Vasil v. Mongovious and another (No. 3)*, 2008 BCHRT 139)

Time for Amending Complaints

Rule 25(4)(b) requires an application to amend a complaint if there is an outstanding application to dismiss it. The complainant must persuade the Tribunal to exercise its discretion and allow the amendment to ensure procedural fairness to the respondent who should not have to deal with a moving target. The tribunal may grant leave for an amendment when to do so would further the purposes of the *Code* and the Rules while ensuring that all parties are treated fairly. (*Pausch v. School District No. 34 and others*, 2008 BCHRT 154)

The Tribunal allowed an amendment because it provided particulars that would assist the parties in defining the conduct at issue, and because there was no prejudice to the respondents. (*Priegnitz v. Pacific Pallet and others*, 2009 BCHRT 108)

Conversion of Individual Complaint into a Representative Complaint and Anonymization

The Tribunal granted an application to convert an individual complaint into a representative complaint. The complainant was clearly a member of a vulnerable group, suffering from serious physical and mental disabilities, and homeless. This would make it difficult for him to proceed with a complaint on his own. It would be inconsistent with the purposes of the *Code* to erect procedural roadblocks preventing effective access to the Tribunal. Also, having a representative act for him would assist in the fair, efficient and timely resolution of the complaint. The highly personal nature of the complaint and safety concerns justified anonymizing his name to protect his identity. (*The British Columbia Coalition of People with Disabilities obo J.T. v. B.C. (Ministry of Employment and Income Assistance)*, 2008 BCHRT 224)

Publication Ban

The Tribunal ordered anonymization of a complainant's name. He was a convention refugee with relatives in Iran who could be subject to hardship if his whereabouts in Canada were known. The Tribunal declined to anonymize the respondents' names as a matter of reciprocity. (*KP v. Immigration Services Society and Siemens*, 2008 BCHRT 266)

Pre-Hearing Ruling on Admissibility of Similar Fact Evidence

The Tribunal generally declines to make preliminary rulings on the admissibility of evidence, but did so where some of the disputed evidence was not similar fact evidence to show the respondent's propensity to fail to accommodate, but to show that the respondent could accommodate its employees and failed to do so. Evidence of a male-dominated work environment was relevant as the complainant alleged she had been harassed and shunned at work because she is a woman and disabled. It might show that the respondent's actions were due, in whole or part, to the complainant's sex. Contextual evidence of the treatment of women in the workplace may be important in assessing whether that inference should be made. While there is some prejudicial effect to a respondent whenever similar fact evidence is allowed, the prejudice did not outweigh the potential probative value of the evidence. (*Neumann v. LaFarge Canada (No. 4)*, 2008 BCHRT 303)

Intervenor Application

Intervenors may assist the Tribunal in understanding the context of a complaint, the perspectives of individuals and groups other than the parties, the factual and legal issues raised by a complaint, and the impact of a Tribunal decision. An intervenor should demonstrate that it has some expertise in relation to the issues. (*Hall v. B.C. (Ministry of Environment), (No. 4)*, 2008 BCHRT 437)

Time Limit for Dismissal Applications

The parties agreed jurisdictional issues should be decided before the hearing. The arguments relating to the Tribunal's authority to deal with a complaint (s. 27(1)(a)), whether a complaint alleges facts that if proven could constitute a contravention of the *Code* (s. 27(1)(b)), and whether a complaint was filed in time (s. 27(1)(g)) should be decided on a preliminary basis. The issue was whether an amendment to the complaint allowed the respondent to argue there was no reasonable prospect of success (s. 27(1)(c)). Rule 26(2)(d) allows a dismissal application within 30 days of new information or circumstances where they form the basis for the application. The Tribunal confirmed that an amendment clarifying the scope of a complaint is not sufficient to amount to new information forming the basis of an application to dismiss; the amendment must be substantive as it was in this case. (*Hughes v. City of New Westminster*, 2008 BCHRT 392)

Costs

The Tribunal ordered $500 in costs against a complainant who made gratuitous, disrespectful, and personal attacks against the City manager, and vague allegations of race and socio-economic discrimination against the City, none of which was relevant to the complaint. She also misled the Tribunal through omission, and demonstrated a lack of concern with factual accuracy. (*Hughes v. City of New Westminster (No. 2)*, 2009 BCHRT 107)

The Tribunal ordered $1,700 in costs against a complainant who took contrary positions with WorkSafe BC, her long-term disability benefits provider, and the Tribunal that either exaggerated or downplayed the extent of her disabilities when she believed it would benefit her. An application for judicial review has been filed. (*McDougall v. Superior Building Maintenance (No. 8)*, 2009 BCHRT 93)

The Tribunal ordered $3,500 in costs where the complainant repeatedly contravened Tribunal Rules and directions, and then withdrew her complaint one day before the hearing. (*Samuda v. Olympic Industries*, 2009 BCHRT 65)

The complainant sought costs on the basis that the respondent sought to rely on confidential settlement discussions in support of its application to dismiss the complaint on the basis of improper motives or bad faith. While in most cases this conduct will result in a finding of improper conduct and an award of costs, the circumstances of this case were unusual. The representative who attended the Early Settlement Meeting had died, and his spouse, the new representative, was not aware of the applicable confidentiality covenant. She would not have relied on what happened at the Early Settlement Meeting if she had understood its purpose, and acknowledged her error. While the conduct was improper, a costs award was not appropriate. (*Pruss v. Irwin and Paramount (No. 2)*, 2008 BCHRT 321)

The Tribunal awarded $3,000 in costs against a complainant for transforming a contract dispute into a human rights complaint, after abandoning the original basis for his complaint when the respondent provided information that showed that it was clearly groundless. (*Rajput v. UBC and others (No. 2)*, 2008 BCHRT 256)

The Tribunal refused to order costs where a party made an unsuccessful argument supporting the admissibility of a "without prejudice" letter. (*Sawyer v. Pacific Palisades Hotel and another*, 2008 BCHRT 304)

The Tribunal awarded costs for improper conduct against a respondent who approved and later revoked approval for its employees to appear as witnesses for the complainant with pay. It also sought to penalize the complainant or his counsel by telling the employees to ask them for reimbursement for lost wages. (*Buchner v. Emergency and Health Services Commission (No. 3)*, 2008 BCHRT 449)

The Tribunal awarded the complainant $5,000 in costs because the respondent engaged in improper conduct prior to and during the hearing. The respondent repeatedly failed to make full disclosure of documents; its witnesses were evasive and unnecessarily argumentative; there were indications of collusion and much of their evidence was not credible; the President/CEO misrepresented the Tribunal Members' directions and misrepresented and misquoted evidence that had previously been given; and, shortly before the hearing, reversed the position that an employee had reported the complainant to the RCMP. An application for judicial review has been filed. (*Asad v. Kinexus Bioinformatics*, 2008 BCHRT 293)

The Tribunal declined to order costs where the respondent called a witness without notice and behaved inappropriately during the hearing by winking at one of the complainant's representatives. The unex-

pected witness did not result in significant prejudice to the complainant. While winking was inappropriate, it did not have a substantial prejudicial impact on the integrity of the process or on the complainant. (*Louie v. 50 Bourbon Pub/Bar*, 2008 BCHRT 315)

FINAL DECISIONS

This year there were 72 final decisions made after a hearing on the merits, an increase from last year's 45 decisions, and in line with the trend seen in previous years, where there were 53 decisions in 2005/2006 and 76 in 2006/2007.

Thirty-six percent of the complaints (26 of 72) were found justified after hearing. This compares to 33% in 2007/08, 36% in 2006/07, and 40% in 2005/06.

REPRESENTATION BEFORE THE TRIBUNAL

Complainants appeared on their own behalf and, in one case, through an agent in 69 of the hearings. The Tribunal dismissed the complaint in the four cases where the complainant did not personally attend.

Respondents did not attend two hearings, and in another case, one of the respondents did not attend. The Tribunal found the complaints justified where the respondent did not attend, but the complainant did.

As in prior years, complainants were unrepresented in more hearings than were respondents. They had legal counsel in 27 cases, while respondents had legal counsel in 47 cases. Counsel from the Human Rights Clinic represented complainants in nine of the cases which went to hearing this year. Complainants had no legal representation in 60% (42 of 69) hearings in which they appeared. On the other hand, respondents had no legal representation in 32% (23 of 70) hearings in which they appeared.

For complainants, there was a correlation between success and legal representation: represented complainants succeeded in 52% of the hearings but unrepresented ones succeeded in only 28%. Complainants had the highest rate of success where both parties had counsel: of the 22 cases, the complaint was successful in 12 (55%). Where only the complainant had counsel, the complaint was proven in 2 of the 5 cases (40%). In the 17 cases where neither party had counsel, the complaint was proven in 5 (29%). The rate of success was lowest where only the respondent had counsel: the complaint was justified in 6 of the 24 cases (25%).

For represented respondents, the complaint was proven in 38% of the cases, and without counsel, the complaint was proven in 30% of the cases. These numbers reflect the fact that in about 25% of the cases neither party had counsel, and the success rate was only 29% in these cases. In two-thirds of the cases, respondents had counsel: the success rate was lower where only the respondent had counsel (25%) but was higher where both parties were represented (55%).

CASE HIGHLIGHTS

A complaint may cite allegations of discrimination in more than one area and ground. This year, the final decisions involved complaints in the areas of employment (s. 13), services (s. 8), tenancy (s. 10), purchase of property (s. 9), publication (s. 7), membership in a union, employer's organization, or occupational association (s. 14), and retaliation (s. 43). No decisions were about employment advertisements (s. 11), or lower rate of pay based on sex (s. 12).

EMPLOYMENT - SECTION 13

Employment cases totalled 48 of 72 final decisions (67%). Seventeen (35%) were found to be justified.

Disability Complaints

Twenty-one (44%) of the employment decisions involved disability discrimination, with seven (33%) found to be justified. Ten involved physical disability, with four successful; four involved mental disability, with one successful. Seven involved both grounds, with two successful.

Duty to Accommodate

Two cases involved paramedics, and the duty of an employer to accommodate an employee with a disability. In one, the Tribunal found procedural failures in the accommodation process, but in the other, found the accommodation was satisfactory. The duty to accommodate on a return to work after a disability-related absence was considered.

Accommodation Process Unsatisfactory

The employer discriminated when it removed a paramedic, who could not manually palpate a pulse due to a medical condition, from his job. The employer proved that the requirement to manually palpate a pulse was rationally connected to the performance of a paramedic's job, was adopted honestly and in good faith, and reasonably necessary and the employer could not accommodate the employee. However, it did not treat the complainant fairly. It treated him as an occupational safety hazard, made false and derogatory comments about his condition to his co-workers, refused to allow him to work in another capacity, and, in the absence of medical evidence, took steps to have his driver's and paramedic's licences revoked, subjecting him to unnecessary frustration, anxiety, financial insecurity and hardship.

The Tribunal awarded $22,500 for injury to dignity, feelings and self-respect, relying on his serious medical condition, making him inherently vulnerable; the absence of income replacement, he lived in a small community with limited employment opportunities; the conduct left him anxious and frustrated; his employer viewed him with suspicion and hostility; and those feelings poisoned his relationship with his crew. This went on for over a year, which was a significant factor in the larger award. An application for judicial review has been filed (*Cassidy v. Emergency Health and Services Commission and others (No. 2)*, 2008 BCHRT 125)

The Tribunal refused to order the complainant reimbursement for conduct money paid to witnesses because he did not show that it was reasonably necessary to prove his case, there is no legal obligation to pay conduct money, and he had not shown it was necessary to get witnesses to attend. (*Cassidy v. Emergency and Health Services Commission and another (No. 3)*, 2009 BCHRT 110)

Duty to Accommodate Satisfied

A paramedic lost his Class 4 driver's license due to a complex partial seizure disorder. The license was required to drive an ambulance but paramedic partners usually share driving and attending duties. The employer accommodated him by allowing him only attendant duties but allegedly refused him a transfer or promotion to other positions. He alleged individual and systemic discrimination against paramedics without a Class 4 driver's license. The Tribunal dismissed the complaint, finding the respondent had fulfilled its duty to accommodate to the point of undue hardship and considered requests for transfers in a reasonably timely manner. The complainant never lost work, wages or hours, and had been treated with dignity. The duty to accommodate must be in proportion to the consequences of an employer's discriminatory actions. Where the potential impact on the employee is less severe, the extent of the duty to accommodate may be proportionately less, especially where there have been substantial accommodations. Also, the accommodation was on an appropriately individual basis, and any differences in treatment were not indicative of systemic discrimination. (*Buchner*

v. Emergency Health Services Commission (No. 2), 2008 BCHRT 317)

DISCRIMINATION ON RETURN TO WORK

The complainant alleged a three month delay in her return to work after her recovery from Bell's palsy and discrimination because of age and a perceived ongoing disability. The employer believed that a return to a stressful job would exacerbate her condition and delayed a pay raise, having lost confidence in her abilities because of a perception of her past disability. She was wrongly blamed for errors and berated. The Tribunal awarded wage loss for the three months delay and for the period of time it took her to find a new job, plus $5,000 in damages for injury to dignity, feelings and self-respect. (*McComb v. Yaletown Restoration and Aziz*, 2008 BCHRT 320)

ACCOMMODATION OF ABSENCE DUE TO DISABILITY

The Tribunal considered several cases involving the obligation to accommodate an absence due to a disability. Terminating an employee because of their absence is *prima facie* discriminatory, and the employer must prove that it satisfied the duty to accommodate.

An employer discriminated on the basis of mental and physical disability when it terminated the complainant's employment due to her two-year leave of absence. The employer argued that the employment contract was frustrated and the absence constituted undue hardship. The Tribunal considered:

- the terms of the employment contract
- the period of past employment and how long the employment was expected to last
- the nature of the employment
- the nature of the disability, and the prognosis as known to the employer
- any enquiries about the ability to return to work
- the employer's role in the development of the disability
- the absence of a warning that the job was in jeopardy
- notification of the termination by email
- whether it caused the employer hardship to continue to employ the complainant and its motivations in terminating her how and when it did.

The evidence, including expert medical evidence, established that the termination had a profound effect on the complainant. The Tribunal ordered $35,000 for injury to her dignity, feelings and self-respect, and the payment of reasonable legal fees and other related expenses incurred. As the complainant was not able to work following the termination, there was no order for lost wages. (*Senyk v. WFG Agency Network (No. 2)*, 2008 BCHRT 376)

The employer argued that the complainant abandoned his position. However, while the communication between the parties could have been better, the employer was aware of the complainant's disabling medical treatment. There was no evidence that the employer notified the complainant that the updates were insufficient nor that it accommodated the complainant to the point of undue hardship. The Tribunal considered:

- the employer did not to make inquiries, initiate an accommodation process or meet with the complainant to explore those options
- there was no effort to get information about the prognosis, the expected return date and any work limitations
- there was no assessment of available alternatives
- the financial information did not support the conclusion of undue hardship.

The Tribunal ordered compensation for expenses incurred (medical services premiums and prescription costs), and $6,000 for injury to dignity, feelings and self-respect. As the complainant was unable to

work during the entire period, there was no basis for an award of lost wages. (*Gaarden v. Fountain Tire and Ingram*, 2008 BCHRT 402)

Other Disability Cases

A housekeeper at a wilderness lodge developed a wrist injury and was accommodated with light duties. She asked for a wage increase when she returned to full duties. The employer believed it was an ultimatum and fired her for that non-discriminatory reason. (*Kyle v. King Pacific Lodge and Beatty*, 2008 BCHRT 458)

The Tribunal found discrimination on the grounds of physical disability and age where the employer dismissed a 59 year old employee with acute gout after his medical leave and had hired a younger, stronger man during his absence. (*Flores v. Duso Enterprises and Duso (No. 2)*, 2008 BCHRT 368)

The tribunal dismissed a complaint where a diabetic employee was refused a transfer to the day shift. The employer did not know he had diabetes and needed the shift change to manage his condition. The disability was not a factor in the dismissal. (*Yee v. West Telemarketing Canada and others (No. 3)*, 2008 BCHRT 119)

The complainant was denied time off of work and told other employees that she would arrange for a doctor's note instead. When she did so, it upset co-workers who believed she had manipulated the system and the employer fired her. She was not able to discharge the onus to show that the employer's non-discriminatory explanation for firing her was a pretext. (*Mollet v. Beaver Creek Home Center and Wilson (No. 2)*, 2008 BCHRT 285)

The Tribunal held that an employer refused employment to a front desk clerk because there was no work available not because of physical disability. There was uncontradicted evidence that if the complainant had applied for advertised jobs once work was available, she would have been hired. While comments about a physical disability can be discriminatory, in this case, comments made by a manager that she could see pain in the complainant's eyes, and that her shoulders were asymmetrical, were not discriminatory as they were friends as well as employer and employee. (*Burns v. Halcyon Hot Springs and Burmeister*, 2008 BCHRT 278)

Two disability complaints were dismissed at the conclusion of the complainant's case after a successful "no evidence" motion. The Tribunal considers whether there is a reasonable basis to find in the complainant's favour. If so, the hearing continues. If not, the complaint is dismissed. The Tribunal dismissed the complaint where there was no reasonable basis to conclude that her physical disability was a factor in the decision to end her employment. (*Pardo v. School District No. 43 (Coquitlam)*, 2008 BCHRT 129)

The employer posted the complainant's contract position as a full time position requiring a degree, which excluded her from the competition. The Tribunal found no nexus between her disability and the posting change. (*Sime v. Okanagan College (No., 2)*, 2008 BCHRT 257)

Sex Discrimination

Fourteen decisions (29%) cited the ground of sex, with six (43%) found to be justified, including two pregnancy cases.

Termination Based on Sex Where Employee Viewed as a "Trouble-Maker"

The Tribunal found that sex was a factor when the employer health authority terminated a female protection services officer viewed as a "trouble-maker" because she raised concerns about sex discrimination in a male-dominated workplace. It scrutinized

her conduct differently than that of men and its claim that she was dismissed as a poor employee was unsubstantiated. She was a 20-year employee with a positive evaluation history who was unfairly terminated resulting in her suffering reactive mental health problems, and a loss of self-worth and injury to dignity. The Tribunal's remedial orders included wage loss and $20,000 for injury to dignity, feelings and self-respect, as well as immediate reinstatement to her position. The Tribunal ordered that if the employee requested it, an outside facilitator acceptable to both parties should assist with her reintegration to the workplace, for a six-month period. The Tribunal retained jurisdiction over the implementation of the reinstatement for one year. (*Kalyn v. Vancouver Island Health Authority (No. 3)*, 2008 BCHRT 377)

Effect of Pregnancy in the Workplace

The Tribunal found that a worker in a pub was discriminated against on the ground of sex. As a result of her relationship with a customer, there was workplace disruption. The Tribunal found that one reason for her termination was that disclosure of her pregnancy might result in greater disruption. The Tribunal awarded compensation for lost wages, maternity benefits, expenses incurred in an earlier hearing, and $7,500 for injury to dignity, feelings and self-respect. (*Ballendine v. Willoughby and others (No. 5)*, 2009 BCHRT 33)

Failure to Consider Worker for Maternity Leave Coverage

A worker agreed to cover a maternity leave, then became pregnant and was laid off. Subsequently, the employer advertised another position that the worker could have filled. The Tribunal did not find discrimination with respect to the lay off, and while the failure to consider the worker for the advertised position was arbitrary and unfair, there was insufficient evidence that this was due to her pregnancy. It found discrimination when the manager did not determine whether she could cover the maternity leave despite her pregnancy without causing undue hardship to the employer. The Tribunal awarded lost wages, maternity and parental leave benefits and $5,000 for injury to dignity, feelings and self-respect. An application for judicial review has been filed. (*de Lisser v. Traveland Leisure Vehicles and others*, 2009 BCHRT 36)

Sexual Harassment

Two of six sexual harassment cases were proven.

A complainant was sexually harassed by a co-worker who made an inappropriate comment, asked her for a hug and felt her buttock. She received $5,000 for injury to dignity, feelings and self-respect, and lost wages to the time when she should have broadened her search for other employment. (*Behm v. 6-4-1 Holdings and others*, 2008 BCHRT 286)

A single mother who worked as a construction safety officer was fired for complaining of sexual harassment. The project manager created a sexualized environment, touched her inappropriately, asked her to view pornography, propositioned her, and reacted negatively when she did not respond. When she complained to the employer, the project manager denied any misconduct and had a lawyer warn the complainant not to defame him. The investigation into her complaint was cursory, and the complainant was terminated soon afterward.

The Tribunal awarded lost wages, out of pocket expenses and $15,000 for injury to dignity, feelings and self-respect, as well as $3,000 in costs for improper conduct by the respondents at the hearing for making untrue statements in regard to the complainant's reputation and for confronting her outside the hearing room. (*Harrison v. Nixon Safety Consulting and others (No. 3)*, 2008 BCHRT 462)

The complainant alleged a co-worker, who shared her office, sexually harassed her by grabbing her arm while trying to take a tape-recorder that she had put up to his face. The Tribunal found that the conduct did not have a sexual aspect nor did him calling her "old woman" constitute discrimination on the basis of age. (*Lawhead v. Southern Insurance Services and Jensen*, 2008 BCHRT 287)

Another complaint was dismissed because the conduct was not related to employment. An employee chose to stay after work to drink alone with her employer and both became intoxicated. Afterward, she alleged that she had been sexually harassed. She admitted she did not feel compelled to stay, but that she stayed to drink. Alternatively, the Tribunal found that she had not met the legal burden of proving that the conduct was unwelcome. Due to their conditions, neither party could provide reliable evidence about what happened before or after the alleged incidents. The Tribunal held that whatever occurred was not in the context of employment. (*Chan v. Pryer*, 2008 BCHRT 441)

Race, Colour, Ancestry and Place of Origin

Eleven decisions (23%) involved the grounds of race, colour, and/or place of origin, with three (27%) found to be justified. Race was cited as a ground in all of the complaints, colour in six, ancestry in five, and place of origin in nine. Five of these cases also cited religion as a ground; one was successful. Political belief was also a ground in two, succeeding in one complaint.

Discrimination in Wages and Benefits

A union filed a representative complaint on behalf of Latin American workers hired to construct a rapid transit tunnel, alleging discrimination on the grounds of race, colour, ancestry and place of origin. The union argued that the Latin American workers performed substantially the same work as imported European workers but were paid less than the Europeans and given less desirable benefits.

The complaint involved adverse effect discrimination and the Latin American workers shared a constellation of identifiable characteristics related to race, colour, ancestry and place of origin. The appropriate comparator group was "other non-resident workers with tunneling experience and expertise who were engaged in the construction of the Canada Line tunnel". As this was a group comparison, the Tribunal rejected comparing each Latin American worker with a European counterpart and rejected, on the evidence, that the Europeans were managers, rather than specialized workers like the Latin Americans.

The respondents argued there was no *prima facie* case of discrimination because the pay differences resulted from their international compensation practices, which provided pay increases as a worker moved from project to project based on their level of compensation when first hired in their home country. The Tribunal concluded that this argument was a defence, rather than part of the *prima facie* analysis, although it did not affect the result. The international compensation practices were not related to, and therefore did not justify, the adverse differential treatment in accommodations, meals and expenses. With respect to the disparity in wages, the Tribunal found the evidence about the respondent's international compensation practices did not substantiate the employer's assertions. Workers from poorer countries were paid less regardless of how long they worked. This practice perpetuated the disadvantaged position of the Latin American workers while they were in British Columbia.

The Tribunal ordered financial compensation to all members of the group, except those who opted out of the complaint, for the difference in salary and expenses. It also awarded damages to each for injury to dignity, feelings and self-respect in the amount of

$10,000. An application for judicial review has been filed. (*C.S.W.U. Local 1611 v. SELI Canada and others (No. 8)*, 2008 BCHRT 436)

Workplace Harassment

Several cases considered whether comments in the workplace violated the *Code*. In some cases, the resulting poisoned work environment amounted to discrimination, while in others it did not.

Poisoned Work Environment: Race, Religion, Place of Origin and Political Belief

An employer discriminated against an Arab Muslim because of his race, religion, place of origin and political belief. After visiting New York and Washington D.C. shortly before the September 11, 2001 terrorist attacks, a co-worker reported him to the RCMP and made discriminatory remarks to him. While the employer was not responsible for the report to the RCMP, it failed to provide a safe and healthy workplace for him. He was terminated for non-discriminatory reasons. The complainant was awarded $6,000 for injury to dignity, feelings and self-respect and $5,000 in costs. (*Asad v. Kinexus Bioinformatics*, 2008 BCHRT 293) Both parties have filed applications for judicial review.

Race-Based Harassment of a Family in the Workplace

An employer discriminated against four Hispanic employees based on race, colour, ancestry, place of origin and family status. Other employees made race-based comments and management did not respond. The family was singled out for taking breaks at work. Three family members were fired and the fourth quit due to the poisoned work environment. Each was awarded lost wages and damages for injury to dignity, feelings and self-respect of between $3,500 to $6,000. There was also compensation for lost income to attend the hearing and medical expenses. An application for judicial review has been filed. (*Torres and others v. Langtry Industries (No. 5)*, 2009 BCHRT 3)

Single Inappropriate Racial Comment Not Always Discriminatory

In a good working relationship, where there was mutual bantering, the supervisor sometimes called the complainant a “black man”. He was not offended and responded in kind. On one occasion, in response to a question about his pay cheque , the supervisor said “Don’t you know you don’t get paid. You are still a slave”. The supervisor denied making this comment. The Tribunal did not need to determine if the comment was made, because if so, it was hurtful and inappropriate but, in the circumstances of the case, not discriminatory. (*Feleke v. Cox*, 2009 BCHRT 7)

No Discriminatory Behaviour During a Workplace Confrontation

An employee confronted her boss over business practices and he responded by throwing a glass of water in her face, sweeping items off his desk and physically removing her from his office when she refused to leave. He apologized for this behaviour at the hearing. The Tribunal held that the worker had not proven that her boss’ behaviour was related to, or influenced by, her sex, ancestry or place of origin. (*Han v. Gwak and Nammi Immigration*, 2009 BCHRT 17)

Bad Working Relationship But Not Discrimination

A complainant alleged that her co-worker discriminated against her on the grounds of race, marital and family status by making remarks, and in regard to a

physical confrontation but did not prove a *prima facie* case of discrimination. There were reservations about the reliability and credibility of the evidence of both parties. They had a very negative work relationship, and their employer had to assign them to different shifts. The physical confrontation seemed an escalation of a pattern of baiting each other. However, the Tribunal did not conclude that the comments or the confrontation were related to the alleged grounds of discrimination. (*Vidal v. Hedayat*, 2008 BCHRT 459)

Termination Not Race-Based

An employee alleged discrimination, believing that he was terminated because he does not speak Chinese. The Tribunal found that he failed to prove this allegation, and that there were non-discriminatory, performance based reasons for his termination. (*Ellis v. Zhang*, 2008 BCHRT 316)

Marital and Family Status

Marital and family status were grounds in three cases, and successful in one, where the Tribunal found race-based discrimination against a family. An application for judicial review has been filed. (*Torres and others v. Langtry Industries (No. 5)*, 2009 BCHRT 3)

The Tribunal found discrimination based on family status where an employee received less vacation pay because he took a parental leave when his child was born as compared to those on leaves for injury, illness, bereavement, or jury duty. The Tribunal rejected the argument that the distinction is that parental leave is "voluntary" while the timing of the other leaves is not and found discrimination on the basis of family status. (*Beaton v. Tolko Industries*, 2008 BCHRT 229)

Other Grounds

Age was a ground in five cases and succeeding in one. (*Flores v. Duso Enterprises and Duso (No. 2)*, 2008 BCHRT 368) Sexual orientation was a ground in one case, which was dismissed. Religion was a ground in seven cases, succeeding in one. (*Asad v. Kinexus Bioinformatics*, 2008 BCHRT 293)

Religion: Preaching During Work Hours

The complainant believed his faith required him to convert his co-workers who complained about it and threatened to quit. The work was unpleasant and it was difficult to retain workers, so attempts were made to resolve everyone's concerns. The complainant was allowed to preach during lunch hour, but his refusal to stop during work resulted in him being fired. The Tribunal dismissed the complaint because the employer established that its restriction on preaching during work hours was a *bona fide* occupational requirement. (*Friesen v. Fisher Seafood and others*, 2009 BCHRT 1)

Services - Section 8

The Tribunal decided 14 complaints in the area of services.

Six of the 14 complaints (43%) were justified, including one complaint on the ground of sex, two on family status, two on physical disability, and one on mental disability.

Sex Discrimination

A successful representative complaint was made on behalf of members of a female little league softball team. Little League softball team members were all girls while the baseball team members were almost all boys. Due to league rules, the 2005 softball team was denied access to travel funding. The rules had never excluded baseball teams from funding, but

were never met by a softball team.

The Tribunal found that the girl's softball team was discriminated against on the ground of sex by being deprived of subsidies and having to finance travel. There was a general preferential treatment and regard for boy's baseball and sex was a factor in the policy's adoption even though it applied to both baseball and softball. The Little League did not establish that the increase in financial costs amounted to undue hardship. The Tribunal awarded $1,000 to each team member for injury to dignity, feelings and self-respect. (*Hawkins obo Beacon Hill Little League Major Girls Softball Team - 2005 v. Little League Canada (No. 2)*, 2009 BCHRT 12)

Family Status

A store with a policy against strollers discriminated against a mother of young children on the ground of family status. It did not prove its policy was needed to reduce shoplifting or for customer safety or preventing property damage, nor did it try to accommodate the mother. The Tribunal awarded $5,000 for injury to dignity, feelings and self-respect. (*Ellis v. Snow Trails Sales and Service and Meiorin (No. 3)*, 2008 BCHRT 152)

The bus company discriminated against a mother in applying its stroller policy by not making clear to the public that areas designated for passengers in wheelchairs are also designated for passengers with strollers and that they have priority. Some drivers did not assist passengers with strollers to board a bus or ask others to vacate the designated areas. The Tribunal ordered the complainant's wage loss for attending the hearing and $1,000 for injury to her dignity, feelings and self-respect. (*Rodriguez and others v. Coast Mountain Bus Company and another (No. 3)*, 2008 BCHRT 427)

Accommodation of Disability

The owners of a strata corporation discriminated by not installing a wheelchair ramp in the lobby to allow a 91 year old woman with a walker to access the elevator. Only with difficulty, and at risk of falling, could she use the stairs. The Tribunal rejected arguments that she was not denied access because she could use the same stairs and that she was "not disabled, just old". The owners did not establish that the cost of installing a ramp was an undue hardship and the Tribunal ordered that they submit architectural drawings for a ramp for City approval, there be a bid tender process, and that a ramp be installed if the cost were under $63,000. In the absence of approval or costs over $63,000, mandatory mediation was ordered. The complainant did not ask for damages. (*Mahoney obo Holowaychuk v. The Owners, Strata Plan #NW332 and others*, 2008 BCHRT 274)

Failure to Provide Support Services

The Tribunal found that the Ministry of Children and Family Development discriminated on the basis of mental disability in respect of a service when it denied a child with Noonan's Syndrome funding for a youth worker to help him develop social and community skills. He was disqualified because his IQ was over 70 and he did not have a "chronic mental health problem". The Tribunal found that the criteria used, which were not stated in the legislation or regulations, were discriminatory because they effectively excluded some disabled persons with characteristics relevant to the purpose of the legislation.

Had the statutory discretion been exercised in accordance with the governing statute and the *Code*, the respondents would have concluded that the child was developmentally disabled and entitled to the services. The Tribunal ordered the services be provided and compensation for the value of past services denied. It also ordered $20,000 for injury to R's dignity, feelings and self-respect, taking into account the child's

age, the nature of his disabilities and his resulting vulnerability, and the impact of the denial of services. (*J & J obo R v. B.C. (Ministry of Children and Family Development) and Havens (No. 2)*, 2009 BCHRT 61)

MSP Premiums Based on Family and Marital Status

Single people pay higher Medical Services Plan (MSP) premiums than couples or larger families do per person, but this differential treatment is not discriminatory. Rates are based on factors such as household expenses, the overall tax burden and variable access to MSP premium assistance and not on stereotypical views of the needs of single individuals. Viewed as part of a complex system, they do not demean single individuals. Evidence did not show that single individuals are subject to a pre-existing disadvantage or restricted access to the MSP program. (*Doige v. B.C. (Ministry of Finance)*, 2008 BCHRT 158)

Denial of Income Assistance on Marital Status

A recently separated woman proved *prima facie* discrimination when denied income assistance because of a joint bank account with her spouse. The Ministry was entitled to consider joint accounts as long as it met its duty to accommodate. Here, the complainant was unable to access the account, but she did not tell the Ministry her husband was not cooperating in closing it so the defence that they did not know she needed an accommodation was valid. (*Drobic v. B.C. (Ministry of Employment and Income Assistance) and others (No. 2)*, 2008 BCHRT 143)

Relationships in a Strata Corporation

A Polish immigrant alleged discrimination by the strata corporation on the ground of place of origin and he filed several retaliation complaints based on treatment by the owners and council. He was not treated differently at council meetings, except once when Council members reacted negatively not because of his place of origin, but because he demanded $1.3 million dollars for "loss of joy of living" for undone repairs and complaints about the property manager. That meeting influenced all subsequent interactions with the respondents as he then viewed everything as discrimination and retaliation. The Tribunal found that the difficult relations between the complainant and his neighbours was not based on his place of origin. (*Malik v. Robson Gardens and others*, 2008 BCHRT 299)

Race, Colour, Ancestry, Place of Origin not a Factor in Decision to Refuse Entry

The Tribunal found no link between an Aboriginal complainant being denied entry to a pub and her Aboriginal ancestry. The doorman in enforcing liquor control laws, mistakenly refused to accept her Certificate of Indian Status as valid identification. Despite his error, her race, colour, ancestry or place of origin were not factors in his decision to refuse her entry. (*Louie v. 50 Bourbon Pub/Bar*, 2008 BCHRT 315)

Tenancy - Section 10

The Tribunal decided six complaints in the area of tenancy. Two were proven: one on the ground of marital status and one on the ground of sex. Four were dismissed: two on the ground of family status, and two on the grounds of race, ancestry, and/or place of origin.

Co-op Policies on the Death of a Spouse

Two complaints involved co-op policies on the death of a spouse. Both policies were *prima facie* discriminatory, but one was justified and one was not.

A policy that required a tenant to move to a smaller suite after his wife died was *prima facie* discriminatory, but justified because of the inefficient use of limited resources in a single person occupying a two-bedroom suite. Allowing an exception would impact its future application and create undue hardship. (*Bone v. Mission Co-op Housing Association*, 2008 BCHRT 122)

The widow of a co-op member was discriminated against on the ground of marital status by a rule allowing only one member in a unit. Her right to live in the co-op was based on his membership. On his death, she had to apply for membership, was refused as unsuitable, and lost her home.

The Tribunal found she was adversely affected when denied security of tenure in her home of 23 years and had to apply for membership. Although the rule applied to all residents, marital status was a factor in the adverse treatment because the "one member per unit" rule prevented both spouses from acquiring security of tenure and its application was triggered by a change in marital status. Single tenants were not affected in this way. Section 10 of the *Code* does not have a statutory defence, but the Tribunal considered whether the co-op had a *bona fide* reasonable justification for the rule, based on an intervenor's arguments. There was no evidence why joint membership was not an alternative, nor how that would interfere with the co-op's discretion in approving memberships nor how not applying the rule in this case would encourage litigation by other applicants.

The Tribunal ordered that the co-op amend its rules. It did not find that the decision on suitability for membership was discriminatory, but it inferred from the evidence that had it not been for the discriminatory triggering of the need to apply for membership, the widow would have been accepted as a member if she applied any time before the adoption of the rule. The Tribunal ordered that she be accepted for membership, her suite be returned to her or, in the alternative, that she be provided with the next available comparable unit. An application for judicial review has been filed. (*Ford v. Lavender Co-operative (No. 3)*, 2009 BCHRT 38)

Co-op: Relationship not Tenancy or Service

A co-operative association in a modular home park denied occupancy to anyone under 16 as a term of a share purchase agreement. The co-op enforced the rule after the complainant had a child, and she filed a family status complaint. Section 8 (a service customarily available to the public) did not apply in regard to the restriction in the share agreement and there was no tenancy relationship pursuant to s. 10 where a shareholder owns a home and its site and has the right to exclusive occupancy, therefore the complaint was dismissed. (*Stephenson v. Sooke Lake Modular Home Co-operative Association (No. 3)*, 2008 BCHRT 161)

Sexual Harassment of Tenant

A landord harassed a young female tenant by making inappropriate sexual comments about her appearance and references to her boyfriends. He was aggressive and used gifts as a pretext to go to her apartment and he touched her inappropriately on one occasion. She became afraid of him and avoided him when she was alone. The Tribunal found discrimination on the ground of sex (sexual harassment) and awarded $10,000 for injury to her dignity, feelings and self-respect, and compensation for expenses. It also ordered $7,500 in costs for the landlord's improper conduct after the landlord threatened participants in the hearing and made unfounded slanderous allegations against all involved, which seriously impacted the Tribunal's processes. (*MacGarvie v. Friedmann (No. 4)*, 2009 BCHRT 47)

MUTUAL EXCHANGE OF RACIAL SLURS

The complainant got into a heated dispute with his former landlord over the return of a damage deposit. The complainant, a First Nations person, insulted the landlord as an immigrant and the landlord responded in kind. The Tribunal found that due to the landlord's heavy accent and the complainant's sensitivity to his First Nations heritage, the tenant heard "Indian" rather than "idiot". The Tribunal stated if it was wrong in finding that no racial comment had been made by the landlord, a single racial comment made in the context of a mutual exchange of racial slurs was not discrimination under the *Code*. (*Campbell and Abraham v. Krizmanich*, 2009 BCHRT 5)

PURCHASE OF PROPERTY - SECTION 9

Only one decision dealt with the purchase of property.

A strata corporation discriminated against a legally blind prospective purchaser who had a retriever which acted as his guide dog, although not officially trained. His physician provided a letter saying his dog was needed for safety, but the strata would only accept a registered guide dog or a pet weighing up to 15kg, and refused to consider the particular circumstances. (*Jones v. The Owners Strata Plan 1571 and others*, 2008 BCHRT 200)

MEMBERSHIP IN A UNION - SECTION 14

Three decisions dealt with membership in a union. The grounds alleged were political belief, family status, and race, colour, ancestry and place of origin. All were dismissed.

The Tribunal found that limitations on a teacher's right to speak out as a parent of school aged children was not discrimination on the ground of family status.

As a teacher, the complainant was subject to her Union's Code of Ethics, which prescribed a protocol for criticizing another teacher. She violated the Code of Ethics and was publicly reprimanded for raising concerns about her son's teacher, without first trying to resolve those concerns within the protocol. She alleged that the Union discriminated against her contrary to s. 14 on the basis of family status.

The Tribunal held that the meaning of "family status", as defined in regard to complaints of discrimination in employment, should not be applied mechanically outside that context. The complainant did not have to show a significant interference with a substantial familial obligation. The Tribunal decided that it was appropriate to consider if the adverse treatment resulted in discrimination in the substantive sense, and that it did not need to consider whether a defence ought to be read into s. 14. It concluded that the application of the protocol to her had an adverse effect because of her dual status as a teacher and a parent, but the magnitude of it in light of the salutary purposes and effects of the protocol, was insufficient to establish discrimination. (*Miller v. BCTF (No. 2)*, 2009 BCHRT 34)

PUBLICATION - SECTION 7

One decision dealt with publication.

The Tribunal dismissed a complaint alleging that an article published in Maclean's magazine exposed Muslims in British Columbia to hatred and contempt, on the basis of their religion, in breach of s. 7(1)(b) of the *Code*. The article expressed strong, polemical, and, at times, glib opinions about Muslims, world demographics and democracies. It was inaccurate in some respects and the Tribunal accepted that it was hurtful and distasteful. However, read in context, it was an expression of opinion on political issues which, in light of recent historical events involving extremist Muslims and the problems facing the majority of the Muslim community that does

not support extremism, are legitimate subjects for public discussion. Viewed objectively, from the standpoint of a person aware of the relevant context and circumstances, it did not expose Muslims in British Columbia to "feelings of an ardent nature and unusually strong and deeply felt emotions of detestation, calumny and vilification", which defines hatred and contempt in s. 7(1)(b) of the *Code*. (*Elmasry and Habib v. Roger's Publishing and MacQueen (No. 4)*, 2008 BCHRT 378)

Post-Final Decisions

After the Tribunal makes a final decision, either after a hearing or on a preliminary application, a party may apply to reopen the complaint. The Tribunal can do so if the "the interests of justice and fairness" requires it, but must consider the interest in finality once a complaint is decided.

The Tribunal re-opened a complaint found justified after a hearing. The respondent assumed his counsel was attending to the complaint, and was outside the country when his counsel called him to say he had forgotten about the complaint and the hearing commenced the next day. The Tribunal found that the respondent was seriously prejudiced through no fault of his own, and he filed a court proceeding when he learned of the Tribunal's decision. (*Kwan v. Marzara and another (No. 2)*, 2008 BCHRT 382)

The Tribunal re-opened an application to accept a late-filed complaint where one of the factors considered in refusing to accept it was that the complainant had a civil action dealing with the same issues which the respondent appeared to indicate was timely. After the decision, the respondent advised the Tribunal that it would be raising a jurisdictional issue in the court action and did not oppose re-opening the application. (*Childs v. B.C. (Public Service Agency) (No. 2)*, 2008 BCHRT 112)

The Tribunal refused to re-open a complaint which was dismissed on a no evidence motion. With no blame attributed to any party, the complainant discovered that she had been given a different version of certain documents put in evidence by the respondent. In this case, the differences in the documents would not affect the outcome of the no evidence motion. An application for judicial review has been filed. (*J.J. v. School District No. 43 and another (No. 4)*, 2008 BCHRT 223)

Judicial Reviews and Appeals

The *Code* does not provide for appeals of Tribunal decisions but judicial review is available within 60 days to the B.C. Supreme Court, pursuant to the *Judicial Review Procedure Act* and the *Administrative Tribunals Act* ("*ATA*").

Judicial review is a limited type of review. Generally, the Court considers the information that the Tribunal had before it and decides if the Tribunal made a decision within its power or in a way that was wrong. The Court applies the standards of review in s. 59 of the *ATA*, which set out when the Tribunal's decision may be set aside or when it should stand even if the Court does not agree with it. If the Tribunal's decision is set aside, the Court may send it back to the Tribunal for reconsideration, or, if there can only be one right answer to the issue, the Court may supply the answer.

To assist parties, the Tribunal provides information sheets on how to seek judicial review and explains the Tribunal's role.

The Supreme Court's decision may be appealed to the BC Court of Appeal. A Court of Appeal decision can only be appealed to the Supreme Court of Canada if that Court agrees to hear an appeal.

Judicial Reviews and Appeals

Judicial Reviews in BC Supreme Court

This year, 22 petitions for judicial review were filed in the Supreme Court, an increase of five from 2007/2008. The Court issued 13 judgments and dismissed eight of them on the merits. One petition was also dismissed because the petitioner did not pursue it.

An unsuccessful complainant also brought an action for damages against the Tribunal and its members. The Court held that the Tribunal and its members cannot be sued for fulfilling their duty under the *Code*. *Stephen v. HMTQ*, 2008 BCSC 1656

Unsuccessful Judicial Reviews

The Court upheld the Tribunal's decision that it had jurisdiction under s. 27(1)(d)(ii) of the *Code* to dismiss a complaint where the complainant failed to accept a reasonable settlement offer. A Notice of Appeal has been filed. *Carter v. Travelex Canada Limited*, 2008 BCSC 405.

The Court decided that the Tribunal is not required to hold an oral hearing, or a hearing on the merits, where there are conflicting affidavits before it on an application to dismiss a complaint. It also held that the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 does not change the patent unreasonableness standard of review in s. 59 of the *ATA*, but reinforced the need for courts to respect the decision-making process of adjudicative bodies. *Evans v. University of British Columbia*, 2008 BCSC 1026

The Court found that it was premature to review a disclosure order for medical records. *Brown v. PML Professional Mechanical Limited*, 2008 BCSC 1429

The Court concluded that a union's failure to provide interpretation services to one of its members was not in itself discrimination, although there was little doubt that language could be an aspect of discrimination on the basis of race, ancestry or place of origin. It upheld the Tribunal's decision that the complainant had no reasonable prospect of proving that the union's conduct was part of a broader, veiled attempt to discriminate. The Court applied the definition of patently unreasonable in s. 59(4) of the *ATA*, holding it had not been modified by the Supreme Court of Canada decision in *Dunsmuir*. *Yang v. British Columbia (Human Rights Tribunal)*, 2008 BCSC 1456

An anti-abortion group was denied standing as a campus club due to complaints about the nature of material it distributed. The Tribunal held that the group's complaint of discrimination on the ground of religion had no reasonable prospect of success. The Court upheld the decision on the basis that religious freedom in the context of services does not include the right to compel others to support the promotion of a person's religious views. *Gray v. UBC Students' Union*, 2008 BCSC 1530

The Court confirmed that the Tribunal is not under a statutory obligation to provide written reasons when it does not dismiss a complaint under s. 27(1). Even if the Tribunal's reasons might arguably be inadequate to permit judicial review on fairness principles, it was not prepared to overturn the decision. *PML Professional Mechanical Limited and Wightman v. Brown et al* (Oral Reasons: November 26, 2008, Vancouver Registry No. S077626)

Successful Judicial Reviews

A driver alleged his insurer discriminated under a policy which presumed that low velocity motor vehicle impacts do not cause injury. The Court held that the six-month time limit to file a complaint runs from the date of the alleged discrimination, not the date that the complainant discovers he has a complaint. It found that the Tribunal's refusal to dismiss the complaint under s. 27(1)(c) was arbitrary and

declared that a perception that a person does not have a physical or mental disability does not constitute discrimination. A Notice of Appeal has been filed. *Insurance Corporation of British Columbia v. Yuan and the British Columbia Human Rights Tribunal* (Oral Reasons: July 8, 2008, Victoria Registry. No. 07 – 0273)

With respect to a collective agreement which provided that seniority accrued while on WCB benefits, but not on long term disability, an arbitrator found that this did not violate the *Code*, but the Tribunal found that it did. The Court said that mootness and the principles underlying issue estoppel are the predominant factors for the Tribunal to consider under s. 27(1)(f) of the *Code*. It held that the Tribunal erred in not dismissing the complaint because it considered other factors that were not relevant. *HMTQ v. Matuszewski*, 2008 BCSC 915

The Court held that judicial review of an unsuccessful s. 27(1)(c) application was not premature because the respondent and the complainant should have an equal right to judicial review of a final decision. It decided that the Tribunal's decision was arbitrary because it misread the evidence before it. Notices of Appeal have been filed. *Workers' Compensation Appeal Tribunal v. Hill*, 2009 BCSC 107

Two grandparents did not meet the eligibility criteria for foster parent benefits because they had or obtained custody of their disabled grandchildren. With respect to the grandparents, the Court held the benefits were not a service customarily available to the public because they were not caring for children in need of protection and in the custody of the state, nor was the area of employment engaged. The Court remitted back to the Tribunal the question of whether the Tribunal had jurisdiction respecting representative complaints brought on behalf of the grandchildren in the area of services on the ground of family status. It also held that the existence of the legislation conferring the benefits was not a continuing contravention and ordered the Tribunal to reconsider whether the complaints were filed on time. *HMTQ v. MacGrath*, 2009 BCSC 180

Three complainants suffering from chronic pain as a result of workplace injuries complained that the Review Division of the Workers' Compensation Board denied them benefits when it applied a chronic pain policy. The Court decided they were trying to relitigate the issue before the Tribunal and their complaints should have been dismissed under s. 27(1)(a) or (f). The Tribunal did not have jurisdiction to rule on the correctness of the Review Division's decision or, alternatively, it ought to have declined to hear the complaints. A Notice of Appeal has been filed. *Workers' Compensation Board v. British Columbia (Human Rights Tribunal)*, 2009 BCSC 377

The Court overturned a final decision of the Tribunal and held that an attendance management program that applied to disabled transit operators was a *bona fide* occupational requirement. A Notice of Appeal has been filed. *Coast Mountain Bus v. CAW-Canada*, 2009 BCSC 396

Court of Appeal

The Court issued two judgments.

The Tribunal accepted a novel complaint for filing on the basis that it was not clearly outside its jurisdiction. The complaint alleged that the police denied a chauffeur's permit because of the complainant's pagan beliefs and his "BDSM" lifestyle (bondage/discipline, domination/submission, and sadism and masochism). The Tribunal decided that, in the absence of evidence, it could not determine whether the ground of sexual orientation included BDSM. The Court of Appeal upheld the Supreme Court's conclusion that it was premature to judicially review this screening decision. It stated that the Tribunal did not exceed its jurisdiction in accepting the complaint for filing to permit examination of the evidence and

further submissions on an unusual question. *Barker v. Hayes*, 2008 BCCA 148

In a severance agreement created for the purpose of dealing with a partial mill shutdown, disabled employees did not receive severance benefits unless and until they returned to work. The Court held that a distinction drawn between active employees and inactive disabled employees was not inherently discriminatory. No *prima facie* case had been made out because the distinction was based upon availability for work, not physical or mental disability, and there was no negative impact on the complainants. *International Forest Products Ltd. v. Sandhu*, 2008 BCCA 204

Supreme Court of Canada

There were no applications for leave to appeal filed this year.

Special Programs and Policy

Section 42(3) of the *Code* recognizes that treating everyone equally does not always promote true equality and the elimination of discrimination. It provides for the establishment of special programs which treat disadvantaged individuals or groups differently to recognize their diverse characteristics and unique needs.

The objective of a special program is to ameliorate the conditions of disadvantaged individuals or groups. All approvals are time-limited and are generally for six months to five years but may be renewed. Employment equity programs are usually approved for several years. Periodic reporting may be a condition of approval.

Special programs do not require Tribunal approval, but are not protected from a human rights complaint if approval is not granted. When a special program is approved by the Chair, its activities are deemed not to be discrimination under the *Code*.

New Programs

The Chair approved seven new special programs this year.

The British Columbia Nurses' Union received five year special program approval to restrict hiring for the position of Education Diversity Officer to candidates who are members of a visible minority. Although the Union had made great strides to ensure that its employees represent its demographics, visible minorities continued to be underrepresented. The program's objective is to provide the Union with clear policies and guidelines to ensure that its underrepresented membership is reached and encouraged to be involved in the Union.

The Legal Services Society ("LSS") received five year special program approval to limit hiring and/or provide preference to people of Aboriginal ancestry for lawyer and staff positions in Terrace and Nanaimo and is to report annually on its Aboriginal service programs and results. LSS is an independent, non-profit organization providing a system of legal aid for residents of British Columbia, particularly those living in poverty. The purpose of the Special Program is to improve services to Aboriginal clients.

School District No. 28 (Quesnel) received five year special program approval to restrict hiring of teaching positions assigned to the Aboriginal Education Department to persons of Aboriginal ancestry, as well as to allow the District to annually restrict hiring of one teaching position, outside the Aboriginal Education Department, to a qualified candidate of Aboriginal ancestry. The purpose of the program is to enhance the direction and goals set for Aboriginal student achievement by providing more Aboriginal role models for all students and staff, open doors for Aboriginal teachers and reinforce that it values diversity and that Aboriginal workers bring expertise,

knowledge and skills.

Thompson Rivers University received five year special program approval for three programs that allow it to restrict hiring to a person of Aboriginal descent for the positions of Aboriginal Communications and Project Coordinator, Coordinator for Aboriginal Student Services and Student Counselor, Faculty of Student Development to help the university to ensure that the campus curriculum and university community are welcoming, supportive and positive environments for Aboriginal students. It must report annually on its efforts to support Aboriginal students to achieve their education goals, the role of each of the positions and the effect of having the positions filled by an Aboriginal person.

Vancouver Community College received five year special program approval to recruit persons of Aboriginal Ancestry for its new Culinary Arts – Aboriginal Speciality training program (the "Training Program"), at its School of Hospitality as they are underrepresented in the tourism-hospitality sector, and there is a growing labour market shortage in the culinary arts field. The Training Program provides accredited cooking training to Aboriginal peoples, including management training, and supports the tourism-hospitality sector's increasing labour demands. Graduates will also be recognized by the industry for their particular skills and knowledge in Aboriginal cuisine. It must provide an annual report with information on the program, graduation rates, and its significance to Aboriginal persons.

Tribunal Members

The Tribunal has nine full-time Members including the Chair, who mediate and decide human rights complaints under the *Code*. The current Chair was appointed in 2000 and has acted as the head of human rights and equity tribunals in Canada for almost fifteen years. The eight current members are qualified and experienced lawyers.

Appointments

Members are appointed by the Lieutenant Governor in Council for renewable five-year terms, following a merit-based, multi-step qualification process. Candidates must demonstrate their ability for adjudicative work through decision-writing, situational interviews and peer reviews. Under the Administrative Tribunals Act, the Chair may appoint a member for two consecutive six-month terms to address workload issues and the Minister may appoint for temporary terms to address absences. Three members' terms expired this year with one of the three being extended on a six-month Chair's appointment. Two of them have been replaced on a five-year term basis and one has been replaced by a member with a six-month Chair's appointment.

Code of Conduct

The Chair supervises the Members, designates preliminary applications and hearings to be decided by them, and monitors adherence to performance standards and timeliness. Members are subject to a Code of Conduct in the performance of their role, and complaints about the conduct of Members may be made to the Chair. Section 30 of the *Administrative Tribunals Act* requires Members to faithfully, honestly and impartially perform their duties and to maintain confidentiality.

Decisions

In making their decisions, Members are required by law to be independent and impartial. Although the Ministry of the Attorney General provides budget funding, the government may not direct or influence Members in their decision-making or otherwise interfere with their independence through administrative and budgetary matters that touch on decision-making.

Tribunal Members

The Tribunal does not make decisions on human rights complaints on a consensus basis. Each Member decides the matter before them independently and in good faith, according to the law and their own best judgment. To ensure flexibility in the application of the *Code*, Members are not bound by each others' decisions but are bound to follow decisions of the BC courts and the Supreme Court of Canada and may find guidance in decisions of courts and tribunals in other jurisdictions. To ensure consistency, Members departing from earlier Tribunal jurisprudence render decisions explaining why. Members' draft decisions are subject to a voluntary internal review process. To further promote the development of a principled and coherent body of jurisprudence, Members meet regularly to discuss, at a general level, their evolving articulation of the rights protected by the *Code*, and the practices and procedures that support it. Members and legal counsel also meet to discuss existing and emerging legal issues and to review appeals and judicial reviews of their decisions.

Human Rights Education

Pursuant to sections 5 and 6 of the *Code*, the Attorney General is responsible for educating the public about human rights, and researching and consulting on matters relevant to the *Code*. The Tribunal does not have a mandate to monitor the state of human rights in the province, but it is a source of information to the public about their rights and responsibilities under the *Code*. Through open hearings, publication of its decisions, public speaking and media reporting, complaints which are upheld or dismissed perform an educative function.

Provincial Contrubitions

During the last year, the Chair made presentations to the Continuing Legal Education Seminar on Human Rights, the Human Rights and Administrative Law sections of the BC Branch of the Canadian Bar Association, gave a client education seminar at a Vancouver law firm, and addressed a University of Victoria administrative law and policy class. Legal counsel spoke at a Continuing Legal Education Seminar on Human Rights and to a school class.

The Chair, other members and the Registrar have participated in educational sessions with post-secondary students in the Masters in Public Policy program at the University of Victoria, the Human Resources Seminar and Administrative Law classes at the University of British Columbia, and the Employment Law course at Kwantlen Polytechnic University.

The Chair is the Chair of the BC Council of Administrative Tribunals' (BCCAT) Education Committee and is actively involved in training members of other administrative tribunals on hearing and mediation skills and decision writing. Two Tribunal members are directors on BCCAT's board, and another member is an adjunct professor at the University of British Columbia and teaches administrative law.

Extra-Provincial Contributions

The Chair is a director on the Canadian Council of Administrative Tribunals' Board and a member of its Professional Development, Literacy and Nomination Committees. She presented a paper at CCAT's annual conference in June 2008 on Resisting Judicialization of Administrative Tribunal Processes and Developments in Human Rights Law.

The Chair is also a Director on the Canadian Institute for the Administration of Justice's Board and chairs its Administrative Tribunals Committee. She organized and chaired the National Roundtable among tribunal members, judges, academics and practitioners, on Timeliness and Sufficiency of Reasons.

INTERNATIONAL CONTRIBUTIONS

The Chair also spoke at the National Association of Administrative Law Judiciary in New York City on the topic of clear writing and accessibility for those with literacy challenges.

HEATHER MACNAUGHTON, CHAIR

Ms. MacNaughton was first appointed as Chair of the Tribunal on August 1, 2000, and was reappointed for a further five-year term beginning July 31, 2005.

She holds both a Bachelor of Laws (1982) and Master of Laws (1998) from Osgoode Hall Law School and a Bachelor of Arts (with distinction) from Brock University (1979). Her Master's work focused on the Litigation Process and Alternative Dispute Resolution.

Prior to her appointment to the Tribunal, Ms. MacNaughton chaired both the Ontario Human Rights Board of Inquiry and the Ontario Pay Equity Hearings Tribunal.

Ms. MacNaughton left private practice in 1995 to become a Vice Chair of the Ontario Human Rights Board of Inquiry, the Pay Equity Hearings Tribunal, and the Employment Equity Tribunal. Prior to that, she had been a partner with a national law firm practising in the areas of Labour, Employment, Human Rights, Administrative Law and Civil Litigation.

J.A. (TONIE) BEHARRELL, MEMBER

Ms. Beharrell was appointed as a full-time Member of the Tribunal on December 2, 2002 for a five-year term. She was most recently reappointed for a five-year term expiring in December 2012.

She holds a law degree from the University of British Columbia (1997) and a Bachelor of Arts from Simon Fraser University (1994).

Prior to joining the Tribunal, Ms. Beharrell was an Associate at a national law firm practising in the areas of Labour, Employment, Human Rights, and Administrative Law.

MURRAY GEIGER-ADAMS, MEMBER

Under a Chair's appointment, Mr. Geiger-Adams was appointed a full-time Member of the Tribunal effective March 9, 2009 for a six-month term. He holds a law degree from the University of Toronto (1985), and a Bachelor of Arts (Honours) degree in political science from the University of British Columbia (1975).

Prior to joining the Tribunal, and from 1997-2008, Mr. Geiger-Adams was legal counsel for a professional association responsible for collective agreement administration. Before that, and from 1985-1997, he was a student, associate and then partner in a Vancouver law firm, representing clients in matters including labour, human rights, aboriginal rights and employment.

BARBARA HUMPHREYS, MEMBER

Ms. Humphreys was appointed as a full-time Member of the Tribunal in 1997. She was most recently reappointed for a five-year term expiring in December 2009.

She holds a law degree from the University of Victoria (1984) and a Bachelor of Arts from Sir George Williams University (1969).

Ms. Humphreys joined the B.C. Council of Human Rights in 1990. She was actively involved in the transition from the former B.C. Council of Human Rights to the Human Rights Tribunal.

Prior to joining the B.C. Council of Human Rights, Ms. Humphreys was an Ombudsman Officer for the Office of the Ombudsman.

Barbara J. Junker, Member

Ms. Junker was appointed as a full-time Member of the Tribunal on July 28, 2003 for a five-year term. Her appointment expired in July 2008.

She holds a Bachelor of Commerce degree (1977) from the University of British Columbia.

Prior to joining the Tribunal, Ms. Junker spent nine years as a Vice-Chair at the Labour Relations Board. Prior to that, Ms. Junker worked in the healthcare industry as an employer representative in Labour and Employee Relations.

Lindsay Lyster, Member

Ms. Lyster was appointed as a full-time Member of the Tribunal on September 30, 2002 for a five-year term. She was most recently reappointed for a five-year term expiring in September 2011.

She holds a law degree from the University of British Columbia (1991) and a Bachelor of Arts (with distinction) from the University of Victoria (1987).

Ms. Lyster was an Associate at a national law firm practising in the areas of Labour, Human Rights, Constitutional Law, Administrative Law, and Employment Law. Prior to joining the Tribunal, Ms. Lyster was Policy Director of the B.C. Civil Liberties Association.

She left private practice to become an Adjunct Professor, Faculty of Law, University of British Columbia, teaching in the area of Canadian Constitutional Law.

Diane MacLean, Member

Ms. MacLean was appointed as a full-time Member of the Tribunal on July 28, 2003 for a five-year term. Her appointment expired in July 2008 but she was reappointed under a Chair's appointment, until the end of January 2009.

She holds a law degree from the University of British Columbia (1985), a Bachelor of Arts (1972) and a Master of Arts (1980) in Economics from Simon Fraser University.

Prior to her appointment to the Tribunal, Ms. MacLean was a Vice-Chair at the Workers' Compensation Appeal Tribunal.

Enid Marion, Member

Ms. Marion was appointed as a full-time Member of the Tribunal, effective July 27, 2008. She holds a law degree from the University of Victoria (1988).

Prior to joining the Tribunal, Ms. Marion practiced labour, employment and human rights law as an Associate with a Vancouver law firm and as an Associate and then Partner with another Vancouver law firm.

Kurt Neuenfeldt, Member

Mr. Neuenfeldt was appointed as a full-time Member of the Tribunal on January 6, 2003 for a five-year term. He was most recently reappointed for a five-year term expiring in January 2012.

He holds a law degree from the University of British Columbia (1978) and a Bachelor or Arts degree from the University of Wisconsin (1972).

For several years, Mr. Neuenfeldt worked with the Legal Services Society of BC. While there, he held a range of positions including Staff Lawyer, General Counsel and Director of Client Services. He then practised privately in Vancouver.

Prior to joining the Tribunal, Mr. Neuenfeldt had been a member of the Immigration and Refugee Board of Canada for over nine years.

Abraham Okazaki, Member

Mr. Okazaki was appointed as a full-time Member of the Tribunal on July 28, 2003 for a five-year term. His appointment expired in July 2008.

He holds a law degree from the University of British Columbia (1971) and a Bachelor of Arts degree from the University of Alberta (1964).

Prior to joining the Tribunal, Mr. Okazaki was a Vice-Chair of the Workers' Compensation Appeal Tribunal.

Judith Parrack, Member

Ms. Parrack was appointed as a full-time Member of the Tribunal on August 1, 2005 for a five-year term. Ms. Parrack holds a law degree from Osgoode Hall Law School (1987).

Ms. Parrack was an Associate with a national law firm from 1989 to 1994 and a staff lawyer at the B.C. Public Interest Advocacy Centre from 1995 to 1999. She was a full-time Member of the B.C. Human Rights Tribunal from 1999 to 2002.

Prior to re-joining the Tribunal in 2004, Ms. Parrack was in private practice in the areas of Labour, Human Rights and Administrative Law.

Marlene Tyshynski, Member

Ms. Tyshynski became a full-time Member of the Tribunal on December 1, 2005 for a temporary six-month term.

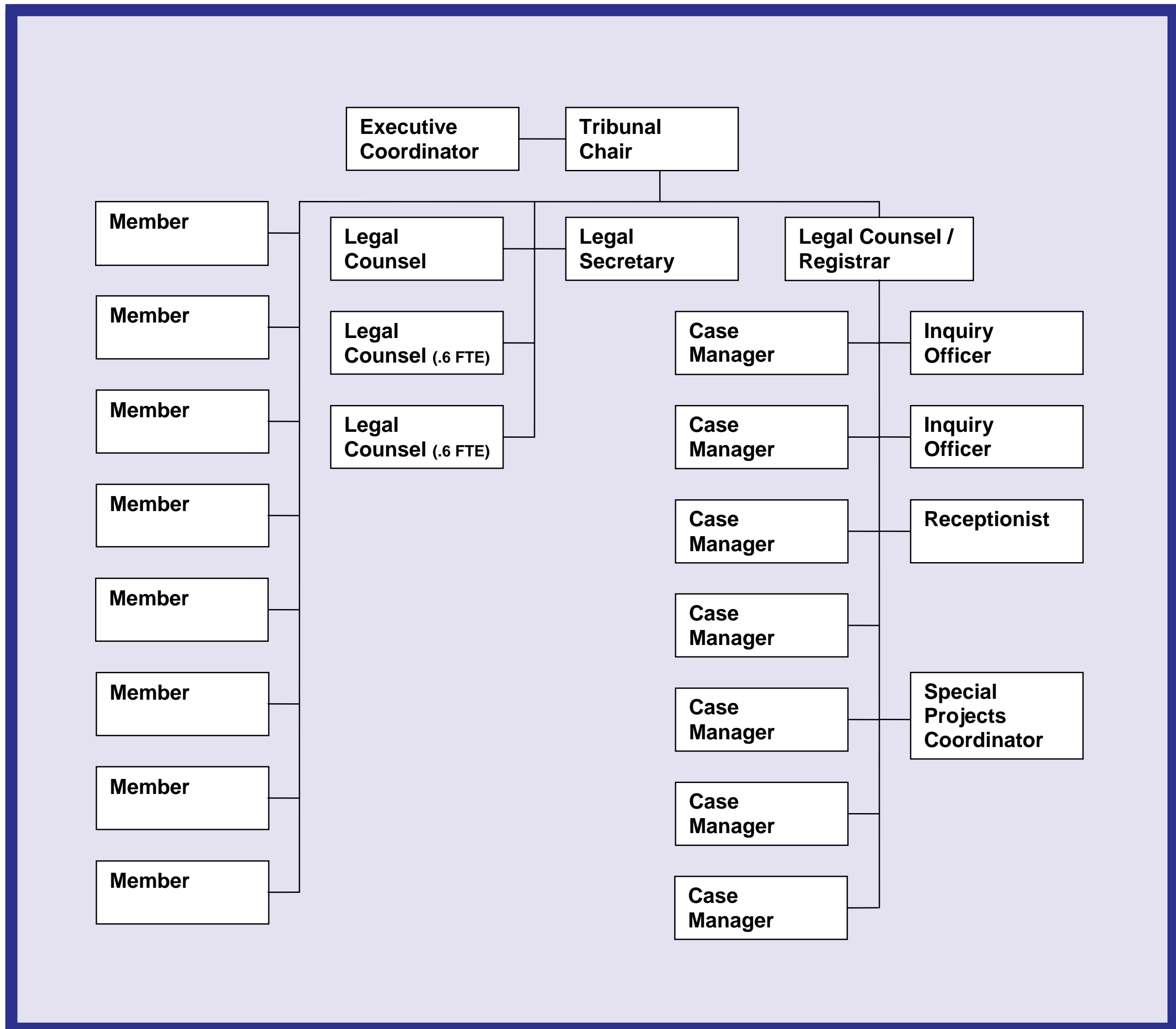
Upon expiry of her term, Ms. Tyshynski returned to her position as legal counsel to the Tribunal. In October 2007, following amendments to the *Administrative Tribunals Act*, the Chair appointed her to a second six-month term. She was most recently reappointed to a five-year term expiring in April 2013.

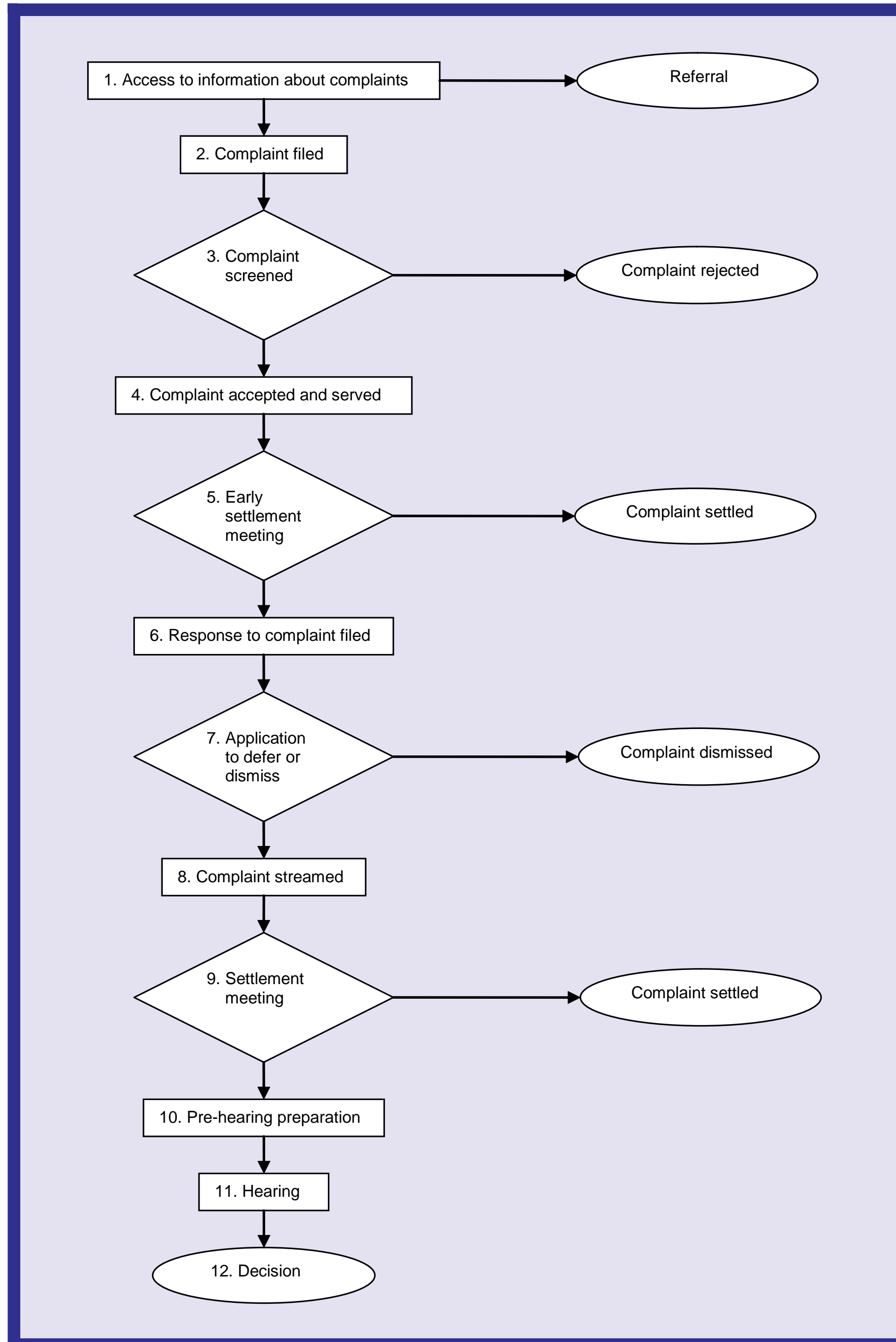
She holds a law degree from the University of Victoria (1988), a Master of Social Work degree from Wilfred Laurier University (1978) and an Honours Bachelor of Applied Science degree from the University of Guelph (1976).

At the outset of her career, Ms. Tyshynski was an associate with two law firms in Victoria. She was in private practice for several years specializing in, among other areas, Administrative Law, then she worked as a staff lawyer for the Legal Services Society.

Prior to her appointment as Member, Ms. Tyshynski served as legal counsel to the Tribunal for three years.

Organization Chart




1. Access to information about complaints
Referral
2. Complaint filed
3. Complaint screened
Complaint rejected
4. Complaint accepted and served
5. Early settlement meeting
Complaint settled
6. Response to complaint filed
7. Application to defer or dismiss
Complaint dismissed
8. Complaint streamed
9. Settlement meeting
Complaint settled
10. Pre-hearing preparation
11. Hearing
12. Decision

Steps in the Complaint Procedure

1. Access to Information about Complaints

Two Tribunal inquiry officers give callers basic information about human rights protection under the *Code*, the complaint process and other organisations providing assistance in human rights matters. If the call is not about a human rights matter, the inquiry officers may refer the caller to another agency. Complaint forms, guides and information sheets are available from the Tribunal, on its website, at government agents' offices, the Human Rights Clinic and other organisations.

2. Complaint Filed

The first step in the complaint process is filing a complaint form.

3. Complaint Screened

The complaint is assigned to a case manager who reviews it to see it is complete, appears to be within the jurisdiction of the Tribunal, and is within the six-month time limit.

If the complaint form is not complete, the case manager explains why and gives the complainant a limited time to complete it.

If it is clear that the complaint does not involve a provincial matter or a human rights matter covered by the *Code*, the case manager will recommend to the Chair that the complaint be rejected.

If it appears that the complaint was filed after the six-month time limit, the case manager asks the parties whether it is in the public interest to accept the complaint and whether anyone would be substantially prejudiced by the delay in filing. A Tribunal member decides whether to accept the complaint.

4. Complaint Accepted and Served

After the complaint is screened, the Tribunal notifies the parties that it has been accepted.

5. Early Settlement Meeting

The parties may meet with a Tribunal mediator who will help them resolve the complaint before any further steps are taken. Many complaints are settled at this stage.

6. Response to Complaint Filed

If the parties do not settle or do not want an early settlement meeting, the respondent files a response to the complaint form and may also file an application to defer or dismiss the complaint.

7. Application to Defer or Dismiss

If a respondent applies to have the complaint deferred or dismissed, the Tribunal gets submissions from the parties and a Tribunal member makes a decision. Complaints may be deferred if there is another proceeding capable of appropriately dealing with the substance of the complaint. Complaints may be dismissed for the reasons provided in section 27(1) of the *Code*.

8. Complaint Streamed

Once a response to the complaint is filed and screened, the Tribunal decides whether it will follow the standard stream or be case-managed by a Tribunal member because of its complexity or other special characteristics.

9. Settlement Meeting

After the complaint is streamed, the parties have another opportunity to take part in a settlement meeting.

10. Pre-Hearing Preparation

If the complaint does not settle, the parties must prepare for the hearing and exchange relevant documents, witness lists, and positions on remedy. The case manager will telephone them several weeks before the hearing to check that they are ready.

11. Hearing

Hearings are held before a Tribunal member or a panel of three members in exceptional cases. The parties attend in person and the hearing is open to the public. Evidence is given through witnesses, documents and other items. Each party has an opportunity to challenge the other party's evidence and to make arguments supporting their position.

12. Decision

Based on the evidence, the arguments and the relevant law, the Tribunal member or panel decides whether the complainant has proven that discrimination occurred and, if so, whether the respondent has a defence to the discrimination. If the complaint is not justified, it is dismissed. If the complaint is justified, orders are made to remedy the discrimination.

Publications and Staff

The following Guides, Information Sheets and Policies are available in English, Chinese and Punjabi on our website or by contacting the Tribunal. Please refer to the back cover of this report for contact information.

Guides

1– The BC Human Rights Code and Tribunal
2– Making a Complaint and guide to completing a Complaint Form
3– Responding to a Complaint and guide to completing a Response to Complaint Form
4– The Settlement Meeting
5– Getting Ready for a Hearing

Information Sheets

1– Tribunal's Rules of Practice and Procedure
2– How to Name a Respondent
3– What is a Representative Complaint?
4– Time Limit for Filing a Complaint - Complainants
5– Time Limit for Filing a Complaint - Respondents
6– Tribunal Complaint Streams
7– Standard Stream Process - Complainants
8– Standard Stream Process - Respondents
9– How to Ask for an Expedited Hearing
10– How to Deliver Communications to Other Participants
11– What is Disclosure?
12– How to Make an Application
13– How to Add a Respondent
14– How to Add a Complainant
15– How to Make an Intervenor Application
16– Applying to Dismiss a Complaint Under Section 27
17– How to Request an Extension of Time
18– How to Apply for an Adjournment
19– How to Require a Witness to Attend a Hearing
20– Complainant's Duty to Communicate with the Tribunal
21– How to Find Human Rights Decisions
22– Remedies at the Human Rights Tribunal
23– How to Seek Judicial Review
23A– Judicial Review: The Tribunal's Role
24– How to Obtain Documents From a Person or Organization Who is Not a Party to the Complaint
25– How to Enforce Your Order

Policies

- Complainant's Duty to Communicate with the Tribunal
- Public Access and Media Policy
- Settlement Meeting
- Special Programs

Tribunal Staff

Registrar / Legal Counsel
Vikki Bell, Q.C.

Executive Coordinator
Andrea Nash

Legal Counsel
Jessica Connell
Katherine Hardie (part-time)
Denise Paluck (part-time)

Legal Secretary
Mattie Kalicharan

Case Managers
Pam Bygrave
Kevin D'Souza (partial year temporary assignment)
Peter Dowsett (partial year)
Janice Fletcher
Alicia Hamade (partial year temporary assignment)
Lindene Jervis
Anne-Marie Kloss
Lorne MacDonald
Maureen Shields
Stacey Wills (part-time)

Special Projects Coordinator
Luke LaRue

Administrative Assistant
Olga Malkoc (part-time)

Inquiry Officers
Myla Yalung
Cheryl Seguin

Reception
Janet Mews

BC Human Rights Tribunal
1170 - 605 Robson Street
Vancouver, BC V6B 5J3
Website: www.bchrt.bc.ca

Phone: 604-775-2000
Fax: 604-775-2020
TTY: 604-775-2021
Toll free: 1-888-440-8844