British Columbia Human Rights Tribunal

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Information Brief

British Columbia Law Institute

Workplace Dispute Resolution Consultation

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I. SUMMARY

The Law Institute's Backgrounder proposes a model for workplace dispute resolution in relation to employment standards complaints, labour grievances, collective bargaining disputes and human rights complaints arising out of the workplace. The proposed model would leave intact the first-level processes for all but human rights issues. It would divide human rights issues among various agencies and processes: a "residual" human rights tribunal, a government branch, the labour grievance process, and possibly also a new workplace tribunal.

Instead of one forum with jurisdiction to resolve any human rights complaint, a complainant would have to assess which of three or four different fora is appropriate for the specific complaint. No forum that would deal with human rights complaints involving issues related to both employment and another area such as public services or tenancy is identified.

The proposed model appears to amalgamate the mandates of the Labour Relations Board and Employment Standards Tribunal under one workplace tribunal, but otherwise leaves intact the review processes for all but human rights issues. For human rights issues, the model proposes a new layer of administrative review.

The model proposed in the Backgrounder fragments the administration, resolution and adjudication of human rights complaints in the province, and adds a costly layer of administrative review.

The Backgrounder does not disclose the need or rationale for such a significant policy change and potentially expensive structural change. The Law Institute's targeted consultation process seeks "opinion" and "perception" about the proposed model as well as the current agencies and processes. It does not seek the *basis* for those opinions and perceptions, nor does it seek to identify or quantify concerns that the proposal seeks to address.

The Law Institute's project focuses on the resolution of workplace disputes. The proposed model eliminates a specialized and unified human rights tribunal. The Backgrounder does not acknowledge the central importance of human rights legislation in British Columbian society.

This Brief therefore outlines the pre-eminence and purposes of human rights legislation and identifies advantages of a specialized and unified human rights model.

This Brief also describes the proposed model's changes to dispute resolution respecting employment-related human rights issues. It then identifies several issues arising out of the proposed changes for the Law Institute's consideration.

While the Backgrounder does not identify the rationale for its proposed structural and policy change, its focus on workplace dispute resolution mechanisms suggests it is intended to address issues relating to the existence of multiple fora for the resolution of disputes arising out of the workplace.

Previous human rights reviews have addressed the issue of concurrent jurisdiction between a specialized human rights tribunal and the labour grievance process in relation to human rights issues. We outline the discussion of this issue in the 2001 Human Rights Review[1] and identify the 2003 statutory provisions enacted to address the concern. The BC Human Rights Tribunal [Tribunal] was given the authority to defer and to dismiss human rights complaints the substance of which it determines could be, or has been, appropriately dealt with in another proceeding. We describe the Tribunal's processes and case law under the applicable provisions.

This Brief also describes the Tribunal's dispute resolution processes, including its screening and alternate dispute resolution processes, which resolve the vast majority (93-96%) of complaints made to the Tribunal. It also describes the Tribunal hearing processes. The Tribunal's hearings are generally short and relatively informal, though in some cases, due to factors such as the number of parties and complexity of issues, they may be lengthy and more formal.

This Brief proposes that reform initiatives should be based on full public consultation and identified and quantified concerns arising out of the current workplace dispute resolution mechanisms. In this way, appropriate institutional or systemic changes may be identified, including alternative methods of addressing concerns, such as agency improvements or inter-agency cooperation.

II. THE BASIS FOR THE WORKPLACE DISPUTE RESOLUTION CONSULTATION

The Backgrounder states that the Law Institute is conducting "legal research and analysis in relation to workplace dispute resolution mechanisms." It identifies as one of the project's focuses:

> to consider the strengths and weaknesses of approaches that integrate the resolution of employment standards complaints, labour grievances, collective bargaining disputes and human rights complaints arising out of the workplace under a single tribunal and enforcement agency.

The Backgrounder does not identify any other focus of the project.

The sole model proposed in the Backgrounder envisions some integration in the resolution of some disputes arising in the workplace. The proposed model would be limited to those disputes giving rise to employment standards, labour relations, collective bargaining disputes, and human rights issues. It does not address other legal disputes arising out of the workplace, such as disputes giving rise to issues under the common law and workers' compensation legislation.

To achieve the integration of employment-related human rights issues with those arising out of the current employment standards and labour relations systems, the proposed model fragments the resolution of human rights issues, dividing responsibility among various agencies and processes.

The Backgrounder does not disclose the rationale or need for policy change, or how the proposed model addresses the needs of British Columbians. It starts with a "model" without identifying any compelling issues which warrant review or how the proposed model responds to the issues. The proposed model assumes that the advantages of integration in relation to some workplace

disputes outweigh the advantages of an integrated human rights system and that there is no need for a specialized human rights tribunal. The Backgrounder does not test these assumptions. It seeks limited input of "opinion" and "perception" in a "targeted consultation". It does not seek the *basis* for stakeholders' opinions or perceptions.

Historically, governments considering policy change in the human rights arena have engaged in significant research and public consultation. See, for example:

1. The Black Report[2] that resulted in the tripartite system introduced into BC January 1, 1997;
2. The 2001 Human Rights Review[3] that resulted in the current BC model for adjudicating human rights disputes on March 31, 2003; and
3. The La Forest Report, the Federal Human Rights Review[4] also recommending a form of "direct access" human rights tribunal, released in 2000.

In their 2001 Human Rights Review, Lovett and Westmacott state:

> The point should also be made that legislative reform in the area of human rights raises both complex and sensitive issues for governments. The controversial and complicated nature of any significant legislative reform in this area does much to explain why governments have generally been slow to act on recommendations contained in human rights reviews.[5]

In addition to the complexity and sensitivity of the issues raised in human rights reform, the proposed model may have significant costs. Implementation would require considerable resources for developing new processes, training and public education. Because the proposed model creates a new layer of administrative review for employment-related human rights issues, there would be significant ongoing costs attached. Apart from financial costs, dismantling the Tribunal would cause disruption and create uncertainty for the BC public during a period of transition.

In assessing the proposed model, the Law Institute may wish to identify and quantify concerns about the dispute resolution mechanisms currently in place, as well as the potential costs associated with implementation of the proposed model.

III. THE PURPOSE AND PRE-EMINENCE OF HUMAN RIGHTS LEGISLATION

The proposed model focuses on the workplace. It does not address the central importance of human rights legislation in our society.

Human rights legislation is enacted for the benefit of the community at large as well as its individual members. Its overriding purpose is to eliminate discrimination.[6] It is intended to protect the most vulnerable members of society[7] and to remove unfair disadvantages which have historically been imposed on certain individuals or groups.[8] There is a strong public interest in the resolution of human rights complaints, which may give rise to both individual and systemic issues. Section 3 of the *Human Rights Code* sets out its purposes:

> (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;

Because it protects fundamental rights, human rights legislation is considered the most important in our society. The Supreme Court of Canada has said:

> When the subject matter of a law is said to be the comprehensive statement of the "human rights" of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others. Therefore, short of that legislature speaking to the contrary in express and unequivocal language in the Code or in some other enactment, it is intended that the Code supersede all other laws when conflict arises. [9]

The Court "has repeatedly reiterated the view that human rights legislation has a unique quasi-constitutional nature and ought to be interpreted in a liberal and purposive manner in order to advance the broad policy considerations underlying it".[10]

In their 2001 Human Rights Review, Lovett and Westmacott said:

> Human rights have a special, pre-eminent status in our legal system. Human rights legislation is central to the fulfillment of our international human rights obligations and is the instrument by which we seek to prevent discrimination and foster tolerance and equality in our society.[11]

> Recognition of the centrality of human rights to Canada's international obligations and the primacy of human rights legislation in our domestic legal system is the fundamental starting point for any discussion of human rights law reform.[12]

Following the release of the Human Rights Review, then Attorney General Geoff Plant said in a letter:

> I want to begin by restating government's fundamental commitment to human rights and to an administrative system that protects those rights. We are committed to a human rights system that operates at arm's length from government and is publicly accountable, cost-effective, affordable and accessible.[13]

Given government's long-standing commitment to human rights and to a system that protects those rights, consideration of human rights reform ought to acknowledge the primacy of human rights laws in our legal system and its central importance in our society. However, the central importance of human rights in our society is not referenced or acknowledged in the Backgrounder.

IV. A SPECIALIZED HUMAN RIGHTS TRIBUNAL

The proposed model eliminates the integrated and specialized human rights system currently in place. Assessment of the proposed model should address the advantages of a specialized human rights tribunal.

A. Fulfilling the Purposes of the *Human Rights Code*

The inequalities and discrimination that give rise to the need for human rights legislation are multi-faceted and inter-related.[14] The *Code* prohibits discrimination in certain areas, including employment, tenancy, purchase of property, and services customarily available to the public. In each area, the *Code* prohibits discrimination based on specific identified grounds. The disadvantage experienced by individuals and groups relates in complex ways to the prohibited areas and grounds of discrimination. For example, the disadvantages experienced by an individual living in poverty may be related to intersecting grounds of discrimination[15] and will likely relate to several aspects of their life such as employment, housing, and public services. Similarly, the experiences of persons with disabilities in relation to government services or professional associations may be linked to their ability to earn a living.[16]

A unified and specialized human rights regime is responsible for dispute resolution respecting all aspects of the *Code*'s protections and its overriding purpose of preventing discrimination. It is publicly accountable for the effectiveness of its dispute resolution mechanisms in relation to individual complaints as well as in relation to advancing the public interest in achieving the *Code*'s purposes.

Under the proposed model, certain human rights issues would be addressed by a "residual" tribunal, which would retain a focus on the *Code*'s purposes in respect of its truncated mandate. Otherwise, the model proposes that the *Code*'s purposes in relation to equality in employment would be achieved in two different systems, depending on whether the workplace is unionized or not. The BC Court of Appeal has said that the *Labour Relations Code* and the *Human Rights Code* "create very different schemes for the resolution of differences."[17] The same may be said of the *Employment Standards Act*.[18]

The proposed model includes three separate dispute resolution systems, each responsible for different aspects of the *Code*'s human rights protections, two of which are also responsible for other mandates. Assessment of the proposed model should consider its ability to ensure the primacy of the *Code* and to advance its over-arching purpose of ending discrimination.

B. Human Rights Expertise

Human rights expertise is an element of public confidence in the human rights dispute resolution system.

A standing tribunal attains expertise where it addresses the resolution of human rights issues on a daily and on-going basis. A specialized tribunal is intimately familiar with the various circumstances giving rise to complaints of discrimination, both individual and systemic.

The Supreme Court of Canada has recognized a human rights tribunal's special expertise in fact-finding and adjudication in the human rights context.[19] Such a tribunal has extensive exposure to the application of legal principles in particular factual contexts. Human rights disputes, like the situations from which they arise, are often multifaceted. They may include systemic issues and complex factual and legal issues. The expertise of a direct access tribunal, such as the BC Human Rights Tribunal, also relates to its role in assessing which complaints warrant a hearing, and in alternate dispute resolution of complaints.

The proposed model would split human rights determinations among at least three bodies. There would be no expert human rights body, with the exception of the "residual" tribunal with its truncated mandate. Employment-related human rights issues would be determined by government branch employees, who currently deal with employment standards and, under the proposed model, would also have responsibility for human rights and some labour relations issues.

Labour arbitrators currently have jurisdiction over human rights issues arising out of collective agreements. They are considered to have sufficient expertise to determine human rights issues.[20] Depending on the frequency with which they address human rights issues, some arbitrators will develop a higher degree of expertise. However, individual arbitrators do not benefit from the institutional expertise of a standing human rights tribunal composed of full-time members.

Assessment of the proposed model ought to address the importance of human rights expertise and the impact of dismantling a specialized tribunal.

C. Human Rights Case Law

The interpretation of human rights legislation plays a central role in our legal system, [21] by identifying and clarifying the norms in an evolving societal context. The courts have recognized the role of human rights tribunals in the development of legal principles. [22] Under the proposed model, the "residual" human rights tribunal would continue to develop a body of law, but that body of law would not apply to the workplace.

Further, the Tribunal's public process and case law provide a principal source of information to the public about their fundamental rights and obligations. The proposed model would not include an adjudicative agency in relation to human rights in the employment context. Many arbitral decisions are not easily accessible to the public. Under the proposed model, without the publication of a body of case law, public information about the application and development of human rights principles in the employment context would be limited.

D. Inter-related Human Rights Issues

A unified tribunal can determine all human rights issues arising from the same set of facts. Employment related human rights complaints may also involve other areas of human rights protection under the *Human Rights Code*, such as tenancy or services. The proposed model does not address the process for resolution of the legal issues in such circumstances.

E. Summary

Given the special status and purposes of the *Human Rights Code*, the premise that a specialized human rights tribunal is no longer needed demands full exploration and debate. Assessment of the proposed model, or any alternative model, should consider its ability to fulfil the *Code*'s purposes, the importance of human rights expertise and case law, and the value of a unified specialized tribunal that can address all issues arising under the *Code*.

V. OTHER ISSUES RELATED TO THE PROPOSED MODEL

The Backgrounder identifies a "particular integrated system" called the "Proposed Unified Workplace Tribunal Model". The proposed model would change both first-instance decision-making and review mechanisms, as follows:

A. Proposed changes in first-instance decision-making

The proposed model would not integrate the first-instance decision-making respecting employment standards complaints, labour grievances, or collective bargaining disputes. Each of these disputes would still be determined in a different forum, as they are currently: by a government branch, the grievance process, and a tribunal, respectively.

The only change proposed would be the system for resolving human rights complaints from one specialized tribunal (with additional access to human rights dispute resolution through other proceedings such as the grievance process) to three first-instance decision-makers:

a. Human rights complaints in the areas of tenancy, services customarily available to the public, publications and purchase of property would be filed with a "residual" human rights tribunal;

b. Human rights complaints for employees who are not union members, including non-union government employees, would be made to and determined by a government branch;

c. Human rights complaints in the area of employment for persons who are union members would be made through the labour grievance process.

The proposed model does not specify where complaints under s. 14 of the *Human Rights Code* would be dealt with. These involve complaints against unions, employers' organizations and occupational associations. If responsibility for s. 14 complaints respecting unions were transferred to a workplace tribunal, it would be a fourth first-instance decision-maker for human rights disputes.

The following principles are relevant to the proposal to transfer responsibility for most employment-related human rights issues to a government branch.

First, independence is a key principle in Canadian administrative law. Following the release of the 2001 Human Rights Review, then Attorney General Geoff Plant confirmed the government's commitment to "a human rights system that operates at arm's length from government".[23] The

Paris Principles, endorsed by the United Nations Commission on Human Rights and the General Assembly, and the foundation for work in the human rights field, require autonomy from government.[24]

Second, another fundamental value in our legal system is the requirement for fair hearings. The proposed model refers to "determinations" made in a Workplace Services Branch. It does not appear to contemplate "hearings". If a complaint is not otherwise resolved, given the importance of the rights at stake, fairness requires the right to a hearing, to call evidence, including expert evidence, to cross-examine witnesses, and to make legal argument. (In the last 5 years, for instance, the Tribunal issued between 45 and 76 decisions each year after a full hearing on the merits. A majority of these (between 29 and 54) were in the employment area, mainly non-unionized.[25])

Third, under the proposed model, the government branch would have multiple roles. Lack of separation can give rise to fairness concerns in the adjudication process, especially on the part of respondents, who in the proposed model would be largely non-unionized employers. This was a criticism of the 1984 legislative model reviewed in the Black Report.[26] The model introduced in 1997 separated the intake and investigation functions from adjudication. The model introduced in 2003 does not include an investigative function.

With respect to complaints made by unionized employees, the proposed model does not specify whether union members could themselves choose where their human rights issues would be determined. Would they have an alternative to an arbitrator paid for by their employer and union? If so, how would the model address concurrent jurisdiction? If the model gives exclusive jurisdiction to labour arbitrators, the Law Institute may wish to consider Lovett and Westmacott's discussion of the advantages and disadvantages of this option in their 2001 Human Rights Review. Further, the model does not address where union members would file complaints of discrimination in employment against their unions[27] or if their union declined to proceed with a grievance.

Finally, the proposed model provides substantially different dispute resolution models depending on whether the employment is unionized. Assessment of the proposed model may consider why parties to human rights disputes in the non-union employment context would not have access to the dispute resolution services of an expert tribunal.

B. Proposed changes in review mechanisms

The proposed model maintains the current review jurisdiction respecting employment standards and labour relations, but gives responsibility to one rather than two workplace tribunals. It appears that the Labour Relations Board and Employment Standards Tribunal would be renamed the Workplace Tribunal.

As with the change to first-instance decision-making, the principal change in the proposed model would be in the human rights context. For human rights matters, review would depend on the first-instance decision-maker:

a. Review from the "residual" tribunal presumably would continue under the *Judicial Review Procedure Act* with the standards of review under s. 59 of the *Administrative Tribunals Act* [*ATA*].

b. There would be a new level of review for complaints of non-union employees to the Workplace Tribunal, followed by judicial review. It is not clear what standards of review would apply. The standards of review under s. 58 of the *ATA* apply to the Labour Relations Board and Employment Standards Tribunal.

c. For human rights matters determined by grievance arbitrators, it appears that review would not change. Appeals on questions of law would be made to the Court of Appeal as under s. 100 of the *Labour Relations Code*.[28] Otherwise there would first be administrative review as under s. 99 of the *Labour Relations Code*[29] and then a subsequent right of judicial review.

Two issues require consideration respecting the proposed review of first-instance decision-making.

First, the proposed model would create an additional layer of review respecting human rights matters in the employment area. It appears that this simply mirrors the layers of administrative review currently in the employment standards and labour relations systems. One of the terms of reference for the background papers produced for the Administrative Justice Project was to ensure that "compelling rationales exist for more than one "layer" of administrative appeal or review".[30] It is not clear what compelling rationale exists for creating a new layer of administrative appeal or review in relation to employment-related human rights matters.

Second, the proposed model would provide three means of access to the courts depending on the first-instance decision-maker and, in the case of arbitrators, depending on the nature of the question:

- From the "residual" tribunal directly to the Supreme Court on judicial review;
- From labour arbitrators, directly to the Court of Appeal for questions of law; and
- From the Workplace Services Branch and other arbitral decisions, after review by the Workplace Tribunal to the Supreme Court on judicial review.

The courts play an important role in the development of human rights law. Court decisions ensure consistency in the applicable legal principles, including in the various areas of prohibited discrimination. The Supreme Court of Canada has held that there should be a unified approach to the analysis of discrimination, regardless of whether the discrimination is direct or indirect.[31] Similarly, the Court held that the same approach applies to the applicable defences under s. 13 (employment) and s. 8 (services).[32]

The proposed model does not set out the applicable standards of review, either in respect of an appeal to the workplace tribunal or on judicial review. In the current system, the applicable standards differ for the Human Rights Tribunal, the Employment Standards Tribunal and Labour Relations Board, and for appeals to the Court of Appeal on questions of law.

Assessment of the proposed model should consider the ability of the courts to ensure consistency in the development of human rights principles applied in multiple fora.

VI. WHAT IS THE RATIONALE FOR THE PROPOSED MODEL?

The Backgrounder does not set out the basis for the model it proposes. It appears that the proposal to integrate dispute resolution arising under two employment statutes with the resolution of human rights complaints in the employment area seeks to address issues that may arise as a result of having multiple fora for the resolution of workplace disputes, at least insofar as they relate to the employment standards and labour relations systems on the one hand, and the human rights system on the other.

In the 2001 Human Rights Review, Lovett and Westmacott devoted a chapter to "Parallel or Multiple Proceedings,"[33] including two appendices summarizing views expressed on the subject in other reports[34] and legislative measures to avoid potential duplication in the adjudication of human rights issues in other jurisdictions.[35] Lovett and Westmacott devoted a further chapter to "Forum Multiplicity Options – Special Considerations"[36] where they outlined:

> options to deal with issues of concurrent jurisdiction and resulting overlap or duplication in the consideration or adjudication of what are essentially human rights issues. These options will inform the Workplace Tribunal Review's consideration of such issues from a human rights perspective.[37]

The authors addressed the potential for duplication in the adjudication of human rights issues arising out of the workplace: grievance procedures, employment standards, wage discrimination, wrongful/constructive dismissal, and workers' compensation.

This Brief focuses on the statutory mandates in the proposed model. Because the Backgrounder does not identify actual concerns, we address the following issues related to multiple fora:

A. Choosing the appropriate forum to address an issue;
B. The potential need to access more than one forum;
C. The potential for overlapping jurisdiction;
D. Concerns about dispute resolution in the current fora.

A. Choosing the appropriate forum to address an issue

A variety of issues may face those in employment relationships, either during or at the end of those relationships. They include minimum standards, workplace injuries, discrimination, issues arising from the collective agreement, breach of the employment contract, privacy legislation, taxation, employment insurance, criminal injuries compensation, and the *Charter of Rights and Freedoms*.

Is there public concern about identifying the appropriate forum for addressing these issues? We are unaware of public consultation or research on this issue. The proposed model increases the fora for the resolution of human rights disputes. It does not reduce and may increase the number of fora for the resolution of employment-related human rights disputes. Choice of forum, if it is an issue, remains an issue.

If specific concerns are identified, consideration ought to be given to alternative, easier, and lower-cost solutions within the current fora.

B. The potential need to access more than one forum

Workplace circumstances may give rise to issues requiring resolution in more than one forum. An employee injured at the workplace may be required to proceed through both the workers' compensation system and the labour arbitration or human rights system if the injury relates to a human rights issue of accommodation in the workplace.[38] A person whose employment is terminated may have a human rights complaint, a claim for wrongful dismissal and an employment standards claim.[39]

In the 2001 Human Rights Review, Lovett and Westmacott addressed "overlap" under the *Employment Standards Act* and *Human Rights Code*.[40] They identified "subject matter" overlap where the workplace circumstances of pregnant employees give rise to complaints under both statutes. They reported that the former Human Rights Commission and Employment Standards Branch entered a Memorandum of Understanding to minimize duplication in the use of resources.[41]

In the last five years, 60 to 69% of the complaints filed with the Tribunal arose under s. 13 of the *Human Rights Code*.[42] This means somewhere in the range of 620 to 775 complaints arose in the area of employment each year, with about 500 accepted for filing each year.[43] We are not aware of data respecting the number of workplace circumstances that give rise to more than one type of legal issue, human rights or otherwise, or the extent to which these situations cause real concern to the users of the various systems.

Where the legal issues arising out of the workplace are discrete and the mechanisms for dispute resolution are accessible, there may be little public concern about the need to access more than one agency to address different though related concerns. Similarly, to the extent that the agencies operate efficiently, there may be little or no duplication of resources. Again, we are unaware of research in this area.

Some complaints relate to circumstances giving rise to additional legal issues, and the settlement of a complaint will typically address any related legal issues between the parties. The Tribunal's alternate dispute resolutions processes, described below, are capable of addressing employment problems in an integrated fashion. For example, it is not uncommon for Tribunal-assisted settlements arising in the non-union context to resolve employment standards, wrongful dismissal and human rights issues. Because a large percentage of human rights complaints are resolved through settlement,[44] the Tribunal process can effectively address the issue of multiple fora in many cases where it might arise.

In any event, the model proposes only limited integration and therefore does not fully address this concern. Depending on the nature of any actual concerns, there may be alternate solutions, such as improvements in processes of the applicable agencies or agency cooperation on particular issues.

C. The potential for concurrent jurisdiction

Concurrent jurisdiction exists where two fora have authority to deal with the same legal issue arising from the same factual circumstances. The courts have recognized advantages of concurrent jurisdiction, such as bolstering human rights protection.[45] However, as Lovett and Westmacott said, "The availability of more than one forum for the adjudication of discrimination allegations gives rise to concerns relating to the time, expense and uncertainty involved in relitigating what are essentially the same issues."[46]

This Brief identifies the fora in which discrimination allegations may be litigated, briefly summarizes the Human Rights Review's discussion of available options, the statutory mechanisms selected by the Legislature in 2003, and the Tribunal's process and case law under the relevant statutory provisions.

1. In what fora can discrimination allegations be adjudicated?

The civil courts cannot apply the *Code* or award remedies under it,[47] although in certain limited circumstances the Tribunal may dismiss pursuant to s. 27(1)(f) where civil actions address the facts underlying a human rights complaint.[48]

In 2006 the Supreme Court of Canada held that, absent legislation to the contrary, all administrative tribunals empowered to decide questions of law are presumed to be able to, and must, look beyond their enabling statue and apply the whole of the law, including human rights legislation.[49] The Legislature responded by amending the *ATA* to specify which tribunals had jurisdiction to apply the *Code*.[50] For instance, the Workers' Compensation Board appears to have jurisdiction to determine human rights issues but the Workers' Compensation Appeals Tribunal does not.[51]

This Brief will focus on issues respecting concurrent jurisdiction in the fora which the model proposes will deal with human right issues.

a) Labour Relations Board

The proposed model does not indicate that complaints would be made at first instance to the Labour Relations Board. Rather, the Board would be part of the renamed Workplace Tribunal, and would maintain its current mandate.

The Tribunal has held that s. 12 duty of fair representation complaints to the Labour Relations Board are proceedings that are capable of appropriately dealing with the substance of a complaint.[52] Whether a s. 12 complaint has appropriately dealt with the substance of a complaint will depend on the facts.[53]

b) Employment Standards Branch

The Employment Standards Branch and the Employment Standards Tribunal do not have jurisdiction to determine human rights issues.[54]

The Human Rights Review did not identify concurrent jurisdiction in the employment standards and human rights systems. The Tribunal has held that because the Employment Standards Branch has no jurisdiction to deal with allegations of workplace discrimination, complaints cannot be appropriately be dealt with in those proceedings.[55] There is no overlap that results in potential duplication of adjudication of human rights issues.

There is therefore no need or rationale for the proposed transfer of authority from the Human Rights Tribunal to the renamed Employment Standards Branch based on concerns about concurrent jurisdiction between the two fora.

c) Grievance Procedures

The only significant area of concurrent jurisdiction respecting human rights issues is the authority of labour arbitrators to determine human rights issues.[56]

The model in the Backgrounder appears to propose eliminating concurrent jurisdiction by giving labour arbitrators exclusive jurisdiction.

i. The Human Rights Review

Lovett and Westmacott identified other reviews and reports addressing the issue of concurrent jurisdiction respecting human rights issues, noting that most recently the La Forest Report concluded that the human rights tribunal should have "primary and oversight jurisdiction over all human rights issues".[57] Lovett and Westmacott were not asked to make recommendations.[58] Rather, they identified the competing policy objectives of permitting and limiting pursuit of human rights remedies and outlined available options.

The status quo option at that time included the former BC Human Rights Commission's statutory power to defer and dismiss complaints the substance of which either could be or had been appropriately addressed in another proceeding, and the Tribunal's common law power to dismiss complaints determined in another forum.[59] The statutory provisions were intended to implement a recommendation from the 1994 Black Report about how to address "overlap" between human rights complaints and labour grievances.[60]

Lovett and Westmacott addressed the ability of grievance procedures to deal with human rights issues.[61] They identified the competing policy considerations permitting and limiting access to human rights remedies in both the human rights and grievance processes,[62] and set out options that addressed the concerns about concurrent jurisdiction other than the status quo. These included exclusive jurisdiction to the Human Rights Tribunal, exclusive jurisdiction to labour arbitrators, and statutorily requiring an election of forum by the employee.[63]

They canvassed "some important points of distinction" between the human rights and grievance processes.[64] They summarized some of the advantages of giving exclusive jurisdiction to labour arbitrators[65] and identified "a number of notable disadvantages".[66]

Further, Lovett and Westmacott noted that both the Black and La Forest Reports rejected the idea of requiring employees to elect either the human rights or grievance process.[67] They addressed the underlying assumption that labour arbitrators lack an appropriate level of human rights

expertise, noting that arbitrators are "increasingly called upon to decide grievances that engage difficult and complex human rights issues."[68] They said, "Conversely, it should not be presumed that [Human Rights Tribunal] members lack an appropriate level of labour relations expertise".[69]

We note that over 60% of complaints to the Tribunal are made in the area of employment. Institutional expertise is developed by daily, on-going work dealing with the same issues, in similar contexts.[70] Further, the particular circumstances of any given workplace are a matter within the knowledge of the parties, and the parties are responsible for submitting evidence of the particular workplace context relevant to the issues in dispute.[71] The same may be said of the particular context for any dispute, whether workplace or service, which might range from a small owner-operated business to a not-for-profit society to a large corporation.

With respect to relative human rights expertise, Lovett and Westmacott said:

> It is reasonable to expect, however, that a permanent adjudicative body like the [Human Rights Tribunal] that is charged with responsibility of adjudicating human rights issues will have a greater relative expertise in respect of human rights legal principles. [72]

We also note that the courts have recognized the greater expertise of a human rights agency respecting human rights, though they have also said that this does not preclude concurrent jurisdiction in labour arbitrators, and that there are advantages in access to the grievance system as well.[73]

Lovett and Westmacott suggested ways of addressing concerns about relative expertise:

- Expand the Labour Relations Board's review jurisdiction to cover an error in the interpretation or application of human rights principles, and cross-appoint Human Rights Tribunal members to the Board to participate in appeal proceedings on human rights issues.
- Provide for appeal of grievance awards raising human rights issues directly to the Human Rights Tribunal.[74]

They concluded with further consideration of the option of requiring an employee election.[75]

ii. The Government's 2003 Policy Choice

When it created the new direct access system for human rights complaints in 2003, the Legislature was alive to the issue of concurrent jurisdiction and opted to address the concern by giving the Tribunal the power to defer complaints that may be appropriately resolved in another proceeding, including specifically a grievance proceeding (s. 25), and the power to dismiss complaints if the Tribunal determines that the substance of the complaint has been appropriately dealt with in another proceeding (s. 27(1)(f)).

The Court of Appeal has said that in ss. 25 and 27(1)(f), the Legislature clearly conferred on the Tribunal jurisdiction to adjudicate a human rights complaint even though the same issue is being raised before, or has been dealt with by, another body, and that the *Code* contemplates subsequent adjudication by the Tribunal.[76]

An issue, therefore, is how the *Code*'s method of addressing concurrent jurisdiction is working in cases of true concurrent jurisdiction, that is, where labour arbitrators adjudicate human rights issues.

iii. The Tribunal's Process and Decisions under ss. 25 and 27(1)(f)

The Tribunal requires complainants to identify on the complaint form if they are involved in another proceeding dealing with the same circumstances and asks whether they want the Tribunal to wait until the other proceeding is finished before dealing with the complaint. The parties may consent to a deferral, the Tribunal may seek submissions on whether a complaint should be deferred on its own motion, or a party may apply to the Tribunal to defer the complaint pursuant to s. 25.

In deciding whether to defer a complaint, the Tribunal considers the following non-exhaustive factors: the subject matter and nature of the other proceeding; the adequacy of the remedies available in the other proceeding; the fairness to the parties of a deferral of the complaint and the timeliness of the resolution of the human rights issue, including whether the other proceeding has begun or is scheduled to begin and when; and whether the public interest in the resolution of human rights issues is likely to be adequately addressed by the other proceeding.[77]

In deciding whether to dismiss a complaint pursuant to s. 27(1)(f) of the *Code*, the Tribunal considers whether the complaint, in its essence or pith, was dealt with in a manner suitable or proper to that essence or pith. In approving the Tribunal's approach, the BC Supreme Court said, "This does not amount to a review of the correctness of the decision but requires a determination as to whether the other proceeding substantively addressed the issues from the perspective of the Tribunal, informed by the policy considerations within its specialized knowledge in administering the *Code*."[78]

Between April 1, 2003 and August 31, 2010, the Tribunal published approximately 121 decisions regarding deferrals pursuant to s. 25, and 107 regarding applications to dismiss pursuant to s. 27(1)(f).[79]

As noted above, the only significant area of concurrent jurisdiction respecting human rights issues is the authority of labour arbitrators to determine human rights issues.

Approximately 77 deferral decisions involved possible grievance proceedings. The Tribunal deferred in 62 (81%) cases and refused to defer, or continue to defer, in 15 (19%) cases. In the cases where the Tribunal refused to defer, the most common reasons for the refusal included: [80]

- The substance of the human rights complaint and the grievance were not the same;[81]
- A grievance had not been filed, had been withdrawn, or was not actively being dealt with;[82]
- The human rights issue could be dealt with in a more timely fashion in Tribunal proceedings than in grievance proceedings.[83]

Approximately 50 s. 27(1)(f) dismissal decisions involved grievance proceedings. The Tribunal dismissed (in whole or in part) in 19 (38%) cases, refused to dismiss on the basis of 27(1)(f) in

30 (60%) cases, and dismissed on an alternate ground in one case (2%). In the cases where the Tribunal refused to dismiss because the substance of the complaint had not been appropriately dealt with in another proceeding, the most common reasons for the refusal included: [84]

- The substance of the human rights complaint and the grievance were not the same;[85]
- A grievance had not been filed, proceedings had not concluded, the grievance had been withdrawn, or the grievance was not actively being dealt with.[86]

In the one case where the Tribunal did not dismiss on the basis of s. 27(1)(f) of the *Code* but dismissed on the alternate ground of s. 27(1)(d)(ii), the complainant had achieved the accommodation she sought, so proceeding with her human rights complaint would not further the purposes of the *Code*.[87] The Tribunal has also dismissed on the basis of s. 27(1)(d)(ii) in cases where, in the context of grievance proceedings, the complainant has failed to accept a reasonable settlement offer.[88]

The Tribunal has also considered whether complaints that have been dealt with in other proceedings based on the common law grounds of *res judicata* and issue estoppel, both within the s. 27(1)(f) analysis and as an independent ground for dismissal.[89]

D. Concerns about dispute resolution in the current fora

The Law Institute's Backgrounder asks for opinions about the effectiveness of four agencies, including the Tribunal, in resolving disputes arising out of the workplace. As noted above, the BCLI has not sought the *basis* for the opinions.

The University of British Columbia conducted research into the Tribunal's mediation services in 2004, discussed below. The Tribunal has also sought public input respecting its published practices and procedures at various points since the creation of the direct access system in 2003.[90] We are not aware of other reviews of its dispute resolution processes. Such a review would consider the Tribunal's various stages, including its processes in:

a) initial screening;
b) secondary screening (early dismissal application);
c) alternate dispute resolution;
d) hearings.

a) initial screening process

The Tribunal's initial screening process results in about 29% of complaints not being accepted for filing each year.[91] For instance, in the 2008/09 fiscal year, 366 of the 1,141 complaints made (32%) were not accepted at the initial screening stage.[92] In 2009/10, 395 of 1,123 complaints (35%) were not accepted.[93] In these cases, the respondent, which in employment cases may be an employer, manager, co-worker, or union, is not notified of the complaint and no response is required.

Once a complaint is screened, the parties may be asked to make submissions about the whether the complaint was filed within the statutory time limit, and if not, whether the Tribunal should exercise its discretion to accept the late-filed complaint. For instance, in the 2008/09 fiscal year,

the Tribunal rejected a further 47 complaints (4%) as untimely.[94] Similarly, in the 2009/10 fiscal year, the Tribunal rejected 48 complaints (4%) as untimely.[95]

b) secondary screening (early dismissal application) process

A further 10% of complaints made to the Tribunal are dismissed without a hearing under s. 27 of the *Human Rights Code*.[96] Section 27 permits dismissal on a number of grounds, including that the substance of the complaint has been appropriately resolved in another proceeding, discussed above.

c) alternate dispute resolution processes

The Tribunal's alternate dispute resolution processes are a significant part of its work.[97] For instance, in the 2008/09 fiscal year, the Tribunal provided 273 early settlement meetings (which occur before a respondent is required to respond to a complaint), 120 regular settlement meetings, and 10 settlement meetings after a hearing commenced. Complaints settled in 70% of the cases where the Tribunal provided assistance, and additional complaints settled without Tribunal assistance.[98]

The Tribunal's alternate dispute resolution processes can address all of the legal issues relating to the circumstances giving rise to a complaint. The Tribunal offers a variety of approaches that may be used alone, or in combination, to meet the needs of the parties in any given case. These approaches include interest-based mediation, early evaluation or rights-based mediation, structured negotiations, and mediation/adjudication.[99] The Tribunal makes these services available from the time a complaint is filed (the complaint form asks if the complainant wants to attend an early settlement meeting), throughout the complaint process, including up to and after the commencement of a hearing.

The University of British Columbia conducted research into the Tribunal's mediation processes in 2004, including post-mediation interviews with participating parties. Professors William Black and Philip Bryden found a "high level of satisfaction with the mediation process" and that this "provides significant evidence of the fairness of the process".[100] The authors said that the "training and background of the members makes them sensitive to issues of fairness and undoubtedly contributes to the favourable reaction of the parties."[101]

d) hearing process

Because of the Tribunal's screening and alternate dispute resolution processes, 93 to 96% of the complaints made to the Tribunal are resolved without a hearing on the merits.[102]

A hearing on the merits of a complaint is considered quasi-judicial and accordingly affords a high degree of procedural fairness. There is a pre-hearing disclosure process. Hearings are conducted by a member or panel of members designated by the Tribunal Chair. Parties may be represented by counsel, and have the opportunity to present evidence, cross-examine witnesses, and make legal arguments. In addition to witness testimony and documentary evidence, the Tribunal often hears expert evidence. In some cases, intervenors participate as well. After the hearing, the Tribunal issues written reasons for decision. Its decisions are subject to judicial review.

Criticism is sometimes levelled at administrative tribunals respecting the length and formality of their hearings. The Tribunal's hearings range from short and relatively informal, to lengthier and more court-like, depending on factors such as the number of parties and the complexity of the procedural and substantive issues.

Most hearings are short. A review of final decisions for two fiscal years indicates that about half of the hearings at the Tribunal were two days or less.[103] The average hearing length was higher due to some lengthier hearings: an average of about 4 ½ days in 2008/09, where three hearings exceeded 20 days, and an average of about 4 days in 2009/10, where one hearing exceeded 20 days. Without counsel, at least half of the hearings were one day or less and the average hearing length was about 1 ½ days.

We are not aware of comparative statistics respecting hearing length in other fora dealing with comparable issues.

e) Conclusion

If public consultation, research, or review reveals concerns about the current employment standards, labour relations or human rights systems, consideration could be given to addressing particular concerns short of dismantling the current human rights system.

VII. CONCLUSION

The model proposed in the Backgrounder would dismantle the current human rights system and transfer responsibility for human rights issues in the non-unionized employment context to an agency currently responsible for employment standards and give exclusive jurisdiction for human rights issues in the unionized employment context to labour arbitrators.

The Backgrounder does not identify the rationale or need for such policy change, but assumes that the advantages of each of these two changes outweighs the disadvantages, in particular, the disadvantages associated with the dismantling of an integrated human rights regime. The Backgrounder does not acknowledge the primacy of human rights legislation and the importance of its enforcement mechanisms to British Columbian society. In particular:

- The Backgrounder identifies no need or rationale supporting transferring responsibility of human rights to the Employment Standards Branch given the low level of subject matter overlap, alternative solutions to address concerns about overlap, and the absence of concurrent jurisdiction.

- The option of giving exclusive jurisdiction over human rights issues to labour arbitrators has been canvassed in other comprehensive reviews respecting human rights reform. In 2003 the Legislature chose to address concurrent jurisdiction by enacting ss. 25 and 27(1)(f) of the *Human Rights Code*. We have included in this Brief a review of the Tribunal's process and case law under these provisions, to provide a foundation for considering whether the method has worked as intended.

- The Backgrounder identifies no need or rationale for a new layer of administrate review respecting employment-related human rights complaints.

Finally, human rights reform is a matter of interest to the broader community. Policy reform ought to be founded on evidence-based analysis and broad-based public consultation to ensure appropriate institutional or systemic changes that address identified and quantified concerns.

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[1] "Human Rights Review, A Background Paper" prepared by Deborah K. Lovett, Q.C. and Angela R. Westmacott for the Administrative Justice Project, Victoria, B.C. 2001 (http://www.ag.gov.bc.ca/ajo/down/hrr.pdf) [Human Rights Review]

[2] *Report on Human Rights in British Columbia* prepared by Professor William Black, 1994 [Black Report]

[3] See note 1 above.

[4] Canadian Human Rights Act Review Panel Report, *Promoting Equality: A New Vision* (Canada, 2000) [La Forest Report]

[5] Human Rights Review at p. 51

[6] *Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre)*, [1996] 2 S.C.R. 3 at para. 22; and *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at p. 547

[7] *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566

[8] *Brooks v. Canada Safeway Ltd*., [1989] 1 S.C.R. 1219

[9] *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 245. See also: *Human Rights Code*, s. 4; Human Rights Review at pp. 8-9

[10] *B v. Ontario (Human Rights Commission)*, [2002] 3 S.C.R. 403, 2002 SCC 66

[11] Human Rights Review at p. i

[12] Human Rights Review at p. 6; see generally pp. 6-8 for a discussion of the historical context in which human rights legislation was developed

[13] http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/353072/ag_ajp_ltr.pdf

[14] See discussion in the Black Report at pp. 1-19

[15] For a discussion of intersecting grounds of discrimination, see *Radek v. Henderson Development (Canada) Ltd. and Securiguard Services (No. 3)*, 2005 BCHRT 302

[16] See, for example, *Bolster v. B.C. (Min. of Public Safety and Solicitor General*), 2004 BCHRT 32, petition dismissed 2005 BCSC 1491, appeal dismissed 2007 BCCA 65; *Mans v. British Columbia Council of Licensed Practice Nurses*, [1990] B.C.C.H.R.D. No. 38, petition dismissed [1991] B.C.J. No. 2666 (S.C.), appeal dismissed [1993] B.C.J. No. 371 (C.A.)

[17] *Canpar Industries v. International Union of Operating Engineers, Local 115*, 2003 BCCA 609 [*Canpar*] at para. 17; see also the purposes of the *Labour Relations Code*. Section 2 provides:

> The board and other persons who exercise powers and perform duties under this Code must exercise the powers and perform the duties in a manner that
>
> (a) recognizes the rights and obligations of employees, employers and trade unions under this Code,
>
> (b) fosters the employment of workers in economically viable businesses,
>
> (c) encourages the practice and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees,

(d) encourages cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and developing a workforce and a workplace that promotes productivity,

(e) promotes conditions favourable to the orderly, constructive and expeditious settlement of disputes,

(f) minimizes the effects of labour disputes on persons who are not involved in those disputes,

(g) ensures that the public interest is protected during labour disputes, and

(h) encourages the use of mediation as a dispute resolution mechanism.

[18] See also the purposes of the *Employment Standards Act*. Section 2 provides:

(a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;

(b) to promote the fair treatment of employees and employers;

(c) to encourage open communication between employers and employees;

(d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;

(e) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia;

(f) to contribute in assisting employees to meet work and family responsibilities.

[19] *Ross v. New Brusnswick School District No. 15*, [1996] 1 S.C.R. 825 at paras. 28-29. Note also the developments with respect to the common law standards of review following *Dunsmuir v. New Brunswick*, 2008 SCC 9. Human rights tribunals subject to the common law standards of review are accorded deference on questions of law and mixed fact and law. See: *Canadian Human Rights Commission v. National Capital Commission*, 394 N.R. 348, 2009 FCA 273, [2009] F.C.J. No. 1196 (QL) at paras. 4-5 where the court said that the Canadian Human Rights Tribunal is intimately familiar with and has specialized expertise respecting questions of discrimination; leave to appeal refused, [2009] S.C.C.A. No. 473; *Vilven v. Air Canada*, 344 F.T.R. 104, 2009 FC 367, [2009] F.C.J. No. 475 (QL) at paras. 60-74

[20] *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157 [*Parry Sound*] at para. 54

[21] Human Rights Review at pp. 8-10

[22] See, for example, *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees' Union*, 2008 BCCA 357; *Health Employers Assn. of British Columbia v. British Columbia Nurses' Union*, 2006 BCCA 57; *Communications, Energy and Paperworkers' Union of Canada, Local 789 v. Domtar Inc.*, 2009 BCCA 52

[23] See note 13 above

[24] Lovett and Westmacott state:

> In the last decade, international standards have been established for the status of human rights institutions vested with responsibility for promoting and protecting human rights. Representatives from national human rights commissions developed a detailed set of standards known as the Paris Principles.10 These principles were subsequently endorsed by the United Nations Commission on Human Rights and the General Assembly and have become the foundation for international work in this area. The key criteria of the Paris Principles are independence guaranteed by statute or constitution, autonomy from government, pluralism, a broad mandate based on universal human rights standards, adequate powers of investigation and sufficient resources. (Human Rights Review at p. 10)

[25] Annual Reports: 2005/06 at p. 14; 2006/07 at pp. 17-18; 2007/08 at pp. 18-19; 2008/09 at p. 21; 2009/10 (unpublished) at p. 19

[26] Black Report at p. 31; Human Rights Review at p. 73

[27] *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970

[28] Under s. 100 of the *Labour Relations Code*, a party can apply to the Court of Appeal to review a decision or award of an arbitration board if the basis of the decision of award is a matter or issue of the general law, not included in s. 99(1). The Court of Appeal has held that it has jurisdiction where an arbitrator has interpreted human rights principles, including the meaning and legal elements of *prima facie* discrimination and the scope and nature of the duty to accommodate, but not if the decision concerns the application of human rights principles to facts as found by the arbitrator: see *Communications, Energy & Paperworkers' Union of Canada (CEP), Local 789 v. Domtar Inc.*, 2009 BCCA 52 at para. 34.

[29] Under s. 99 of the *Labour Relations Code*, a party can apply to the Labour Relations Board to review a decision or award of an arbitration board on the ground that a party has been or is likely to be denied a fair hearing, or the decision or award is inconsistent with implied or express principles in the *Code* or another Act dealing with labour relations.

[30] Human Rights Review, preface

[31] *British Columbia (Public Service Employee Relations Commission)*, [1999] 3 S.C.R. 3 [*Meiorin*] and *British Columbia Superintendent of Motor Vehicles v. British Columbia (Council of Human rights)*, [1999] 3 S.C.R. 868 [*Grismer*]

[32] See *Meiorin* and *Grismer*

[33] Human Rights Review, chapter VI at pp. 76-104

[34] Human Rights Review, appendix D

[35] Human Rights Review, appendix E

[36] Human Rights Review, chapter VII at pp. 104-115

[37] Human Rights Review at pp. 104-105

[38] Lovett and Westmacott discuss this subject matter overlap: see Human Rights Review at pp. 89-90

[39] See Human Rights Review at p. 89

[40] Human Rights Review at pp. 86-87

[41] Human Rights Review at p. 87

[42] Annual Reports: 2005/06 at p. 7; 2006/07 at p. 6; 2007/08 at p. 6; 2008/09 at p. 6; 2009/10 (unpublished) at p. 6

[43] Based on % of complaints not accepted for filing at initial screening. See note 91 below

[44] See p. 17

[45] *Parry Sound* at para. 52

[46] Human Rights Review at p. 76

[47] *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362

[48] See for example *Gillette v. Sisett and another (No. 3)*, 2009 BCHRT 67

[49] *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513

[50] Sections 46.1, 46.2 and 46.3 of the *ATA* set out three jurisdictional options. Each tribunal's enabling legislation sets out which provisions of the *ATA* apply to it. Two tribunals (the Labour Relations Board and Securities Commission) have full jurisdiction to apply the *Code*, as well as the option to decline to exercise that jurisdiction. Seven other tribunals may apply the *Code*, but they do not have the jurisdiction to determine questions of conflict between the *Code* and any other legislation. These tribunals may also decline to exercise jurisdiction in appropriate circumstances. The remainder of British Columbia's 30 tribunals, including the Employment Standards Tribunal and the Workers Compensation Appeal Tribunal, do not have jurisdiction to apply the *Code*.

[51] *Workers' Compensation Act*, R.S.B.C. 1196, c. 492, s. 245.1; *ATA*, s. 46.3

[52] *Christopherson v. Victoria Shipyard Co*., 2005 BCHRT 193 [*Christopherson*]

[53] See for example *Christopherson*; *Edwards v. H.Y. Louie Co. and UFCW Local 247*, 2005 BCHRT 394; *Prokopetz and Talkkari v. Burnaby Firefights' Union and City of Burnaby*, 2006 BCHRT (application to defer); *Shen v. Teamsters Local Union No. 31*, 2007 BCHRT 457; *Sharrock v. Nanaimo Forest Products Ltd. and Pulp, Paper & Woodworkers of Canada, Local 8 (No. 2)*, 2009 BCHRT 339

[54] *Employment Standards Act*, R.S.B.C. 1996, c. 113, s. 103; *ATA*, s. 46.3

[55] See for example *Hilliard v. Tactema Enterprises Ltd. dba Shoppers' Drug Mart*, 2003 BCHRT 164; *Kinney and Gamble v. B.C. (Ministry of Children and Family Development)*, 2004 BCHRT 187; *Jacobs v. Dynamic Equipment Rentals Ltd. and Stewart*, 2005 BCHRT 23; *Makarenko v. Arvai*, 2005 BCHRT 418; *Peat v. Chalkias (No. 2)*, 2005 BCHRT 449; *Stackhouse v. Craft and Stack Trucking*, 2006 BCHRT 214; *Fernando v. Spectrum Society for Community Living*, 2009 BCHRT 162

[56] In *Parry Sound*, the Supreme Court of Canada held that labour arbitrators have the jurisdiction to determine whether human rights legislation has been breached and to award remedies if it has. The BC Court of Appeal followed *Parry Sound* in *Canpar Industries v. International Union of Operating Engineers, Local 115*, 2003 BCCA 609

[57] Human Rights Review at p. 98

[58] Human Rights Review at p. ii

[59] Human Rights Review at pp. 98-104

[60] See *Canpar* at paras. 24-28

[61] Human Rights Review at pp. 83-86

[62] Human Rights Review at pp. 105-106

[63] Human Rights Review at pp. 106-107

[64] Human Rights Review at pp. 107-109

[65] Human Rights Review at pp. 109-110

[66] Human Rights Review at pp. 110-111

[67] Human Rights Review at pp. 111-112

[68] Human Rights Review at p. 112

[69] Human Rights Review at p. 112

[70] See: *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para. 29

[71] For example, a complainant has the burden of proving a *prima facie* case of discrimination, while a respondent has the burden of proving a *bona fide* occupational requirement [BFOR]. A component of a BFOR is establishing that the employer has fulfilled the duty to accommodate, meaning it has reasonably accommodated the employee. Whether the defence is established in any set of circumstances is a finding of fact, and is therefore dependent on the evidence provided by the parties at a hearing.

[72] Human Rights Review at p. 113

[73] *Parry Sound* at para. 53; see also *British Columbia v. Tozer*, [1998] B.C.J. No. 2594 (S.C.) at para. 112

[74] Human Rights Review at pp. 113-114

[75] Human Rights Review at p. 114

[76] *Workers' Compensation Board v. British Columbia (Human Rights Tribunal)*, 2010 BCCA 77 at paras. 29, 31, leave to appeal to the SCC granted, S.C.C. Registry No. 33648 [*Figliola*]. See also *Hines v. Canpar Industries Ltd.*,

2006 BCSC 800; *HMTQ v. Matuszewski*, 2008 BCSC 915 at paras. 28, 31-32; *Canpar Industries v. International Union of Operating Engineers, Local 115*, 2003 BCCA 609, per Newbury J.A..

[77] *Young v. Coast Mountain Bus Company Ltd.*, 2003 BCHRT 28.

[78] *Hines v. Canpar Industries Ltd.*, 2006 BCSC 800 at para. 25; see also paras. 15-16, 25-26; *Villella v. City of Vancouver and others (No. 3)*, 2005 BCHRT 405 at paras. 14-19; *Workers' Compensation Board v. British Columbia (Human Rights Tribunal)*, 2010 BCCA 77 at para. 39.

[79] See Tribunal decisions at http://www.bchrt.bc.ca/decisions/index.htm

[80] An example of a decision relying on other factors is *Bates v. Overwaitea Food Group*, 2006 BCHRT 44. In *Bates*, the issue was whether to defer a complaint pending the outcome of an informal part of a grievance process rather than the regular arbitration process. (para. 18) While recognizing the value of the process, the Tribunal was concerned that the process denied the right to counsel as well with its non-precedential nature. (paras. 24-27) On judicial review, the court remitted the matter to the Tribunal. In the mean time, the accommodation arbitrator advised the parties there were outstanding issues raised in the human rights complaint going beyond his jurisdiction: see *Bates v. Overwaitea Food Group (No. 2)*, 2006 BCHRT 419 at para. 20.

[81] See for example *Patel v. Greater Vancouver Regional District*, 2004 BCHRT 175; *Chang v. B.C. (Ministry of Small Business and Revenue)*, 2006 BCHRT 124; *Shen v. Beachcomber Hot Tubs Group and Evans*, 2006 BCHRT 597; *Boehler v. Canfor Pulp Limited Partnership (No. 2)*, 2008 BCHRT 130

[82] See for example *LaFavor v. Port Coquitlam Senior Citizens' Housing Society*, 2003 BCHRT 61; *Rivera v. Newdale Holdings Inc. and Seikanon Corporation dba Quality Hotel Downtown*, 2010 BCHRT 99; *Sullivan v. British Columbia (Ministry of Public Safety and Solicitor General)*, 2009 BCHRT 225;

[83] See for example *Cable (J.) v. Coast Mountain Bus Company Ltd.*, 2004 BCHRT 345; *Pretty and Pretty v. City of Surrey and Garis and Merryweather*, 2004 BCHRT 382; *Galban Lara v. Developmental Disabilities Association*, 2004 BCHRT 388; *Barberie v. Vancouver Coastal Health Authority operating as Vancouver General Hospital and Heritage*, 2005 BCHRT 384; *Chang v. B.C. (Ministry of Small Business and Revenue)*, 2006 BCHRT 124; *Boehler v. Canfor Pulp Limited Partnership (No. 2)*, 2008 BCHRT 130

[84] An example of a decision relying on other factors is *Matuszewski v. B.C. (Ministry of Competition, Science and Enterprise) (No. 2)*, 2007 BCHRT 30, rev'd 2008 BCSC 915 [*Matuszewski*]. In *Matuszewski*, the Tribunal declined to dismiss a complaint under s. 27(1)(f) of the *Code*. The complainant's union had gone to arbitration on another member's grievance, with partial success. The Tribunal was concerned that complainant could not have had a fair hearing since he was not present, had no opportunity to instruct counsel or give evidence, and was not consulted about whether to appeal. (para. 124) On judicial review, the court found the union was the complainant's privy, so the Tribunal's concern was in misplaced. Accordingly, the court's decision, which is binding on the Tribunal, addresses the situation of a bargaining unit member proceeding with a complaint, the substance of which has been appropriately dealt with in another person's grievance proceeding.

[85] See for example *Esposito v. B. C. (Ministry of Skills Development and Labour)*, 2003 BCHRT 139; *Crosby v. Dairyland Fluid Division Ltd. and Saputo Boulangerie Inc./Saputo Bakery Inc. and Schwartz and Neil and Ellis*, 2004 BCHRT 1; *Forber v. City of Vancouver*, 2004 BCHRT 29; *Dorvault v. Hadford (No. 2)*, 2005 BCHRT 11; *National Automobile, Aerospace, Transportation and General Workers of Canada Local 111 v. Coast Mountain Bus Co. No. 5*, 2005 BCHRT 242, discussed elsewhere in the paper; *Armbruster v. Pacific National Exhibition*, 2005 BCHRT 536; *Gosal v. Overwaitea Food Group Ltd.*, 2005 BCHRT 538; *de Lima v. Empire Landmark Hotel*, 2006 BCHRT 440; *Dunlop v. Overwaitea Food Group Ltd*., 2007 BCHRT 254; *Yiu v. Servantage Services Corp.*, 2009 BCHRT 73

[86] See for example *Crosby v. Dairyland Fluid Division Ltd. and Saputo Boulangerie Inc./Saputo Bakery Inc. and Schwartz and Neil and Ellis*, 2004 BCHRT 1; *Mkhize v. Central Park Lodges Ltd*., 2004 BCHRT 274; *Fendick v. Lakes District Maintenance Ltd.*, 2004 BCHRT 296; *Wucherer v. Selkirk College*, 2004 BCHRT 85; *Mayo v. Web Press Graphics Ltd.*, 2004 BCHRT 91; *Neumann v. Lafarge Canada Inc.*, 2004 BCHRT 247; *Stevens v. Advanced Hydro Tech Inc. and Verslype*, 2005 BCHRT 107; *Pjecha v. B.C. Hydro Construction Business Unit*, 2005 BCHRT 381; *Stonehouse v. Elk Valley Coal Corp*., 2005 BCHRT 568; *Parks v. Kemess Mines Ltd*., 2006 BCHRT 264; *Entwisle v. Peerless Limited Penticton BC*, 2006 BCHRT 306; *Dunlop v. Overwaitea Food Group Ltd*., 2007

BCHRT 254; *Dixon v. British Columbia Ambulance Service*, 2008 BCHRT 71; *Yiu v. Servantage Services Corp.*, 2009 BCHRT 73; *Post v. Thyssen Krupp Elevator (Canada) Limited and Axelson*, 2009 BCHRT 369

A grievance does not need to go to arbitration in order for a complaint to be dismissed pursuant to s. 27(1)(f): *Charbonneau v. Alcan Inc. and others*, 2004 BCHRT 19. A grievance proceeding is the entirety of the process, from the time the grievance is filed to its resolution, including a resolution by agreement: see for example *Neumann v. Lafarge Canada Inc.*, 2004 BCHRT 247; *Ho* v. *FPI Products and International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers*, 2004 BCHRT 149; *Vetro v. Klassen and Pacific Transit Cooperative (No. 2)*, 2005 BCHRT 263; *Armbruster v. Pacific National Exhibition*, 2005 BCHRT 536; *Lloyd v. Gauvin*, 2006 BCHRT 241; *Sandhu v. Vancouver (City)*, 2009 BCHRT 238. However, the fact that a grievance was resolved or withdrawn does not necessarily lead to the conclusion that the resolution appropriately dealt with the substance of the complaint: see for example *Parks v. Kemess Mines Ltd. (No. 2)*, 2006 BCHRT 264.

[87] *Maguire v. Overwaitea*, 2009 BCHRT 391. In *Rush v. City of Richmond*, 2008 BCHRT 62, the Tribunal dismissed part of the complaint on the basis of s. 27(1)(f) and part on the basis of s. 27(1)(d)(ii)

[88] *Demasi v. Vancouver (City)*, 2006 BCHRT 220

[89] See for example *C.S.W.U. Local 1611 v. SELI Canada and others*, 2007 BCHRT 404; *Matuszewski*; *Figliola*

[90] Annual Reports: 2003/04 at pp. 2 and 4-5; 2004/05 at pp. 4-5; 2007/08 at p. 1

[91] Based on an average over the past five fiscal years. See Annual Reports: 2005/06 at p. 7 (350/1131=31%); 2006/07 at p. 6 (222/1018=22%); 2007/08 at p. 6 (276/1053=26%); 2008/09 at p. 6 (366/1141=32%); 2009/10 (unpublished) at p. 6 (395/1123=35%)

[92] Annual Report 2008/09 at p. 6

[93] Annual Report 2009/10 (unpublished) at p. 6

[94] Annual Report 2008/09 at p. 7

[95] Annual Report 2009/10 (unpublished) at p. 7

[96] Based on % of files closed. In the last five fiscal years the percentage ranged from 9% to 11%. The percentage of complaints accepted for filing which are dismissed is higher. See Annual Reports: 2005/06 at pp. 7, 9 (141/1220=11.5%); 2006/07 at p. 7 (111/1109=10%); 2007/08 at p. 7(94/1030=9%); 2008/09 at p. 7 (105/1188=9%); 2009/10 (unpublished) at p. 7 (125/1181=10.5%)

[97] In the past 4 fiscal years, 35 to 44% of all complaints made to the Tribunal closed because of settlement. Cases closed includes those closed because of initial screening (about 30%) and time limit screening (about 4%), so the percentage of complaints accepted for filing that are closed because of settlement is significantly higher. See Annual Reports: 2006/07 at p. 7 (44%); 2007/08 at p. 7 (42%); 2008/09 at p 7 (35%); 2009/10 (unpublished) at p. 7(36%)

[98] Annual Report 2008-2009 at p. 3

[99] See the Tribunal's Rules of Practice and Procedure deal with alternate dispute resolution in Part 5 – Settlement Meetings Rule 21

[100] Philip Bryden and William Black, "Designing Mediation Systems for Use in Administrative Agencies and Tribunals – The B.C. Human Rights Experience", at p. 27 [Designing Mediation Systems]

[101] Designing Mediation Systems at p. 28

[102] Based on % of files closed by final decision in the last 5 fiscal years. Annual Reports: 2005/06 at pp. 7, 14 (53/1220= 4%); 2006/07 at p. 7 (76/1109=7%); 2007/08 at p. 6 (45/1030=4%); 2008/09 at p. 7 (72/1188=6%); 2009/10 (unpublished) at p. 7 (48/1181=4%)

[103] Based on final decisions released in the fiscal year. Decisions are available on-line at www.bchrt.ca