

## **Bill 53**

### ***An Assessment of the Government of British Columbia's Draft Human Rights Legislation***

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On May 30, 2002, the Government of British Columbia tabled Bill 53, which, if passed will amend the current Human Rights Code. The implications of this bill are extremely serious for the administration and protection of human rights in the province, and for all residents who may need protection from discrimination in the future.

The Government proposes to abolish the B. C. Human Rights Commission, and to institute a "direct access" model, which will, it claims, provide better access to hearings before the B. C. Human Rights Tribunal, and a faster and more efficient complaint-handling process. How should the B. C. community react to these proposals?

There have been concerns expressed over a long period of time about delays in the Commission's handling of complaints. There have also been concerns expressed by some about the quality of Commission investigations and the adequacy of training for human rights officers. However, it is essential to consider whether the changes proposed by the Government will, in fact, remedy these concerns with the Commission's functioning, or whether, instead, B.C. residents will end up with a weaker, more narrowly focused system that cannot effectively address discrimination in B. C.

The centerpiece of Bill 53 is the abolition of the B. C. Human Rights Commission. Abolishing the Commission is a very serious step. Without the Commission, there will be no body responsible for protecting the public interest in the enforcement of human rights law and the elimination of discrimination. Further, key functions that are necessary to achieving this goal will be lost.

A fundamental principle underlying human rights legislation in every jurisdiction in Canada is that the elimination of discrimination is in the public interest. Discrimination is understood to be an offense against shared public values of equality and fairness for all individuals and groups. Because of this, complaints of discrimination are not viewed as simply disputes between private parties, but rather as matters in which the community as a whole has a stake.

At this time, when serious questions are posed about the roles of both commissions and tribunals, it is useful to reflect on where we have come from. The point is not to suggest that the current human rights structure should be immune from critical evaluation. Rather, the point is to recall the evolution of human rights legislation, and the development of

human rights enforcement machinery, in order to bring a larger understanding to bear on the task of evaluating the proposals set out in Bill 53.

### **History of Human Rights Legislation**

Comprehensive human rights codes are relatively new in the Canadian legal system, with the 1962 *Ontario Human Rights Code*<sup>1</sup> being the first. Contemporary human rights codes are both substantively and administratively comprehensive. They are substantively comprehensive because they cover a broad scope of activities and grounds. And they are administratively comprehensive because they provide structure or machinery for dealing with all aspects of human rights, including 1) a human rights commission, with powers to engage in promotion, education, investigation, conciliation, referral of complaints to a tribunal, and provision of legal representation for complainants; and 2) an adjudicative process, usually a specialized tribunal with judicial powers.

The situation prior to the enactment of human rights codes in Canada was not positive for human rights claimants. A judiciary that valued freedom of contract over human rights declined to recognize a legal right to be free from discrimination. Although a number of cases are notorious,<sup>2</sup> one example will suffice. In the case of *Christie v. York Corp.*,<sup>3</sup> the complaint concerned the policy of a Montreal tavern not to serve persons of colour. Specifically, the tavern refused to serve Mr. Christie, a Black man, a glass of beer. Mr. Christie sued for humiliation. The claim was dismissed. The Court ruled that it is a general principle of the law of Quebec that there is complete freedom of commerce. “Any merchant is free to deal as he may choose with any individual member of the public. It is not a question of motive or reasons for deciding to deal or not to deal; he is free to do either,” the Court stated.<sup>4</sup>

Human rights legislation emerged against this backdrop of judicial refusal to recognize that there was a legal right to freedom from discrimination. Governments saw the need to act, because courts, on their own, would not.

And governments have experimented legislatively, trying different ways of providing human rights protection. The earliest human rights legislation was quasi-criminal legislation.<sup>5</sup> This legislation required claimants to initiate a criminal action and prove the offence beyond a reasonable doubt. Proving intention to discriminate was a major obstacle,<sup>6</sup> and, even if successful, the remedy of a fine against the violator was not satisfying to a person denied a home or a service. However, a virtue of this model was that there was a public prosecutor to carry the complaint.

To overcome the weaknesses of quasi-criminal legislation, legislatures enacted Fair Practices and Fair Accommodation Acts.<sup>7</sup> A shortcoming of this kind of legislation was that it abandoned the role of the prosecutor, instead placing the burden of enforcement on the victim of discrimination. The result was that few complaints were made and very little enforcement was achieved.<sup>8</sup>

Also, to the extent that this early human rights legislation had administrative machinery, that machinery lacked independence from government. The administration of the Fair

Accommodation and Fair Employment Practices Acts was usually entrusted to some officer within a Department of Labour or the Ministry of an Attorney-General.<sup>9</sup>

These early pieces of legislation were also limited in their substantive scope. Race discrimination legislation dealt with race and related grounds, such as ancestry and place of origin, but not sex or the other grounds that we have come to expect in human rights codes.<sup>10</sup> Employment legislation dealt with discrimination in employment only.

Accommodation ordinances dealt with discrimination in housing. The consolidation of human rights legislation into comprehensive codes, covering a range of grounds, and covering employment, accommodation and services, to be administratively enforced by a commission that was independent of government, was an important and distinct stage in the evolution of human rights legislation.

The shift away from a weak model of individual enforcement to a model with an independent and multi-faceted commission was seen as a means of connecting the issues of individuals to the larger community, of promoting human rights values broadly, and providing community support for people who had experienced discrimination. W.S. Tarnopolsky put it this way:

The consolidation of human rights into a code to be administratively enforced by an independent commission insures community vindication of the person discriminated against. This is important to the community itself because of the broad educational value of equal treatment. However, it is important to the people who have suffered discrimination, because without such active community involvement, the mere proclamation of human rights tends to soothe the conscience of the majority, without producing tangible results.<sup>11</sup>

The early advocates of human rights codes were excited by the potential of the mix of educational and enforcement powers that had been conferred on the commissions.<sup>12</sup> The hope was that specialized human rights bodies would be able to accomplish things that the courts were not suited for, and had been unwilling to do. The enactment of the codes represented a deepening of the commitment to human rights values in Canada, and an opportunity to develop a new area of law, more modern in its preoccupations and form than the common law.

And comprehensive human rights legislation has been a successful innovation in Canada. Our understanding of human rights has broadened significantly since its introduction, and basic conditions in workplaces and in the provision of services and tenancy have improved through the promotion and enforcement of human rights standards.

Through the 1980's and 1990's the Supreme Court of Canada issued a number of decisions which legitimized, strengthened and extended the reach of human rights legislation, articulating and elaborating on the view that human rights legislation is fundamental public policy that is intended to benefit the community as a whole as well as individual victims of discrimination, and that human rights legislation lays out the procedure for the vindication of that public policy.<sup>13</sup>

The Supreme Court has established the following general principles:

- *Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It has a natural primacy over other laws.*<sup>14</sup>
- *Human rights legislation is enacted for the benefit of the community at large as well as its individual members and therefore falls within the category of enactments which may not be waived or varied by private contract, including collective agreements.*<sup>15</sup>
- *Human rights legislation is remedial in nature, and is directed to the removal of anti-social conditions without regard to the intention of those who cause them. It must be given such fair, large and liberal interpretation as is necessary to ensure its objects.*<sup>16 17</sup>

Human rights commissions played a central role in advancing these principles and in securing their adoption by the courts. Human rights law in Canada has developed rapidly, particularly in the last three decades. There is much more to be done to eradicate the most pernicious forms of discrimination from social and economic life, and to address the long-standing disadvantage faced by major groups including Aboriginal peoples, women, people of colour, people with disabilities, lesbians and gay men, and people with low incomes. But Canada has come a long way since the days of *Christie v. York Corp.*

### **Current Problems**

Ironically, however, as courts have increasingly embraced human rights legislation and emphasized its importance, governments have taken steps backwards, steps that weaken human rights agencies. Perhaps this has happened because it is clear that, in the view of the courts, human rights legislation sets an essential standard for evaluating government employment practices and government service-delivery.<sup>18</sup> Governments have cut the budgets of human rights commissions at times when complaint loads were increasing; they have tied commission hiring practices to those of governments, thereby weakening the independence of commissions; they have engaged in obstructive behaviour when complaints are filed against them;<sup>19</sup> and attempted to interfere with or control the work of commissions through budget or other forms of manipulation and intimidation. This has resulted in overburdened commissions unable to carry their caseloads, and in delays and frustrations for claimants and respondents alike.

### ***Delays***

Delays in processing complaints now cause serious dissatisfaction among both claimants and respondents. This general dissatisfaction is evident not just in B. C., but in other jurisdictions in Canada as well.<sup>20</sup> Complainants report that extensive delays discourage people with discrimination claims from filing complaints, dishearten and disempower those who do, and often have the effect of denying human rights claimants an appropriate remedy. If there is delay, the job, the promotion, or the service is sometimes no longer available, or the dispute has been outstanding for so long that reinstatement, for example, is not a realistic remedy. Overall, excessive delay results in justice being denied, and has caused many human rights claimants to lose confidence in the human rights system.

### ***Commissions' Role as Gate-keeper***

There has also been some concern, expressed here and in other jurisdictions, about the “gate-keeper” role of commissions, that is, about the authority of commissions to decide, without hearing, whether complaints should be dismissed. There is a perception that meritorious complaints have been dismissed because there is pressure on commissions to eliminate delays, make do with an inadequate level of resources, and reduce their workloads.

The B.C. Human Rights Commission's statistics for 2001-2002 show that approximately 67% of the complaints that were accepted were subsequently dismissed, either prior to or after investigation, while 13.7% were referred to the B.C. Human Rights Tribunal for a hearing on the merits, and 19% were settled. It should be noted that the B.C. Commission's referral rate is high compared to other jurisdictions. The federal Commission, for example, refers about 6% of complaints for hearings on the merits.

In B.C., as in other jurisdictions, concern about the gate-keeper role and the high rate of rejection has been intensified by the fact that the only appeal available to a person whose complaint has been dismissed is to make an application for judicial review. Because of the 1981 decision of the Supreme Court of Canada in *Bhauria*<sup>21</sup> a person whose complaint has been dismissed by a commission cannot go directly to court for a hearing on the merits, but can only apply for judicial review of the decision to dismiss. Judicial review is expensive and it is usually unsuccessful, since in the main, courts uphold commission decisions to dismiss complaints. Most complainants in all Canadian jurisdictions have their rights conclusively determined by commissions, and never receive a hearing. In *Syndicat des employée de production du Québec et de l'Acadie v. Canada (Human Rights Comm.)*,<sup>22</sup> Justice L'Heureux-Dubé expressed the problem this way:

From the point of view of the complainant, no disposition of a complaint is more determinative of that person's rights than a finding that the complaint has no merit. Such a finding, though made by the Commission, has the same effect on the complainant as a decision by a Tribunal to dismiss the complaint as unsubstantiated...it constitutes a conclusive determination that the complainant's right...has not been infringed and that the complainant is not entitled to any of the remedial measures created by the *Act* to eliminate adverse discrimination.<sup>23</sup>

### ***Distortion of the Role of Commissions***

There is a concern that the work of commissions is being driven by administrative and managerial needs, not by the purposes of the legislation. The primary goal of commissions should be to take the steps that will eliminate discrimination and achieve equality in Canadian society. Often, instead, commissions appear to be taking the steps necessary to manage human rights law enforcement with fewer and less experienced staff, and less money. The goal of the commissions becomes ‘managing human rights law enforcement’ when the priority of timely case-processing overshadows all other priorities and potential commission activities, reducing the capacity of commissions to engage in education, promotion, research, and initiatives to address systemic discrimination.

### ***Commissions' Role Regarding Systemic Discrimination***

Unfortunately, the role of commissions with respect to systemic discrimination remains underdeveloped. This is a result, in part, of commissions being the managers of the gate-keeper function. But, it is also a result of the fact that governments do not provide support and encouragement to commissions to be challenging or innovative. Commissions need to be engaged actively in designing broader measures that will set standards for industries and services, and in carrying forward cases that will have a broad impact on groups that are disadvantaged in Canadian society. Given the current understanding that past discrimination has created serious disadvantages for major groups protected by human rights legislation, an essential and central role for a modern human rights commission is to address systemic discrimination.

### **Refashioning the System**

In any evaluation and refashioning of the system, the public policy character of the law, and of the scheme for enforcing it, must be taken into account.

The community as a whole has a fundamental interest in human rights, and human rights complaints cannot be equated with a dispute between private parties.<sup>24</sup> Stewardship over this public interest is essential. It can be provided in different ways. But changes that move the human rights system closer to a private dispute resolution system will necessarily raise questions about whether the character of human rights is being respected. And changes that shift the burden of enforcing human rights law on to the individual who alleges discrimination will re-create the very unfairness that comprehensive human rights legislation was designed to correct.

Some community advocates favour a “direct access” model, that is, one that would eliminate the gate-keeping function of the commission and provide claimants and respondents with an automatic right to a hearing of the merits of a complaint before a tribunal.<sup>25</sup> The Government of British Columbia claims that it has embraced this approach.

However, it is essential to evaluate whether the proposals offered in Bill 53 provide an improved model for the enforcement of human rights. Are B.C. residents being offered direct access to hearings of complaints on the merits? Are they being offered direct access with the attendant conditions that will, in fact, make this model more effective for claimants? Does the Bill 53 model of direct access protect the public interest in the advancement of human rights?

### **What Does Bill 53 Do?**

#### ***1. The Commission is Abolished and Discrimination Becomes a Private Matter Between Parties***

Bill 53 abolishes the B.C. Human Rights Commission. This has a number of effects. Without the Commission, the character of human rights legislation changes dramatically. There is no public body to represent the public interest in the elimination of discrimination in the province. One might argue that the public interest remains because

of the established character of the rights, but when that public interest has no institutional means of expression, it is hard to hold on to.

With the elimination of the Commission, a number of functions that are necessary to protect the public interest in human rights are also eliminated.

Under Bill 53 there is no public body with a mandate:

- to provide education and information programs designed to promote an understanding and acceptance of human rights (s. 5);
- to conduct and encourage research on matters relevant to human rights (s. 6(1));
- to hold public hearings and consultations regarding matters relevant to the Code (s. 6(2));
- to make special reports to the Legislative Assembly concerning urgent human rights matters (s. 19(1));
- to deal with systemic discrimination, to initiate complaints, or to join complaints as a party in order to argue - on behalf of the broader public interest - for interpretations of law that will eliminate discrimination (ss. 21(2), 21(3); or
- to ensure that complainants receive legal representation at hearings and appeals, and assistance during pre-hearing procedures.

Bill 53 narrows the purposes of the Code,<sup>26</sup> but, more importantly, it is not clear how some of the central purposes of the Code which are retained can be achieved without a Commission, or an independent public body with similar functions.

Specifically, subsections 3a), b) and d) state that purposes of the Code are:

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

Without a public body to fill the legal advocacy, education, research, public inquiry, and systemic discrimination roles, these purposes will be difficult, if not impossible, to fulfill. Under Bill 53, the only part of the human rights system that is left is individual complaint-processing by the Tribunal.

It is essential to note that favouring change, and more specifically, favouring a “direct access” model, which would remove the gate-keeping function, does not require the abolition of the Commission. The Canadian Human Rights Act Review Panel in its report *Promoting Equality: A New Vision*<sup>27</sup> recommended a new federal system, which, if implemented, will provide increased access for complainants to the Canadian Human Rights Tribunal. However, unlike Bill 53, the system proposed by this blue-ribbon Panel

enhances the powers of the Canadian Human Rights Commission, allowing it to carry out its public interest role more effectively.<sup>28</sup>

If Bill 53 passes, with it passes the understanding that the elimination of discrimination is a concern of every resident of the province. Under Bill 53, discrimination becomes a matter of individual complaints only, and those complaints become an entirely private matter between individual complainants and respondents.

## ***2. The Investigative Powers Are Eliminated and All Responsibilities for Complaint-Processing Are Transferred to the Tribunal***

Under Bill 53, complainants will file their complaints with the B.C. Human Rights Tribunal.

Under the current Code, when the Commission receives a complaint, it can require the production of documents, correspondence or records, and make inquiries of any person in writing or orally in order to investigate a complaint.<sup>29</sup> If any person refuses to comply with requests made in the course of an investigation, the Commission can apply to the B.C. Supreme Court for an order requiring the person to comply with the demand. However, under Bill 53, all investigative powers are stripped from the Code.

The substitute for the investigative powers of the Commission appears to be pre-hearing disclosure procedures of the Tribunal. Under s. 35(1) of the Code, the Tribunal can make rules respecting the practice and procedure for the conduct of pre-hearing matters. More specifically, under s. 35(1)(b) it can make rules “respecting disclosure of evidence, including...pre-hearing disclosure and pre-hearing examination of a party...” This means that the Tribunal can make rules requiring parties to disclose evidence and documents after a complaint has been filed and in anticipation of a hearing. Because the Tribunal is an adjudicative body, rather than an administrative body like the Commission, there is a higher onus on the Tribunal to satisfy rules of procedural fairness.

Consequently, Tribunal procedures are likely to be more formal than Commission investigative procedures, and to place unrepresented parties at a distinct disadvantage.

## ***3. The Gate-Keeper Function Remains***

Although the proffered rationale for shifting to a direct access model is to get rid of the gate-keeping role and to ensure that claimants get a hearing of the merits of their complaints, under Bill 53 gate-keeping has not been eliminated. Rather, it has been transferred to the Tribunal.

Bill 53 provides that the Tribunal may dismiss a complaint without a hearing: 1) because the complaint is not within the jurisdiction of the Tribunal; 2) because the complaint was not filed in time; 3) because the acts complained of do not contravene the Code; 4) because proceeding with the complaint would not benefit the person or group alleged to have been discriminated against or further the purposes of this Code; 5) because the complaint was filed in bad faith or for improper motives; 6) because the substance of the complaint has been dealt with in another proceeding; or 7) because a reasonable settlement offer was made to the complainant and was refused.

Under Bill 53, the grounds for dismissal are the same for the Tribunal as they were for the Commission, with two exceptions. The power to dismiss because a reasonable settlement offer was made and refused has been added (s. 27(f.1)). The power to dismiss

because there is no reasonable basis for referring a complaint to hearing (s. 27(1)(c)) has been removed.

If the goal is to provide direct access to hearings on the merits then some of the grounds for screening out complaints are surely improper. Allowing the Tribunal to dismiss complaints on the first two grounds prior to a hearing on the merits is not problematic. The Tribunal should be able to dismiss a complaint without hearing because, for example, it is a federal matter, or because it was filed out of time. Such complaints simply do not fall within the legal jurisdiction of the Tribunal, and dismissal rests on consideration of issues that are not related to the merits of the claim.

The remaining grounds, however, all, potentially, require an exercise of discretion in relation to the merits of the case. Therefore Bill 53 effectively empowers the Tribunal to perform the same function that has been identified as a problem in terms of timely handling of complaints, and perceived fairness. It permits the Tribunal to dismiss potentially meritorious complaints without hearing.

The new authority to dismiss a complaint because of a refusal to accept a “reasonable” offer provides a case in point. There may be many legitimate monetary and non-monetary reasons for refusing a settlement. In the absence of a hearing on the merits, it will not necessarily be possible to determine whether an offer was “reasonable.” Also, dismissing a complaint because “the acts complained of do not contravene the Code” could be used as the basis to dismiss a complaint because there is deemed to be inadequate evidence, a question which goes to the merits of a complaint, and which may require weighing the credibility of witnesses.

In short, Bill 53 does not eliminate or narrow the problematic aspects of the gate-keeping function; it simply transfers them to the Tribunal.

#### ***4. The Problems of the B.C. Human Rights Council Are Recreated***

When the Social Credit Government abolished the B.C. Human Rights Commission in 1983, it created a new Human Rights Council to which it assigned the authority for both gate-keeping and the adjudication of complaints. Having the Council both decide which complaints should go to hearing, and then adjudicate them to determine whether they were meritorious, created an appearance of bias in the system. It was in part to overcome this problem, as well as to restore education, information, and systemic discrimination roles, that in 1997 a separate B.C. Human Rights Commission and B.C. Human Rights Tribunal were established.

Now Bill 53 recreates the tangle of roles that the 1997 Code was introduced to cure. Bill 53 also proposes to proclaim section 28.1, which exists in the current legislation but has never been enacted. This section permits any party aggrieved by the dismissal of a complaint to apply for a review. If the member of the Tribunal who reviews the dismissal decides that it should not have been dismissed, it can be referred to the Tribunal Chair, presumably for mediation or hearing.

Under the current Code, the Commission dismisses a complaint. Had section 28.1 been proclaimed, such a dismissal would be reviewable by the Tribunal. Two distinct bodies would be responsible for the dismissal and the review of the dismissal. Under Bill 53,

however, since only the Tribunal exists, both the dismissals and the reviews of dismissals will be done by Tribunal members.

Though presumably different Tribunal members will be involved in 1) a dismissal decision, 2) a review of a dismissal decision, and 3) a hearing on the merits (if there is one), the deployment of different Tribunal members will not necessarily remove the perception that the adjudicator in any one of these proceedings may be biased because they are a part of the same Tribunal which is making related decisions on the same matter.

So, in effect, Bill 53 brings us right back to the 1983 B.C. Human Rights Council model, which was criticized by both claimants and respondents because of the lack of clarity of institutional roles. It gives us one body that is responsible for both gate-keeping and adjudication of complaints, with no promotion, education or systemic discrimination functions.

### ***5. Resources Are Cut***

Before the introduction of Bill 53, the Attorney General cut the budget of the Commission by 32%. The Commission's budget of 4.6 million dollars for 2001-2002 covered all expenses of the Commission, including the money paid to the Legal Services Society to provide legal representation for complainants and for respondents who met the Legal Aid means test. There has been no assurance given that there will not be further cuts in the overall budget for human rights. However, let us assume that the Tribunal will retain its current resources and receive new resources, amounting to 68% of the Commission's 4.6 million, minus the cost for a new legal clinic - which was promised by the Attorney General, Geoff Plant, in a May 30, 2002 press release. If the legal clinic costs 1 million dollars a year, this will leave 2.1 million dollars in additional resources for the Tribunal.

According to the B.C. Human Rights Commission's annual report for 2001-2002, it handled 19,000 inquiries, accepted 814 new complaints, settled 173 complaints (19%), and referred 124 complaints (14%) to the Tribunal for hearing.

Unless there are serious flaws in the new system, there is no reason to suppose that there will be fewer inquiries, or fewer complaints. Indeed, if in fact, as the Attorney General claims, the new system is more accessible, there could be an increase in the number of complaints.

If the Tribunal exercises the gate-keeper function in the same way that the Commission has, and the number of complaints remains the same, there will be no increase in the number of complaints needing hearing. If, however, claimants do get direct access to Tribunal hearings on the merits of their complaints, many more complaints will require hearings, and some complaints may require more than one hearing before they are completed.

The Tribunal could decide to introduce a system of expedited hearings for some complaints, so that some would receive shorter, speedier hearings. However, even if the Tribunal streams cases in this way, direct access will create a very significant increase in the Tribunal's workload. The Tribunal will have to hold many more hearings, and it will

also be responsible for inquiries, intake, mediation and settlements, and pre-hearing discovery procedures.

It is not clear that with an additional 2 million dollars, the Tribunal can handle this greatly enlarged workload in a way that will not simply repeat the problems of the past. If the resources are not sufficient, the Tribunal will be under pressure to get rid of complaints at the front end, without hearings. There will be delays, and backlogs will build up. The same administrative problems that the Commission has struggled with will simply be shifted from the Commission to the Tribunal.

In short, with the gate-keeper function remaining intact, and the resources for the system overall reduced by 32%, it is not clear that Bill 53 will, or is intended to, provide improved access to Tribunal hearings.

#### **6. *Mediation Can Be Made Mandatory By The Tribunal***

The Tribunal is given new authority to make rules respecting mediation, rules that “would permit or require mediation of a complaint.” In other words, mediation may become mandatory. Complainant advocates have had many reservations about mandatory mediation in the human rights setting because it can cause psychological trauma to complainants, or turn into an occasion for the repetition of the abusive behaviour for which complainants are seeking a remedy. Mandatory mediation, with the threat ever-present that a complaint can be dismissed if a claimant refuses a reasonable settlement offer, does not provide a supportive environment for the resolution of human rights complaints.

#### **7. *Costs Can Be Awarded Against the Complainant***

Under the current Code, costs can be awarded against a party to a complaint only if that party engaged in improper conduct during the course of the investigation or hearing of the complaint (s. 37(4)). Cost awards are traditional in civil court cases, where the loser may be required to pay the legal costs, or some portion of the legal costs, of the winner. But cost awards are not permitted in human rights Tribunal cases, except where there is egregious misconduct on the part of one party or the other.<sup>30</sup>

Bill 53 changes this. A revised s. 37(4) permits the Tribunal to award costs against either a complainant or a respondent without any limitation on this power at all.

Claimants will have to be informed that if they lose, they could be liable for some thousands of dollars in legal costs. Whether such costs are awarded regularly or not, this provision of the proposed legislation is certain to have a chilling effect on claimants who wish to challenge the discrimination that they have experienced. It will have a particularly chilling effect on the most disadvantaged people who cannot afford to face the prospect of paying legal costs if they lose a case. This provision undermines the ability of the human rights system to fulfill its stated purpose of eliminating discrimination.

#### **8. *There is No Obligation to Provide Legal Representation***

Another disturbing structural element of Bill 53 is that, through the abolition of the Commission, the public responsibility for providing support and legal representation for complainants is removed. The Attorney General in his May 30, 2002 press release

promised a human rights legal clinic to provide services to complainants and perhaps respondents, but there is nothing in Bill 53 that makes the provision of legal services to complainants an ongoing statutory duty.

Though the current legislation does not articulate this responsibility fully, elements of the legislation, and of the Commission's budget, have made it clear that it is an obligation of the Commission to ensure that complainants receive adequate legal representation when their complaints are being heard before the Tribunal or courts. Currently, the Deputy Chief Commissioner can join any complaint as a party, and the Commission under its supervisory authority has overseen the provision of legal services through its contract with the Legal Services Society. In other jurisdictions, commissions appear on behalf of complainants before tribunals and "carry" the case for them.<sup>31</sup> In short, it has been the case until now, in every jurisdiction, that because of the public interest in the elimination of discrimination, legal representation for claimants has been provided at no cost, and it is either provided by commissions directly, or, as in B.C., the commission has responsibility for ensuring its provision.

Since 1994, the B.C. Human Rights Coalition and the Community Legal Assistance Society have been lobbying both the government and the B.C. Human Rights Commission to set up a legal clinic. A legal clinic has many advantages as a way of providing legal services to complainants, when compared to the system which has been in place in B.C.. Until April 2002 when the Commission's budget was cut, legal services were provided to complainants, and respondents who met the Legal Aid means test, through private counsel who were paid on the legal aid tariff.

The legal aid tariff provided minimal billing hours and low hourly fees for those representing human rights claimants and respondents. Because of this, the tariff system did not encourage the development of expertise. A private law practice focussed on representing human rights claimants was simply unaffordable. Some B.C. claimants have been fortunate to find experienced lawyers, who are committed to human rights, who have provided services despite the inadequacy of the legal aid tariff. However, a clinic could hire and train staff so that they did have expertise in the human rights area, and complainants could expect improved quality of representation.

Now, apparently, this clinic may be set up. However, it will not be set up under Bill 53 with a statutory mandate to provide legal representation to human rights claimants, nor will it be set up under the supervision of a public body with a mandate to represent the public interest in the advancement of human rights. There will be no public oversight of the services provided. It is likely that the clinic will provide services under a contractual agreement with the Attorney General. The Attorney General can put conditions on how and to whom the services are provided, or can terminate the contract.

With the elimination of the Commission, and no mention of legal representation in Bill 53, the public interest in the provision of legal services to complainants has been removed. There is no statutory obligation to provide complainants with any legal services.

Further, if the clinic does not have sufficient resources, it too will become a kind of gate-keeper, that is, it will be put in the position of deciding which complainants should receive assistance and representation and which should not. Complainants who do not

have representation are not likely to be successful before the Tribunal, no matter what the merits of their complaint may be.

### **How Should B. C. Residents Respond?**

The Government of British Columbia claims that Bill 53 is an advance. It is not. Rather, it represents a serious and dangerous step backwards for the residents of British Columbia, and for potential complainants and respondents alike.

Bill 53 does not provide a well-structured, well-designed ‘direct access’ model, and with fewer resources in the human rights system, it is unlikely that complainants and respondents will get quicker resolution. Further, the legislation is overtly hostile to human rights claimants, who may be forced into mediation, and may have their complaints dismissed if they refuse a ‘reasonable’ settlement. They may also have costs awarded against them if they lose at a hearing. There is no obligation to ensure that complainants have legal representation, and some may face a more legalistic Tribunal process without it.

And, without logic or adequate substitution, the legislation eliminates the Commission, and with it, key public roles which are necessary to the advancement of human rights.

If we move to a new model that claims to provide ‘direct access’, it is essential to ensure that it will, in fact, increase access to Tribunal hearings, and, that it will at the same time, preserve and protect the key elements necessary to an effective human rights system.

These key elements include:

- A public, independent body with the mandate to foster human rights and represent the public interest in their advancement must be a part of any human rights system.
- The functions of this body should include:
  - ◆ to provide education and information programs;
  - ◆ to conduct research on issues related to human rights;
  - ◆ to conduct public consultations and inquiries;
  - ◆ to make special reports to the legislature;
  - ◆ to oversee the provision of legal services to human rights complainants;
  - ◆ to engage in the development of guidelines which will ensure compliance with the Code;
  - ◆ to join any complaint as a party;
  - ◆ to initiate complaints, particularly where there are patterns of systemic discrimination with respect to employment, services or tenancy;
  - ◆ to approve affirmative action programs;

- ◆ to develop strategies to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by the Code.
- The gate-keeper function, which has been identified as the cause of both delays and perceived unfairness to claimants, must be significantly curtailed.
- If the Tribunal is assigned the responsibility for receiving all complaints, for handling information requests from the public, for mediation and settlement of complaints, and for discovery and hearing processes, it must have adequate resources to carry these out effectively, and to ensure that the pattern of delays and high rates of dismissal without hearing will not simply be repeated.
- The complaint-handling process must not be hostile to claimants. Mediation cannot be mandatory. Refusing to accept a “reasonable” settlement should not be grounds for dismissing a complaint without hearing. Complainants should not be liable for costs awarded against them if they lose their claim at hearing. The complaint-handling process must signal respect for those who file complaints.
- Legal representation for human rights claimants at no cost must be guaranteed by statute. Providing assistance to claimants is key for the direct access model to be successful. Increased access to hearings will be of little value to claimants or respondents if claimants do not have adequate legal representation. There is now forty years of human rights jurisprudence, and in some cases there are complex legal questions to be dealt with. Claimants cannot handle their cases on their own.

Further, it has been public policy to ensure that there are no barriers, including no financial barriers, to claimants filing and proceeding with their complaints. This public policy has been designed to guarantee that those who experience violations of their human rights can receive a satisfactory remedy, and to protect the public interest by ensuring that discriminatory practices that are likely to affect others in the future are eliminated.<sup>32</sup>

This public policy should be acknowledged in the Code. If legal services to claimants are to be provided through a clinic, the clinic should be named as an element of the comprehensive scheme of human rights administration in the Code.

- Respondents who need publicly provided legal representation should be able to apply to the Tribunal and have representation supplied on the legal aid tariff. No legal clinic should be required to supply assistance or counsel for both claimants and respondents, as this will inevitably result in conflicts of interest.

### **What About The Consultation Process?**

The Government of British Columbia indicated that the review of human rights legislation would consist of the publication of a background paper on the human rights system, solicitation of comments, production of a white paper indicating the government's proposals for reform, and then open consultations with interested groups and individuals on the proposals in the white paper, prior to the introduction of legislation.

The Attorney General's Ministry produced a background paper, but no white paper. The background paper, which described various models for administering human rights law, was written by two non-government lawyers, and it contained no recommendations. This paper was neither widely publicized nor widely responded to. The Attorney General tabled legislation on May 30, and submissions on this draft legislation must be made by September 15.

Bill 53 appears to have been drafted hastily. It does not, in its present form, provide a clearer or more efficient complaint-handling process, or better administration, enforcement, and promotion of human rights for the Province of British Columbia.

In the circumstances, tabling Bill 53 for consideration by the public over the summer months does not provide adequate opportunity for response and consideration of this key legislation. Full public hearings should be held on this draft legislation in the fall.

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## Endnotes

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<sup>1</sup> S.O. 1961-62 c. 93.

<sup>2</sup> An overview by Justice Bertha Wilson of the common law cases in which people had turned to the courts for assistance with claims of race and sex discrimination may be found in *Bhadauria v. Seneca College of Applied Arts and Technology* (1979), 105 D.L.R. (3d) 707 (Ont. C.A.). See also Walter S. Tarnopolsky and William F. Pentney, *Discrimination and the Law* (Toronto: Carswell, 1998) at 1-1 to 1-25.

<sup>3</sup> *Christie v. York Corp.*, [1940] S.C.R. 139.

<sup>4</sup> *Ibid* at 142.

<sup>5</sup> See, for example, Ontario's *Racial Discrimination Act* 1944 (Ont.) c. 51.

<sup>6</sup> In *Discrimination and the Law*, *supra* note 2 at 2-3, Tarnopolsky and Pentney cite the case of *Regina v. Pfennig*, 1963 unrep., in which "a provincial magistrate in Saskatchewan dismissed a prosecution against a hotel proprietor on the charge that he refused service to an Indian in a beer parlour. The Court held that the motive was not discrimination. The Court believed the evidence on behalf of the accused that Indians were kept on a separate side of the beverage room only in order to prevent disorder on a busy night."

<sup>7</sup> For example in Ontario there was the *Fair Employment Practices Act*, 1951 (Ont.) c. 24 and the *Fair Accommodation Practices Act*, 1954 (Ont.) c. 28.

<sup>8</sup> See Walter S. Tarnopolsky, "The Iron Hand in the Velvet Glove: The Administration and Enforcement of Human Rights Legislation in Canada," Vol. XLVI *The Canadian Bar Review* 565 at 571. At footnote 38, Tarnopolsky reported on his research on enforcement patterns which revealed a dramatic difference in the volume of complaints received under the Ontario *Code* in the 1960's as compared with the volume of complaints received under the Fair Employment and Fair Practices legislation of other provinces for the same period. A great many more complaints were made under the Ontario *Code*. By comparison, the number of complaints under the other legislation was miniscule.

<sup>9</sup> *Ibid.* at 572.

<sup>10</sup> The story of human rights legislation is a story of expanding grounds. In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, (1998), 31 C.H.R.R. D/1 (S.C.C.) the Supreme Court of Canada ruled that it was a violation of s. 15 of the *Charter* for the government of Alberta to refuse to include the ground 'sexual orientation' in its human rights legislation. In the view of the Court the comprehensive nature of the Act must be taken into account in considering the effect of excluding one ground from its protection.

<sup>11</sup> "Iron Hand," *supra* note 8 at 572.

<sup>12</sup> *Ibid.* at 572. Tarnopolsky quoted Dr. Daniel Hill, then Director of the Ontario Human Rights Commission, who said, "Human rights on this continent is a skillful blending of educational and legal techniques in the pursuit of social justice."

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<sup>13</sup> In 1981, when the Supreme Court of Canada was asked to determine whether Pushpa Bhauduria could institute a civil action against Seneca College on the grounds that she had been refused consideration for employment because of her race, it decided that she could not, because the *Ontario Human Rights Code* set out comprehensive enforcement procedures, and therefore foreclosed the possibility of a civil action based on an invocation of the public policy expressed in the *Code*. *Seneca College of Applied Arts and Technology v. Bhaudauria*, [1981] 2 S.C.R. 181, (1981), 2 C.H.R.R. D/468 (S.C.C.) at D/469 [hereinafter *Bhaudauria*].

<sup>14</sup> *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150 at 156, (1985), 6 C.H.R.R. D/3014 at D/3016; *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145 at 158, (1982), 3 C.H.R.R. D/1163 at D/1166; *Action travail des femmes v. Canadian National Railway Company*, [1987] 1 S.C.R. 1114, (1987), 8 C.H.R.R. D/4210.

In *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, 3 C.H.R.R. D/1163, the insurer argued that the *Human Rights Code* of British Columbia did not have any bearing on its right to stipulate terms of an insurance contract. The Court disagreed. In one of the majority judgements, Lamer J. 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 through their legislature clearly indicated that they consider that law, and the values that it endeavours to buttress and protect, are, save their constitutional laws, more important than all others. Therefore, short of the legislature speaking to the contrary in express and unequivocal language in the *Code* or in some other enactment, it is intended that the *Code* supercede all other laws when conflict arises.

<sup>15</sup> *Ontario Human Rights Commission v. Borough of Etobicoke*, [1982] 1 S.C.R. 202, (1982), 3 C.H.R.R. D/781; *Heerspink*, *supra* note 14; *Craton*, *supra* note 14; *Canadian National Railway Company v. Bhinder*, [1985] 2 S.C.R. 561 at 573–74, (1985) 7 C.H.R.R. D/3093 per Dickson C.J., dissenting in the result. In *Ontario Human Rights Commission v. Borough of Etobicoke* at D/785 on behalf of a unanimous Court, McIntyre J. stated:

The *Human Rights Code* has been enacted by the legislature of the Province of Ontario for the benefit of the community at large and its individual members and clearly falls within that category of enactment which may not be waived or varied by private contract;....

<sup>16</sup> See *O’Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at 547, 7 C.H.R.R. D/3102 at D/3105; *Canada (Treasury Board) v. Robichaud*, [1987] 2 S.C.R. 84 at 90–95, 8 C.H.R.R. D/4326 at D/4329– D/4333; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, 10 C.H.R.R. D/6183.

<sup>17</sup> In the landmark case of *Robichaud v. Canada*, *ibid.* the Supreme Court of Canada established the principle that employers are legally responsible for sexual harassment in

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the workplace. At D/4331, on behalf of the Court, Justice La Forest described human rights legislation this way:

It is remedial. Its aim is to identify and eliminate discrimination. If this is to be done, then the remedies must be effective, consistent with the ‘almost constitutional’ nature of the rights protected.

<sup>18</sup> Recent B.C. human rights complaints have set important standards for government employment practices, and service delivery. These cases include *British Columbia (Public Service Employee Relations Comm.) v. B.C.G.E.U.*, [1999] 3 S.C.R. 3, 35 C.H.R.R. D/257 (*Meiorin*); and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868, 36 C.H.R.R. D/129.

<sup>19</sup> See for example, *Platz v. British Columbia (Ministry of Children and Families)* (2002), 42 C.H.R.R. D/52 (B.C.H.R.T.). In this case, the B.C. Human Rights Tribunal found that the Ministry had failed to comply with a direct procedural order of the Tribunal, and that its failure to do so was “deliberate and inexcusable in the circumstances.”

<sup>20</sup> Reviews of human rights legislation undertaken in other jurisdictions, which document dissatisfaction with delays, include: Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000) [hereinafter *Promoting Equality*]; Saskatchewan Human Rights Commission, *Renewing the Vision: Human Rights in Saskatchewan* (Saskatoon: Saskatchewan Human Rights Commission, 1996); William Black, *B.C. Human Rights Review: Report on Human Rights in British Columbia* (Victoria: Government of British Columbia, 1994); and Ontario Human Rights Code Review Task Force, Mary Cornish, Task Force Chair, *Achieving Equality: A Report on Human Rights Reform* (Toronto: Ministry of Citizenship, 1992).

<sup>21</sup> *Bhadauria*, *supra* note 13.

<sup>22</sup> *S.E.P.Q.A v. Canada (Human Rights Comm.)*, [1989]2 S.C.R. 879, 11 C.H.R.R. D/1.

<sup>23</sup> *Ibid.* at D/25, dissenting opinion. To a similar effect see also *Latif v. Canadian Human Rights Commission*, [1980] 1 F.C. 687 at 697, wherein Le Dain J. said, “A decision [by the Commission] not to deal with a complaint...is a decision which effectively denies the possibility of obtaining such relief. It is in a real sense determinative of rights.”

<sup>24</sup> *Scowby v. Dieter*, [1986] 2 S.C.R. 226, 8 C.H.R.R. D/3677 at D/3685.

<sup>25</sup> See *Promoting Equality*, *supra* note 20 at 48-49.

<sup>26</sup> Specifically, “monitoring progress in achieving equality in B.C.” is no longer a purpose of the Code. Nor is creating “mechanisms for providing the information, education and advice necessary to achieve the ... purposes of the Code.”

<sup>27</sup> *Promoting Equality*, *supra* note 20.

<sup>28</sup> *Ibid.* at p. 94.

<sup>29</sup> *Human Rights Code*, R.S.B.C., Chapter 210, s. 24.

<sup>30</sup> See, for example, *Cook v. Citizens’ Research Institute (No. 6)* (2002), C.H.R.R. Doc. 02-025, 2002 B.C.H.R.T. 6; *Forgues v. Garry Stinka and Moxies’ Restaurant* (2001)

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C.H.R.R. Doc. 01-035, 2001 B.C.H.R.T. 7; *Roosma v. Ford Motor Co. of Canada (No. 6)* (2001), 39 C.H.R.R. D/147 (Ont. Bd. Inq.).

<sup>31</sup> This is the general rule. Commissions “carry” complaints before Tribunals and Boards of Inquiry in most other jurisdictions.

<sup>32</sup> *Promoting Equality*, *supra* note 20 at 76.