

CHAPTER NINETEEN: HUMAN RIGHTS

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CHAPTER NINETEEN: HUMAN RIGHTS

I. GOVERNING LEGISLATION AND RESOURCES

A. *Legislation*

Human Rights Code, R.S.B.C. 1996, c. 210, as amended [[HRC](#)]

Canadian Human Rights Act, R.S.C. 1985, c. H-6, as amended [[CHRA](#)]

Civil Rights Protection Act, R.S.B.C. 1996, c. 49 [[CRPA](#)].

B. *Resources*

B.C. Human Rights Tribunal

1170 - 605 Robson Street
Vancouver, B.C., V6B 5J3
E-mail: BCHumanRightsTribunal@gov.bc.ca
Website: www.bchrt.bc.ca

Telephone: (604) 775-2000
TTY: (604) 775-2021
Toll-free in B.C.: 1-888-440-8844
Fax: (604) 775-2020

- An independent, quasi-judicial body created by the B.C. Human Rights Code, responsible for accepting, screening, mediating and adjudicating provincial human rights complaints. Its website is very helpful. Their Guides and Information Sheets provide thorough procedural information in English, Chinese, and Punjabi. Tribunal's decisions dating back to 1997 are available online.

The B.C. Human Rights Coalition

1202 - 510 West Hastings Street
Vancouver, B.C., V6B 1L8
Website: www.bchrcoalition.org

Telephone: (604) 689-8474
Toll-free in Canada: 1-877-689-8474
Fax: (604) 689-7511

- Provides free counselling, advocacy and mediation services for people in B.C. who have legitimate provincial human rights complaints. The B.C. Human Rights Coalition works in close co-operation with Community Legal Assistance Society to provide legal advice and representation to individuals with disabilities and low incomes as well as victims of discrimination.

Community Legal Assistance Society

300 – 1140 West Pender St.
Vancouver, B.C. V6E 4G1
Website: www.clasbc.net

Telephone: (604) 685-3425
Toll-free in Canada: 1-888-685-6222
Fax: (604) 685-7611

- Provides free legal representation or self-representation workshops for people in B.C. who have scheduled an upcoming provincial human rights hearing.

The B.C. Civil Liberties Association (BCCLA)

550 - 1188 West Georgia Street
Vancouver, B.C. V6E 4A2
Website: www.bccla.org

Telephone: (604) 630-9748
Fax: (604) 687-3045
E-mail: info@bccla.org

- If the client's legal issue also extends to Charter rights, the BCCLA may provide assistance.

The Canadian Human Rights Commission

Website: www.chrc-ccdpc.ca

Western Region

Canada Place, Suite 1645, 9700 Jasper Avenue
P.O. Box 21, Edmonton, Alberta T5J 4C3
TTY: 1-888-643-3304

Telephone: (780) 495-4040
Toll-Free: 1-888-214-1090
Fax: (780) 495-4044

National Office

344 Slater Street, 8th Floor
Ottawa, Ontario K1A 1E1
TTY: 1-888-643-3304

Telephone: (613) 995-1151
Toll-free: 1-888-214-1090
Fax: (613) 996-9661

- The Commission can independently initiate federal human rights complaints but normally assists in their drafting and investigates complaints lodged by individuals or organizations. If insufficient evidence of discrimination is presented, the Commission can dismiss the complaint. If the Commission finds that the allegations of discrimination warrant mediation or adjudication, it can refer cases to conciliation or to the Canadian Human Rights Tribunal for hearing.

II. FEDERAL AND PROVINCIAL LEGISLATION

The first step when faced with a human rights issue is to determine whether the provincial legislation, the B.C. Human Rights Code, applies, or whether the problem falls within the federal jurisdiction of the Canadian Human Rights Act. Most human rights problems will fall under the provincial legislation. However, if the respondent is being complained about in their capacity as an agent or employee of a body that falls under federal jurisdiction, then that complaint would be governed by federal legislation. Bodies that fall under federal jurisdiction are outlined in the Constitution Act, 1867 ((U.K.), 30 & 31 Victoria, c.3 reprinted in R.S.C. 1985, App. II, No. 5) s. 91 and include: chartered banks; entities engaged in inter-provincial transportation, media broadcasting, or mining; and First Nations. In either case, because human rights legislation is considered to be “quasi-constitutional” in nature, the legislation must be given a liberal and purposive interpretation to advance the broad policy implications underlying it.

A. LSLAP’s Role in Provincial and Federal Proceedings

In provincial proceedings clinicians may assist clients in completing the Complaint or Reply Forms at the initial stages. Beyond this, LSLAP’s role is usually limited to less complex cases where the scheduled hearing is about two days or less. Where LSLAP cannot help directly, we can refer complainants to the B.C. Human Rights Coalition who may be able to assist clients in completing forms, making submissions or settling a complaint. If the matter is a complex systemic one or is soon proceeding to hearing, we may also be able to refer the matter to a human rights lawyer at the Community Legal Assistance Society (see **Section I.B: Resources**, above), however clinicians should first check with the B.C. Human Rights Coalition to see if they can assist.

In the federal system the Canadian Human Rights Commission [CHRC] has been set up to assist individuals to draft complaints and facilitate mediation. Students should therefore refer clients to the CHRC for assistance, though they can remain involved in the process by providing representation at mediation. To read more about the federal Human Rights system see **Section II.D: The Canadian Human Rights Act**, below.

B. The B.C. Human Rights Code

The Human Rights Code [HRC] is the legislation currently applicable in B.C. and is administered by the Human Rights Tribunal. There were substantial amendments that came into effect in 2003 (Human Rights Code Amendment Act, S.B.C. 2002, c. 62).

The HRC applies to matters within the provincial constitutional heads of power, and covers both public and private bodies and individuals. For example, the HRC applies to provincially regulated employers, unions, professional associations, most commercial businesses, Crown corporations, landlord-tenant relations, as well as the provincial government itself.

NOTE: The Tribunal’s decisions are available online at www.bchrt.bc.ca/decisions. They are indexed by year dating back to 1997 and searchable based on a variety of criteria.

The Chart below illustrates how the HRC's protected grounds apply to each area of protection.

Protected Grounds	Protected Areas			
	<i>Employment</i>	<i>Public Services & Accommodation</i>	<i>Purchase of Property</i>	<i>Tenancy</i>
<u>Race</u>	√	√	√	√
<u>Colour</u>	√	√	√	√
<u>Ancestry</u>	√	√	√	√
<u>Place of Origin</u>	√	√	√	√
<u>Political Belief</u> (so long as it does not cause harm to others)	√	X	X	X
<u>Religion</u>	√	√	√	√
<u>Marital Status</u> (includes protection if you are married, singled, divorced, separated, or living common law)	√	√	√	√
<u>Family Status</u> (includes having children or not having children)	√	√	X	√
<u>Physical or Mental Disability</u>	√	√	√	√
<u>Sex</u> (includes protection for males and females, sexual harassment, pregnancy discrimination and transgendered discrimination)	√	√	√	√
<u>Sexual Orientation</u> (includes protection for heterosexual, bi-sexual, gay men and lesbian women)	√	√	√	√
<u>Age</u> (19 and over)	√	√	X	√
<u>Criminal or summary conviction</u>	√	X	X	X
<u>Source of income</u>	X	X	X	√

1. Protections, Exceptions and Exemptions

The HRC provides protection against discrimination in several different contexts which are listed in ss. 7 – 14. However, for each protected area the Act provides certain built-in exceptions for which *prima facie* discrimination is not prohibited.

Additionally, s. 41, commonly referred to as the group rights exemption, allows discrimination by charitable, philanthropic, educational and other not-for-profit organizations if it is done while promoting the interests and welfare of a group of people that share a common identifiable characteristic, such as religion, race, or marital status. Please refer to *Vancouver Rape Relief Society v. Nixon*, 2005 BCCA 601.

Finally, under s. 42, it is not discrimination to plan, advertise, adopt or implement an employment equity program that has the objective of ameliorating the conditions of individuals or groups who are disadvantaged because of race, colour, ancestry, place of origin, physical or mental disability or sex. Such programs may obtain prior approval by the B.C. Human Rights Tribunal and, if pre-approved, will not be deemed to be in contravention of the HRC.

a) *Discriminatory Publication*

Section 7 deals with forms of discrimination against individuals or groups of individuals, which are published, displayed, or made public in a discriminatory fashion. This section prohibits hate literature and other such communications. Please refer to *Elmasry and Habib v. Roger's Publishing and MacQueen* (No. 4), 2008 BCHRT 378.

Exception: Section 7 does **not** apply to communications that are intended to be private and are related to activities otherwise permitted under the HRC.

b) *Discrimination in Public Facilities*

Section 8 states that any accommodation, service, or facility customarily available to the public may not be denied to an individual for reasons based on that person's race, colour, ancestry, place of origin, religion, marital status, physical or mental disability, gender, or sexual orientation.

A number of jurisdictions have found that various locales and services fall within the definition of "public facilities". This includes, but is not limited to: pubs, nightclubs or supper clubs, restaurants, hotels, theatres, transportation services, education facilities, insurance, medical treatment in hospitals, management services in condominiums, and participation in sporting events. Please refer to *Ellis v. Snow Trails and Service Ltd. and Meiorin* (No. 3) 2008 BCHRT 152.

Also included are licensing services and facilities; for example s. 8 discrimination was found when the B.C. Motor Vehicle Branch maintained a blanket refusal to issue drivers licenses to those with certain visual impairments – regardless of actual driving ability. Please refer to *B.C. (Superintendent of Motor Vehicles) v. B.C. (Council of Human Rights)*, [1999] 3 S.C.R. 868.

Exceptions: There are a number of circumstances where discrimination is permitted, if it can be shown to be supported by "bona fide and reasonable justification" (as per the wording of s. 8(1)). For the most authoritative perspective, see the "Grismer" case which applied the three-part "Meiorin" test to services. Please refer to *B.C. (Superintendent of Motor Vehicles) v. B.C. (Council of Human Rights)*, [1999] 3 S.C.R. 868.

Additionally, courts have recently found that services provided to members of a group who come together as a result of a private selection process based on attributes personal to the members do not qualify as services "customarily available to the public" and are therefore not subject to s. 8 of the HRC. Please refer to *Marine Drive Golf Club v. Buntain et al* and *B.C. Human Rights Tribunal*, 2007 BCCA 17.

Section 8(2) also contains certain built-in exceptions. Discrimination based on sex is permitted insofar as it relates to the maintenance of public decency. Discrimination based on sex, physical or mental disability, or age is permitted insofar as it relates to the determination of premiums or benefits under life or health insurance policies.

c) *Discrimination in Purchase and Rental of Property*

Section 9 provides that a person must not be denied the opportunity to purchase real property due their race, colour, ancestry, place of origin, religion, marital status, physical or mental disability, sexual orientation or sex.

Section 10 states that a person shall not be denied the right to occupy any space that is represented as being available for occupancy or be discriminated against with respect to a term or condition of the tenancy on the basis of race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or lawful source of income. Please refer to *Hunter v. LaViolette* (No. 2), 2007 BCHRT 415.

Exceptions: This section does not apply if the tenant is to share the use of any sleeping, bathroom, or cooking facilities with the person making the representation (e.g. as a roommate). Also, it continues to be possible for landlords to discriminate against those under the age of 19 when accepting new tenants or making other decisions related to rental properties.

d) *Discrimination in Employment Advertisements*

Section 11 prohibits employment advertisements that express limitations or preferences based on race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sexual orientation, sex or age. Refer to *Anderson v. Thompson Creek Mining Ltd. Endako Mines*, 2007 BCHRT 99.

Exception: Discrimination in employment advertisements may be permitted if such limitations are based on “*bona fide* occupational requirement(s)” as per the wording of s. 11.

e) *Discrimination in Wages*

Section 12 states that wage parity between sexes is required for similar or substantially similar jobs. Please refer to *Jules v. United Native Nations Society and Johnson*, 2009 BCHRT 115.

Exception: A difference in the rate of pay between employees of different sexes based on a factor **other** than sex is allowed, provided that the factor on which the difference is based would reasonably justify the difference.

f) *Discrimination in Employment and the Duty to Accommodate*

Section 13 provides that no person shall refuse to employ another person or discriminate against a person with respect to employment or any term or condition of employment on the basis of race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, or age of that person or because that person has a criminal record that is unrelated to the employment. Please refer to *Ratzlaff v. Marpaul Construction Limited and Rondeau*, 2010 BCHRT 13.

In addition, the Government of B.C. has prohibited mandatory retirement as of January 1st, 2008 by revising the HRC to extend protection from age discrimination to those 65 and over (Bill 31, 3rd Sess., 38th Parl., 2007). Under these new

amendments, individuals in both the public and private sector are now able to choose the age at which they wish to retire and the protection from age discrimination applies to all those who are 19 years or over (s. 1, “age”).

Exceptions: Section 13(4) permits discrimination in employment if the basis for discrimination concerns a “*bona fide* occupational requirement” (BFOR). In *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*, (1999) 35 C.H.R.R. d/257, the Supreme Court of Canada established a three-part test for BFOR. An initial investigation determines whether the standard, policy or practice has the direct or indirect effect of excluding or negatively affecting individuals protected by the HRC. The onus of establishing sufficient evidence of a *prima facie* case lies with the complainant. Once this evidence is established, the onus of proving a BFOR defence is transferred to the respondent.

The respondent must justify the standard by satisfying three elements:

- i) The fundamental purpose of the standard must be proven to be rationally connected to the performance of the job.
- ii) The standard must have been adopted with the legitimate belief that it is necessary in order to satisfactorily and safely perform all job related tasks.
- iii) The standard is reasonably necessary to performing the job and it is impossible to accommodate the specific claims of the plaintiff without incurring undue hardship to the employer.

For a specific example of a BCHRT case that applies the BFOR test, please refer to *Kerr v. Boehringer Ingelheim (Canada) (No. 4)*, 2009 BCHRT 196.

The “*bona fide* occupational requirement” exception is unaffected by the 2008 amendments, and continues to apply to age discrimination as it relates to mandatory retirement. Thus, if the employer can establish one or more BFORs related to age, then mandatory retirement can still be imposed on those grounds.

Also, distinctions based on age are not prohibited insofar as they relate to a *bona fide* seniority scheme. Distinctions based on marital status, physical or mental disability, sex or age will continue to be allowed under *bona fide* retirement, superannuation, or pension plans, and under *bona fide* insurance plans, including those which are self-funded by employers or provided by third parties; see s. 13(3).

g) *Discrimination by Unions, Employer Organizations or Occupational Associations*

Section 14 states that trade unions, employers’ organizations or occupational associations may not deny membership to any person or discriminate against a person on the basis of race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age, or unrelated criminal record. Please refer to *de Lima v. The Empire Landmark and Hotel Conference Centre and Major*, 2006 BCHRT 440.

Protection against denial of membership has been held to apply only against an implicated union, organization, or association and not against an individual, since “persons” are not covered by s. 14. Please refer to *Ratsoy v. B.C. Teachers’ Federation and others*, 2005 BCHRT 53. This differs from other protections granted by the HRC, which, in appropriate circumstances, generally do allow an action to be brought against both an organization (e.g. an employer) and its individual members (e.g. a manager).

2. Prohibited Grounds of Discrimination

a) *General*

Prohibited grounds of discrimination include gender, age (for those 19 and over), race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sexual orientation, criminal record (that is not relevant to the employment, union or occupational association), and lawful source of income. Note that not all of the areas listed in ss. 7 -14 of the HRC are afforded protection against all forms of discrimination. For example, the HRC does not prohibit landlords from discriminating on the basis of a tenant's political beliefs. The grounds of discrimination that apply depend on the section of the HRC in question. One must first decide which section is involved and then check to see which grounds are associated with that section.

To determine whether a violation of the HRC has occurred, consult the relevant section of the HRC and review recent case law. Case law can be found on the B.C. Human Rights Tribunal website (www.bchrt.bc.ca/decisions), indexed by year, and searchable based on a variety of criteria.

It should be noted that one might file a complaint on a combination of grounds and that discrimination does not need to have been the primary motivating factor to establish a case on a particular ground, as long as discrimination was a contributing factor to the impugned action.

Discrimination need not be intentional. Any policy or action that has an adverse effect on a protected group might be considered discriminatory. Please refer to *Ont. Human Rights Comm. and O'Malley v. Simpsons-Sears*, [1985] 2 S.C.R. 536. The policy or act does not have to affect every person in the group for it to be considered discriminatory. E.g., if a policy discriminates against only women that are pregnant it would still be considered sex discrimination. As well, it is possible that an act or policy may affect men as well as women, but affect one sex to a disproportionate degree, in which case it could also qualify as sex discrimination.

If, after reading the HRC, you are still unsure whether the impugned action lies within the ambit of the HRC, contact the B.C. Human Rights Coalition (see **Section I.B: Resources**, above).

b) *Ancestry, Colour, Place of Origin and Race*

The grounds of ancestry, colour, place of origin and race are included in the HRC as a means to combat racism and racial discrimination. Each of the above referenced grounds is protected in the HRC and may be cited individually in connection with a discriminatory incident or grouped together in order to better illustrate a particular situation. For further information on how the above grounds interact, please refer to *Torres and others v. Langtry Industries (No. 5)*, 2009 BCHRT 3.

In B.C., the grounds of ancestry, colour, place of origin and race are protected in the areas of employment; employment advertising; membership in a trade union, employer's organization or occupational association; public services such as schools, government programs, restaurants, and stores; publications; tenancy; and purchase of property.

c) ***Political Belief***

The HRC provides protection from discrimination due to political beliefs and/or affiliations in the areas of employment; employment advertising; and membership in a trade union, employer's organization or occupational association. In B.C., few human rights cases have been decided on the grounds of political belief. In order to review a human rights case heard on the aforementioned grounds, please refer to *Chrzanowski v. Mah (No. 3)*, 2006 BCHRT 526.

d) ***Religion***

Religious discrimination cases have helped to define several of the fundamental ideas and standards which comprise human rights law in Canada. Matters before the court have routinely addressed discriminatory incidents concerning religious faith, beliefs, customs and practices. In B.C., protection from discrimination based on religion is provided in the areas of employment; employment advertising; membership in a trade union, employer's organization, or occupational association; public services; publications; tenancy and purchase of property. The duty to accommodate has been firmly established in case law and obliges employers to accommodate the religious practices of their employees as long as doing so does not cause undue hardship. These practices may be linked to customs involving prayer, dietary restrictions, clothing requirements, and not working on religious holy days. Please refer to *Moore v. British Columbia (Ministry of Social Services)* BCHRC (1992), 17 C.H.R.R. D/426.

e) ***Family Status and Marital Status***

Family status generally refers to parent-child relationships but may encompass other family relationships including those between siblings, in-laws, aunts and uncles, nieces and nephews and cousins. Marital status normally refers to couples with a 'spouse-like' relationship. The HRC extends protection to all individuals regardless of their status (i.e. married, common-law, single, separated, divorced or widowed). Issues involving family and marital status may often overlap and may be cited concurrently to fully illustrate a certain situation. In order to better see how the grounds of marital and family status are connected, please refer to *Fianza v. Ladco Investments Inc.* (1999), 35 C.H.R.R. D/500 (BCHRT).

In B.C., the grounds of family and marital status are protected in the areas of employment; employment advertising; membership in a trade union, employer's organization, or occupational association; public services; tenancy and publications. Only marital status is protected in the area of purchase of property.

f) ***Physical or Mental Disability***

The protection of the HRC extends to those who are perceived to have a disability or to be at risk of becoming disabled in the future. Although this principle applies generally, it has been specifically applied to persons with AIDS, persons who are HIV positive, and persons believed to be HIV positive, all of whom are considered to have a physical disability. Please refer to *J. v. London Life Insurance Co.* (1999), 36 C.H.R.R. D/43 (BCHRT); *McDonald v. Schuster Real Estate*, 2005 BCHRT 177.

g) ***Age (19 or over)***

Age can refer to an individual's legal age, membership in a specific age-category, or a generalized characterization of a specific age. In B.C., age is a protected ground of discrimination in the areas of employment; employment advertising; membership in

a trade union, employer's organization, or occupational association; public services; tenancy and publications. Please refer to *Miu v. Vanart Aluminum and Tam*, 2006 BCHRT 219.

In each of these areas, age protection is restricted to those 19 years of age and over; however, those under 19 years are still able to bring complaints to the BCHRT based on grounds other than age.

h) Criminal or Summary Conviction

B.C.'s HRC legislation protects individuals convicted of a criminal or summary conviction offence, or a perceived conviction (i.e. arrest or stayed charges) as long as the offence is unrelated to the employment or the intended employment of the individual. In an effort to establish whether or not a conviction may affect an employment decision, courts require an assessment of the relationship between the conviction and the job description. As such, employers must take into account the circumstances of the conviction in order to determine whether or not the charge relates to the employment. In *Woodward Stores (British Columbia) v. McCartney* (1983) 43 BCLR 314, Justice MacDonald laid out a list of criteria to be considered in making this determination. These criteria are as follows:

- Does the behaviour which formed the basis of the charge, if repeated, compromise the employers' ability to conduct business safely and effectively?
- What were the circumstances and details of the offence, e.g., what was the person's age at the time of the offence and were there any extenuating factors?
- How much time has passed since the charge? What has the individual done since that time and has there been any indication of recidivism? Has there been evidence of the individual's desire for rehabilitation?

In B.C., the HRC extends protection on the basis of a criminal or summary conviction only in the area of employment. Please refer to *Korthe v. Hillstrom Oil Company Ltd* (1997), (BCHRT).

i) Sexual Orientation

The HRC prohibits discrimination based on sexual orientation, affording protection for gay men, lesbians, bisexuals, and heterosexuals. In B.C., protection on the basis of sexual orientation is provided in the areas of employment; employment advertising; membership in a trade union, employer's organization, or occupational association; public services; publications; tenancy and purchase of property.

j) Sex (includes sexual harassment, pregnancy discrimination and transgendered discrimination)

Discrimination on the basis of sex, which is prohibited under the HRC, includes sexual harassment. Sexual harassment is defined as "unwelcome conduct of a sexual nature that detrimentally affects a work environment or leads to adverse job-related consequences for the victims of harassment". Please refer to *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252 at 1284.

Sexual harassment can take a number of forms. One such form may occur when the employer or a supervisory employee requires another employee to submit to sexual advances as a condition of obtaining or keeping employment or employment-related benefits. It may also occur when employees are forced to work

in an environment that is hostile, offensive, or intimidating, such as where an employer allows pornography to be posted in the workplace.

It is not generally necessary for an employee to expressly object to their harasser before filing a complaint. There is also no requirement of continuing harassment; a single incident is sufficient if serious.

The test for whether there is sexual harassment is an objective standard. It must be shown that the alleged discriminatory conduct is “reasonably perceived to create a negative psychological and emotional environment for work”. Please refer to *Mottu v. MacLeod*, 2004 BCHRT 76. The test must also take into account the customary boundaries of social interaction in the circumstances. There may not be an action if the complaint arises due to the complainant’s innate sensitivity or defensiveness. Factors that are examined to determine the limits of reasonableness in a particular context include the nature of the conduct, the workplace environment, the type of prior personal interaction, and whether a prior objection or complaint was made. It is no defence to harassment, however, to show that harassing behaviour was traditionally tolerated in a workplace.

k) Source of Income

In a 1994 amendment to the *Residential Tenancy Act*, source of income was established as a protected ground of discrimination with regards to rental housing. This amendment safeguards the tenancy rights of individuals on social assistance or disability pensions, who might otherwise be denied safe housing. Enforced by the BCHRT, source of income is a protected ground only in the area of tenancy. Please refer to *Tanner and Vlake*, 2003 BCHRT 36 for further discussion.

l) Procedural Discrimination

Where a behaviour or policy adversely affects a protected group or person, either directly or indirectly, there is a duty to accommodate, meaning that all efforts must be taken to accommodate the group or person to the point of undue hardship. Examples include installing wheelchair access and allowing workers days off on religious holidays. A recent BCHRT decision affirmed the principle established by the Supreme Court of Canada in *Meiorin*, paras. 65-66, that an employer’s duty to accommodate involves a substantive aspect as well as a procedural aspect. Please refer to *Gaarden v. Fountain Tires and Ingram*, 2008 BCHRT 402. For instance, an employer who has exhausted all reasonable means of accommodation short of incurring undue hardship would have met their substantive duty to accommodate. What constitutes reasonable measures is a question of fact and will differ from case to case. However, their conduct may still be found to have failed to comply with the procedural aspect of the duty to accommodate if they treat the complainant unfairly while fulfilling their substantive duty.

m) Discrimination Based on Involvement in Human Rights Proceedings (s. 43)

Besides those listed above, there is another ground of discrimination provided for by s. 43 of the HRC. Under the “protection” provision it is considered a ground of discrimination to discriminate against a person because that person has made a human rights complaint, is named in a complaint, gives evidence, or otherwise assists in a complaint or human rights proceeding.

3. The Complaint Process

The B.C. Human Rights Tribunal handles complaints made under the HRC. The first step in filing a complaint with the Tribunal is to fill out a Complaint Form, which are available from the Tribunal at its office address, on its website or from other local Government Agent offices. There are helpful self-help guides to filling out complaint and response forms on the Tribunal's website. The B.C. Human Rights Coalition can also assist in drafting the complaint and completing the Complaint Form. See **Section I.B: Resources**.

a) *Who Can Lodge a Complaint*

A complaint may be made by an individual victim of discrimination, one of the victims on behalf of the group or class, or by someone acting as a representative of the victim(s). If the Complaint Form is being filled out on behalf of another person or group or class of persons, the Representative Complaint Form must also be filled out and accompany the Complaint Form when sent to the Tribunal.

b) *How to File a Complaint*

The Complaint Form must be filed with the Tribunal via mail, fax or e-mail (see **Section I.B: Resources**). If file by e-mail, one must also send in a signed and dated copy within 21 days. The party who is filing the complaint should be aware of the time limits. There is a general **six month** limitation period, which may be extended in certain circumstances. See **Section II.C.5.d: Limitation Period**.

c) *Review Process*

Once the Complaint Form is filed, the Tribunal will review the form to determine if it fits under the HRC and if it appears to meet the six-month limitation period. If the Tribunal believes that it may not have the power to deal with the complaint in substance or it is out of time, the complainant will be given a chance to respond before the Tribunal decides whether or not to proceed with the complaint. If the Tribunal believes it can proceed, it will send the Complaint Form to the respondent for a response to the complaint.

d) *Settlement Meeting*

Parties may agree to a settlement meeting at any time after the complaint has been filed. Guides for settlement meetings and hearings are available from the Tribunal at its office address or on its web site. Additionally, the B.C. Human Rights Coalition may be able to assist a complainant at a settlement meeting or with settlement negotiations in general.

At a settlement meeting, the Tribunal can make recommendations and provide opinions as to the merits of the case, but cannot force parties to settle. Parties to the dispute may agree to voluntarily settle, in which case the complainant will file a Complaint Withdrawal Form and the mediating member will order that the complaint be dismissed. A member of the Tribunal has the power to issue a binding order at the conclusion of the hearing where the parties cannot agree to settle, but nevertheless consent to the final determination of the case at that time (s. 37).

e) *Procedural Options for Employees*

The HRC is a particularly useful tool for seeking redress for a client who has been discriminated against in employment situations. Since the B.C. Human Rights Coalition may potentially handle much of the legal work free of charge, a complaint under the HRC may provide a valuable alternative to a client who cannot afford a lengthy wrongful dismissal suit. Additionally, claimants may choose to pursue a wrongful dismissal suit alongside a human rights complaint as long as they do not benefit from double recovery. An employee who believes that they were discriminated against in relation to their employment may have more than one procedural option to choose from:

(1) Employer's Internal Complaint Procedure

Assuming one exists, this is the most immediate way to obtain a remedy. There is typically a heavy burden on the employee however, as witnesses may be reluctant to come forward and legal counsel is usually not retained at this stage.

(2) Grievance and Arbitration (Union)

Unionized workers are entitled to representation by their union. If the union backs out of its obligation, the worker may wish to file a human rights complaint and may even decide to name the union as a party if the worker has grounds to believe the union is complicit in the alleged discrimination. If the matter is not resolved during the initial stages of the union grievance procedure, an arbitration hearing may be held and an arbitrator will determine liability and relief.

(3) Human Rights Complaint

Another option is, of course, to file a human rights complaint with the B.C. Human Rights Tribunal (see above for the grounds, areas, exemptions, and complaint process, etc.) or, for employment under federal jurisdiction, with the Canadian Human Rights Tribunal (see below for the grounds, areas, exemptions, and process, etc.). This may be a particularly beneficial option for an employee who was wrongfully dismissed and would like their job back since the B.C. Human Rights Tribunal has the authority to order reinstatement. The Tribunal can also award lost wages and damages for injury to dignity. However, note that if a complainant is also seeking severance pay and/or punitive damages in a civil suit, they will not be allowed to recover from both proceedings.

(4) Employment Standards Branch

Employees may choose to file a complaint through the Employment Standards Branch (ESB) self-help kit if their employer has breached the Employment Standards Act (see **Chapter 6: Employment Law**). There is a **six-month** limitation period from the date of the breach and once a complaint has been filed with the ESB, the complainant is barred from initiating a court action on the same matter. Remedies awarded by the Employment Standards Tribunal are intended to make the employee "whole" financially by way of compensation rather than reinstatement. If the complainant is seeking reinstatement they should consider pursuing the issue through the Human Rights Tribunal. It is a strategic decision

whether to pursue a claim in the Human Rights Tribunal or the Employment Standards Branch. It is significant to note that wage claims are very limited within the Employment Standards Branch.

(5) Civil Action

A final option may be to bring a civil action for wrongful dismissal either in Small Claims Court (see **Chapter 22: Small Claims**) or B.C. Supreme Court, depending on the amounts claimed. However, a recent Supreme Court decision clarified that the common law will not provide a remedy for discrimination in the employment context. Please refer to *Keays v. Honda*, 2008 SCC 39 [*Keays*].

The court in *Keays* held that breaches of the HRC must be remedied within the statutory scheme of the Code itself. So even if the reason for dismissal was discriminatory, in a civil action, the complainant will generally only be able to recover damages based on inadequate notice (severance pay). See **Chapter 6: Employment Law**. Compensation for the discrimination itself must proceed before the Human Rights Tribunal.

In rare cases the court may further compensate the complainant in a civil action if the employer has acted unfairly or in bad faith when dismissing an employee. The basis for these additional damages is a breach of the implied term of an employment contract that employers will act in good faith in the manner of dismissal (i.e. payment for such damages can be deemed to have been in the contemplation of the parties at the formation of the contract). In *Keays* the Supreme Court held that any such additional award must be compensatory and must be based on the actual loss or damage suffered by the employee, which can include expenses related to mental distress stemming from the manner of dismissal. Compensable conduct might include, but is not limited to, attacking the employee's reputation at the time of dismissal, misrepresentations regarding the reason for the dismissal, or dismissal meant to deprive the employee of a pension benefit or other right such as permanent status. However, normal distress and hurt feelings arising from the dismissal itself are not grounds for additional damages.

The courts are even more conservative in their approach to awarding punitive damages meant to punish the employer for their conduct in dismissal. Punitive damages will only be awarded if the employer's conduct was harsh, vindictive, reprehensible, malicious and extreme in its nature. Thus, if the complainant is primarily concerned with being compensated for injuries to their dignity and/or denouncing their employer's discriminatory behaviour, then they should file a complaint with the Human Rights Tribunal alongside a civil action for severance pay.

Whatever procedural route an employee ultimately chooses, if an employee is experiencing ongoing harassment on a prohibited ground of discrimination, he or she should maintain records or a journal with dates, times, places, witnesses, details of particular incidents, and even a description of the emotional effects of the harassment.

4. Remedies

Available remedies for a justified complaint are listed in s. 37(2) of the HRC. Non-pecuniary remedies include: an order that the respondent cease the discriminatory conduct; a declaratory order that the conduct complained of is, in fact, discriminatory; and an order that the respondent take steps to ameliorate the effects of the discrimination such as the implementation of human rights policy and training. Pecuniary remedies include compensation for lost wages/salary or expenses, re-instatement of a lost benefit, and compensation for emotional damages. Unlike severance pay, compensation for lost wages is not based on the concept of reasonable notice. A successful complainant may recover lost wages for the entire period between their dismissal and the hearing date if they can show that they have been making reasonable efforts to find new employment. There is no maximum limit on damage awards. Note however that if a complainant seeks a remedy in both the Human Rights Tribunal (e.g. for lost wages) and in civil court (e.g. for severance pay) and are successful in both proceedings they must forfeit one award or the other as they are not entitled to double recovery.

Although the pecuniary remedies available under the Code are meant to be compensatory in nature, not punitive, s. 37(4) does give the Tribunal authority to order costs against either party as condemnation of improper conduct during the Tribunal processes. This order is independent of a finding that the complaint is justified. Additionally, s. 37(2) gives the Tribunal authority to award legal and other related expenses against the respondent if the complaint is found to be justified.

The Tribunal will not provide remedies in every situation where there has been real or perceived discrimination. For example, the Tribunal will not award damages for lost wages/salary following a discriminatory dismissal but during a period for which the complainant was medically incapable of working. . Please refer to *Senyk v. WFG Agency Network* (No. 2), 2008 BCHRT 376. This is because even absent the discrimination the complainant would not have been able to earn wages or a salary.

An order of the Tribunal may be registered in the B.C. Supreme Court so that it is enforceable as though it were an order of the court. No appeal procedure is provided for in the HRC, but the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 may be of some assistance if a client is dissatisfied with the Tribunal's decision (see **Chapter 20: Public Complaint Procedures**).

5. Costs

An emerging area of concern in human rights litigation is the issue of costs. Pursuant to s. 37(4) of the HRC, the purpose of awarding costs has traditionally been to penalize a party who acts improperly during a hearing, thereby interfering with the objective of the B.C. Human Rights Tribunal. In these cases costs are awarded punitively and do not necessarily reflect the actual expenses suffered by the other party due to the improper conduct.

More recently, the B.C. Human Rights Tribunal has extended the practice of awarding costs beyond penalizing parties who act improperly and have begun to award compensation for legal and other related expenses in cases where there has been a contravention of the HRC. In *Senyk v. WFG Agency Network* (No. 2) 2008, BCHRT 376, the Tribunal ordered the respondent to pay the complainant reasonable legal fees and other related expenses which she incurred as a result of WFG's contravention of the HRC. It held that under s. 37(2)(d)(ii) of the *Code*, the Tribunal has the authority to order a respondent to compensate a complainant who has been discriminated against for all, or a portion of, the legal and other related expenses incurred in filing and pursuing the complaint. A specific order to compensate the complainant for legal and other related expenses will be fact-dependent and will be within the discretionary power of the member hearing the complaint.

The matter of costs has also arisen in the federal human rights case of *Canada (Attorney General) v. Mowat* 2009 FCA 309. The issue before the Federal Court of Appeal was whether or not the Canadian Human Rights Tribunal had jurisdiction to award legal costs. The Federal Court of Appeal determined that Parliament did not intend to grant to the Tribunal the jurisdiction to award legal costs because the issue of costs is not expressly addressed in the Canadian Human Rights Act. The Supreme Court of Canada has since granted the Canadian Human Rights Commission's application to appeal this decision.

6. Judicial Review

If an individual disagrees with a decision by a Tribunal, he or she may appeal to the Supreme Court of British Columbia for a "judicial review" A judicial review differs from an appeal to a higher court. In an appeal, the court has the authority to decide whether or not it agrees with a decision. In a judicial review, the B.C. Supreme Court simply decides whether or not there is a "ground" for review and may only disturb the Tribunal's decision if it can demonstrate that the Tribunal:

- Made an "error of law", e.g., an incorrect interpretation of the HRC
- Made a finding of fact that is unreasonable or based on lack of evidence
- Acted unfairly with regards to the rules of procedure and natural justice
- Disregarded legislative requirements; used its discretion arbitrarily, in bad faith, or for an improper purpose; and/or based its decisions on irrelevant factors

If the Tribunal has made any of these errors, the Court will set aside the decision and will usually direct the Tribunal to re-hear the case. Section 57 of the Administrative Tribunals Act mandates that an application for a judicial review must be submitted within 60 days of the date the decision was issued; however, the Court may extend the time in limited circumstances. In order to seek a judicial review, an individual is required to prepare a petition and affidavit, file the petition and affidavit at the B.C. Supreme Court, and serve a copy of the filed petition and affidavit on the Tribunal, the Attorney General of British Columbia, and any person whose interests may be affected by the order you desire the Court to make.

7. Reasons Why the Complaint May Not Proceed

As mentioned above, the Tribunal may refuse to accept a complaint for filing because it does not have jurisdiction due to the nature of the complaint or when it was brought. Once a complaint has been filed, however, the Tribunal may nevertheless dismiss it prior to hearing on application from the respondent for a variety of reasons (s. 27). Among the reasons the Tribunal may dismiss a filed complaint are (check the HRC for a complete list):

a) Complaint Outside the Tribunal's Jurisdiction

The Tribunal will not proceed with a complaint where it is persuaded that the complaint is not, in fact, based on a form of discrimination enumerated by the HRC, or that the complaint falls within the federal jurisdiction. In addition, even if the Tribunal accepts a complaint for filing, the respondent may still have the option to dispute jurisdiction.

b) Substance of Complaint Dealt with by Another Proceeding

Where another proceeding, such as a labour arbitration, has adequately resolved the substance of a complaint, it will usually be dismissed. A complaint may also be deferred if such an alternative proceeding is pending.

c) No Reasonable Basis for Holding a Hearing

The Tribunal may discontinue proceedings where the Tribunal is persuaded that the complaint is made in bad faith, would be of no benefit, would not further the purposes of the HRC, and/or has no reasonable prospect of success. The vast majority of cases do not survive an application to dismiss under s. 27 of the HRC. Please refer to *Marquez v. Great Canadian Casinos and another* (No. 2), 2011 BCHRT 117.

d) Complaint Brought Outside Limitation Period

As mentioned above, there is a general **six-month** limitation period. The six month period begins from the last instance of any continuing discrimination. It is not always clear when the period starts counting. The issue of whether, or how many, instances of discrimination should be considered a “continuing contravention” (thus effectively extending when the six-month period) is often disputed. See *Merzer v. Logan and others*, 2008 BCHRT 217 for the most recent discussion of how to define a “continuing contravention”; see also *O’Hara v. B.C. (Human Rights Commission)*, 2003 BCCA 139.

Additionally, under s. 22(3) of the HRC, the six month time limit may be extended, regardless of whether there is a “continuing contravention”, if it is in the public interest to accept the late complaint and no substantial prejudice is caused to any party. When seeking an extension of the time limit, the complainant bears the burden of establishing both of the requirements of s. 22(3). Refer to *Chartier v. School District No. 62*, 2003 BCHRT 39. Both the reason for the delay and its length are factors, among others, that may be important considerations in determining whether it is in the public interest to accept a late-filed complaint. Please refer to *Earnshaw v. Lilydale Cooperative and UFCW, Local 1518*, 2005 BCHRT 146.

C. The Canadian Human Rights Act

The Canadian Human Rights Act [CHRA] prohibits certain forms of discrimination in the federal jurisdiction. As mentioned above, that jurisdiction is set out in s. 91 of the Constitution Act, 1867. The CHRA applies to both public and private bodies and individuals and covers federal departments and agencies, federal Crown corporations, chartered banks, the broadcast media, airlines, buses and railways that travel between provinces, First Nations, and other federally regulated industries such as mining operations.

1. Prohibited Grounds of Discrimination

The eleven prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, conviction for which a pardon has been granted, and mental or physical disability (including previous or present alcohol dependence). These grounds apply to all activities covered by the CHRA. Section 3(2) explicitly makes discrimination on the grounds of pregnancy illegal and s. 14(2) explicitly prohibits sexual harassment.

Note that the federal equal pay provisions are broader than the provincial ones since it is discriminatory practice to pay different wages to female and male employees for work of “equal value”, even if the work itself is not similar. Factors considered when defining “equal value” include skills required, responsibilities, and working conditions. Pursuant to s. 65(1), employers are liable for the discriminatory acts of their employees.

2. Activities Where Discrimination is Prohibited

The activities where discrimination is prohibited include:

- a) the provision of goods, services, facilities or accommodation customarily available to the general public;
- b) the provision of commercial premises or residential accommodation;
- c) employment, employment application advertising, and membership in, or benefit from, employee organizations;
- d) publication of discriminatory notices, signs, symbols, emblems or other representations;
- e) situations where an individual filed a complaint under the CHRA; and
- f) communication of “hate” messages.

3. Exceptions

Under s. 15, there are general exceptions to practices considered discriminatory, comparable but not identical to those found in B.C.’s HRC, such as those relating to *bona fide* occupational requirements, pension plans, and insurance schemes. Retirement policies are still exceptions under ss. 9 & 15 of the CHRA which is now a significant difference from the HRC of B.C., where mandatory retirement is now generally prohibited.

Section 16 of the CHRA (similar to s. 42 of the B.C. HRC) states that an Equity plan designed to reduce the disadvantage suffered by a group of individuals, where that disadvantage is related to one of the grounds discussed above, is not discrimination in and of itself.

Previously, s. 67 of the CHRA stated that the CHRA did not apply to the Indian Act, with the result that any actions taken by band councils or the federal government under the Indian Act were exempt from the CHRA. Section 67 has since been repealed, which was a contentious move among some First Nations leaders.

4. Filing a Complaint Under the Act

Any individual or group may file a complaint with the Canadian Human Rights Commission. If someone other than the alleged victim files a complaint, the Commission may refuse to proceed without the victim’s consent. The Commission itself may lay a complaint or it may discontinue an investigation if it deems the complaint to be frivolous or if other alternatives would be more appropriate.

The Commission will provide advice and assistance in proceeding with the complaint. Correspondence may be addressed to the Ottawa office but in practice it is generally preferable to deal with the Commission’s Vancouver office. Please consult the Commission’s website for a detailed description of the complaint process (see **Section I.B: Resources**, above).

a) How Complaints are Handled

It is, in most cases, both possible and preferable that complaints be resolved through discussions leading to mutual agreement. To facilitate this, the CHRA provides for an investigation stage and, where necessary, a conciliatory stage. By law, the complaint investigator cannot also be the conciliator, although in practice the investigator attempts to resolve the dispute whenever possible.

Instead of, or subsequent to, these stages, the Commission may refer the complaint to a quasi-judicial Canadian Human Rights Tribunal. The Commission has the power to assist the complainant at all stages of the process, and usually represents the complainant at the hearing stage. However, it acts in a more neutral fashion at the investigation and mediation stages. Please note that the caveat about the difficulty of proving specific discrimination, mentioned in regard to the B.C. HRC, also applies to the federal CHRA.

The Tribunal may award damages and relief similar to an injunction. An order of the Tribunal is enforceable as if it were an order of the Federal Court. Any judicial review is governed by the limitation period set out in the Federal Courts Act, R.S. 1985, c. F-7 (see **Chapter 20: Public Complaints Procedures**).

It is an offence, punishable on summary conviction, to obstruct any investigation under the CHRA (s. 60).

b) Reasons Why Complaints May Not Proceed

Section 41 of the CHRA lists the most common reasons for the termination of an investigation. The reasons are very similar to those discussed under the HRC, including:

- a) the complaint is beyond the jurisdiction of the Commission;
- b) the complaint could more appropriately be dealt with under another Act;
- c) the complaint is trivial, frivolous, vexatious, or made in bad faith;
- d) the complainant has not exhausted all reasonable alternative grievance or review procedures (if collective agreement or arbitration procedures are available, the client will be expected to pursue them); and
- e) the complaint was not filed within **one year** of the alleged act of discrimination (the Commission has the power to extend this period in certain circumstances).

D. B.C. Civil Rights Protection Act

The Ministry of the Attorney General administers the Civil Rights Protection Act, which defines a prohibited act and civil remedies or damages that may be available for victims of such acts. The types of actions and remedies available under the Act may not be suitable for all clients, as these actions are tortious in nature and are heard in the Supreme Court. Usually the HRC or CHRA, whichever applies, will provide more useful protection.

The more pertinent points of the legislation are:

- “Prohibited act” is defined as conduct or communications that interfere with civil rights by promoting hatred or contempt or by promoting the inferiority or superiority of groups classified by colour, race, religion, ethnic origin, or place of origin (s. 1).

- The Attorney General may choose to intervene in such actions, but, in any case, the Attorney General must be notified within 30 days of the start of an action (s. 3).
- Types of damages: general or exemplary. The court may order other types of relief such as an injunction in addition to or in lieu of damages (s. 4).
- For an offence under the Act, a person may be liable for a fine up to \$2,000 and/or six months imprisonment. A corporation or other public body may be liable for a fine of up to \$10,000, and any directors or top personnel who were or should have been aware of the offending conduct may be found personally liable (s. 5).

APPENDIX A: SAMPLE LETTER OF DISCLOSURE AND PARTICULARS OF REMEDIES SOUGHT

Law Students' Legal Advice Program
Rm. 158, Faculty of Law
University of British Columbia
Vancouver, BC V6T 1Z1

May 29th, 2009

WITHOUT PREJUDICE

Big Time Law Firm
1678 – 1700 W Pender St.
Vancouver, BC V6F 3J6

Attn: Ms. Julia Partner

Dear Ms. Partner:

**Re: Jane Doe v. Big Brother Inc. (Tribunal Case No. 5412)
Complainants' Disclosure and Requested Remedies**

Jane Doe has recently consulted us regarding her Human Rights complaint against your client, Big Brother Inc.

Please find enclosed the following documents:

1. Three pay stubs for the pay periods of Apr. 16th – 30th 2008, May 1st – 15th 2008 and May 16th – 31st 2008 respectively.
2. Respondent's notes from meetings with Ms. Doe dated July. 4th and Aug. 28th 2008.
3. A doctor's note from Dr. Zeus dated Oct. 5th, 2008.
4. An email exchange between the Respondent and Ms. Doe dated Dec. 8th, 2008.
5. Ms. Doe's job search record for the period between Jan. 2009 and May 2009.

Any additional documents will be disclosed on an ongoing basis accompanied by an updated list of documents.

Described below are Ms. Doe's requested remedies in accordance with s.37 of the *B.C. Human Rights Code* ("Code"):

1. An order pursuant to s.37(2)(a) of the *Code* requiring Big Brother Inc. to cease and desist discriminating against Jane Doe and to refrain from committing the same or a similar contravention;
2. A declaration pursuant to s.37(2)(b) of the *Code* that Jane Doe was discriminated against by Big Brother Inc. when she was fired on the basis of sex and religion;
3. An order pursuant to s.37(2)(d)(ii) of the *Code* that Big Brother Inc. pay Jane Doe damages for lost wages in the amount of \$12,000 for the 5 months since Ms. Doe's dismissal from Big Brother Inc. and during which Ms. Doe has been actively but unsuccessfully seeking employment;
4. An order pursuant to s. 37(2)(d)(iii) of the *Code* that Big Brother Inc. pay Jane Doe compensatory damages for injury to dignity, feelings and self-respect in the amount of \$4000 for discriminatory conduct on the basis of sex and religion.

Yours truly,

Larry David
Law Student

Encls.

Cc: Jane Doe (by mail)