CHAPTER SIX: HUMAN RIGHTS

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Current as of August 1, 2023

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CHAPTER SIX: HUMAN RIGHTS

This Manual is intended for informational purposes only and does not constitute legal advice or an opinion on any issue. Nothing herein creates a solicitor-client relationship. All information in this Manual is of a general and summary nature that is subject to exceptions, different interpretations of the law by courts, and changes to the law from time to time. LSLAP and all persons involved in writing and editing this Manual provide no representations or warranties whatsoever as to the accuracy of, and disclaim all liability and responsibility for, the contents of this Manual. **Persons reading this Manual should always seek independent legal advice particular to their circumstances.**

I. INTRODUCTION

When faced with a human rights issue, the first step is to determine whether the provincial legislation, the BC *Human Rights Code*, RSBC 1996, c 210 (HRC or the "Code"), applies or whether the problem falls within federal jurisdiction under the *Canadian Human Rights Act*, RSC 1985, c H-6 (CHRA).

Section 91 of the *Constitution Act, 1867* 30 & 31 Victoria, c 3 (UK), reprinted in RSC 1985, App II, No 5, lists the matters that fall under federal jurisdiction. If the complaint is covered by federal legislation, the matter would be handled under the CHRA by the Canadian Human Rights Commission (CHRC). The limitation date under the federal legislation is **1 year**. If the complaint against the respondent (the party who is being alleged to have contravened the Code) is based on an action they undertook in their capacity as an agent or employee of a body that falls under federal jurisdiction, then that complaint could be governed by federal legislation. However, a complaint involving a federally regulated employee who is alleged to have discriminated against a provincially regulated employee in a shared workspace may possibly be brought under the provincial HRC, depending on the circumstances. For more information, see the Supreme Court of Canada's decision in *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62 in which the court confirmed that discrimination in the employment context "may include discrimination by [the complainant's] co-workers, even when those co-workers have a different employer": para 3.

Examples of some industries that are federally regulated and therefore fall within federal human rights jurisdiction are:

- Banking – but not most credit unions (note Coast Capital Savings is now under federal regulation).
- Telecommunications (internet, television and radio) – but not call centres.
- Transportation that crosses provincial or international boundaries (airlines, trains, moving companies, couriers).
- First Nations governments (but not necessarily all businesses or services provided on reserves)
- RCMP

The CHRC has a useful assessment tool that can assist in determining if an entity falls under federal jurisdiction. It can be found at https://www.chrc-ccdp.gc.ca/en/complaints/make-a-complaint. This tool is not always accurate, so if an entity is not found there but you have reason to believe that it is federal, follow up with further inquiries and analysis. See **Section IV** of this chapter for more on matters under federal jurisdiction.

Section 92 of the *Constitution Act, 1867* lists the matters that fall under provincial jurisdiction, including property and civil rights in the province, as well as generally all matters of a merely local or private nature in the province. If a complaint is covered under the HRC, the matter will come before the British Columbia Human Rights Tribunal (BC HRT). Human rights violations that have taken place in BC will usually fall under the provincial legislation. In 2018, the limitation date under provincial jurisdiction was extended to **one year** from the previous six-month limitation period.

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 purposes underlying it.

II. GOVERNING LEGISLATION AND RESOURCES

A. Legislation

Human Rights Code, RSBC 1996, c 210, as amended [HRC or the Code]

Canadian Human Rights Act, RSC 1985, c H-6, as amended [CHRA]

Civil Rights Protection Act, RSBC 1996, c 49 [CRPA]

B. Resources

BC Human Rights Tribunal

1270 - 605 Robson Street
Vancouver, BC, V6B 5J3
E-mail: BCHumanRightsTribunal@gov.bc.ca
Website: www.bchrt.bc.ca

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

- An independent administrative tribunal created by the BC *Human Rights Code*, responsible for accepting, screening, mediating, and adjudicating provincial human rights complaints. The website is very helpful. The Guides and Information Sheets provide thorough procedural information in English, and there is also some information available in Chinese and Punjabi. The Tribunal's decisions dating back to 1997 are available online through the BC HRT website, and are also available on CanLII BC (www.canlii.org/en/bc/bchrt/).

The BC Human Rights Clinic

300 – 1140 West Pender Street
Vancouver, BC, V6E 4G1
Website: www.bchrc.net

Telephone: (604) 622-1100
Toll-free in Canada: 1-855-685-6222
Fax: (604) 685-7611

- The BC Human Rights Clinic is operated by the Community Legal Assistance Society (CLAS) and is funded by the BC Ministry of the Attorney General. The Clinic provides free legal representation to low-income claimants or those unable to represent themselves before the BC Human Rights Tribunal due to lack of capacity or disability. It also provides a free Short Service Clinic on Mondays between 9 am and 4:30 pm and Wednesdays between 5pm and 8pm.

The BC Civil Liberties Association (BCCLA)

550 - 1188 West Georgia Street
Vancouver, BC 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 implicates *Charter* rights, the BCCLA may provide assistance.

The Canadian Human Rights Commission

Website: www.chrc-ccdp.ca

Western Region
Canada Place, Suite 1645, 9700 Jasper Avenue
P.O. Box 21, Edmonton, Alberta T5J 4C3

Telephone: (780) 495-4040
TTY: 1-888-643-3304
Toll-Free: 1-888-214-1090
Fax: (780) 495-4044

National Office
344 Slater Street, 8th Floor
Ottawa, Ontario K1A 1E1

Telephone: (613) 995-1151
TTY: 1-888-643-3304
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 the case to conciliation or to the Canadian Human Rights Tribunal for a hearing.

The BC Office of the Human Rights Commissioner

#750, 999 Canada Place
Vancouver, BC, V6C 3E1
Website: https://bchumanrights.ca

Telephone: 1-844-922-6472
E-mail: info@bchumanrights.ca

- The *Human Rights Code Amendment Act* recently re-established a Human Rights Commission in British Columbia. The province's previous human rights commission was dismantled in 2002.
- Kasari Govender was appointed as BC's first Independent Human Rights Commissioner on September 3, 2019. The Commission will promote human rights, undertake research and offer public education and outreach. It will also examine human rights implications of policies, programs or legislation and make recommendations if aspects of policies, programs or legislation are inconsistent with the human rights protections. Finally, although the Commission will not have the power to file human rights complaints, it will have the power to intervene in complaints before the Human Rights Tribunal. See s 47.12 of the BC *Human Rights Code* for a full list of the Commissioner's powers.

III. THE BC HUMAN RIGHTS CODE

The BC *Human Rights Code* (HRC or the "Code") protects people from discrimination in certain protected areas and provides a mechanism for filing a complaint regarding discriminatory treatment. It is administered by the BC Human Rights Tribunal. The HRC applies to matters within the jurisdiction of the province (as established by s. 91 of the Constitution Act, 1867) and covers both public and private bodies, as well as individuals. For example, the HRC applies to provincially regulated employers, unions, professional associations, most commercial businesses, Crown corporations, landlord-tenant relationships, and the provincial government itself.

The Tribunal's decisions are available online at www.bchrt.bc.ca/law-library/decisions. They are indexed by year dating back to 1997 and searchable based on a variety of criteria. They are also available on CanLII BC (www.canlii.org/en/bc/bchrt/).

A. Framework of a Discrimination Complaint

1. Complainant's Case

As outlined in *Moore v British Columbia (Education)*, 2012 SCC 61 at para 33, the complainant must prove the following three elements on a balance of probabilities to establish their case:

1. That they have a characteristic that is protected under the HRC;
2. That they experienced an adverse impact in an area protected by the HRC; and
3. That their protected characteristic was a factor in the adverse impact they experienced.

Direct discrimination occurs when a person or group is singled out for differential treatment based on their protected characteristic(s) (*M. v H.*,1999 2 SCR 3). Racial slurs, sexual harassment, and homophobic comments are all examples of "direct discrimination."

Indirect or "adverse effect" discrimination occurs when laws or policies do not overtly discriminate, but produce a disproportionate negative impact on members of groups sharing a protected characteristic (*Fraser v. Canada (Attorney General)*, 2020 SCC 28). Many complaints of discrimination on the basis of disability involve adverse effect discrimination because they relate to a facially neutral rule, standard, policy or practice that creates a disadvantage for someone in connection with their disability.

If any one of the three elements of the complainant's case is missing, there is no discrimination. If the complainant proves the three elements of their case, then the burden shifts to the respondent to justify its conduct. If the respondent proves its conduct was justified, then there is no discrimination. If the respondent's conduct is not justified, discrimination will be found to have occurred.

2. Respondent's Case

In the employment context, a respondent can justify its conduct by proving on a balance of probabilities that the rule, standard, practice, or requirement being challenged is a *bona fide* occupational requirement (BFOR). In *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union*, [1999] 3 SCR 3 at para 54 [*Meiorin*], the Supreme Court of Canada (SCC) set out a three-step analysis for determining whether a standard is a BFOR:

1. The employer adopted the standard for a purpose rationally connected to the performance of the job;
2. The employer adopted the particular standard with an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and

3. The standard is reasonably necessary to fulfil its purpose. The employer must show that it could not accommodate individual employees with the protected characteristic without experiencing undue hardship.

In *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 [*Grismer*] at 881, the Supreme Court of Canada considered the application of the *Meiorin* test to a public services complaint and set out the three-stage analysis for determining whether the respondent had a *bona fide* and reasonable justification for its conduct:

1. The respondent's behaviour was for a purpose or goal that is rationally connected to the function being performed;
2. The respondent behaved in good faith; and
3. The respondent's behaviour was reasonably necessary to accomplish the purpose or goal, in the sense that the respondent cannot accommodate the complainant without undue hardship.

Note that most legal disputes arise in regard to the third part of the test – that is, whether the respondent reasonably accommodated the complainant to the point of undue hardship.

B. Protections and Exemptions

The HRC provides protection against discrimination in several different areas, which are listed in sections 7–14. These sections will be further detailed in order below. Please refer to **Section III.A.1-7.** However, for many of these protected areas, the HRC provides certain exceptions for which discrimination is not prohibited.

Additionally, section 41, commonly referred to as the group rights exemption, allows non-profit organizations to engage in what might otherwise be deemed prohibited discriminatory conduct. It allows charitable, philanthropic, educational, and other not-for-profit organizations to give a preference to members of the identifiable group or class of persons they serve. For more information, please see *Vancouver Rape Relief Society v Nixon*, 2005 BCCA 601 at paras 43–59 [*Nixon*]. (Please note that this case involves a sex-binary-focused discussion of transgender identity that may be troubling for some readers.)

Furthermore, under section 42, it is not discriminatory 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 Indigenous identity, race, colour, ancestry, place of origin, physical or mental disability, sex, sexual orientation, or gender identity or expression, and achieves or is likely to achieve that purpose. Section 42 also gives the Human Rights Commissioner jurisdiction to approve special programs that are aimed at improving the situation of individuals or groups that have suffered historical disadvantage. If pre-approved, a special program is deemed not to contravene the *Code*.

1. Discriminatory Publication

Section 7 deals with forms of discrimination against individuals or groups of individuals which are published, displayed, or made public. This section prohibits hate literature and other such communications that expose or are likely to expose someone in a protected group to hatred or contempt, as well as publications that indicate discrimination or intent to discriminate against a protected group. Please refer to *Oger v Whatcott (No 7)*, 2019 BCHRT 58 at paras 93–97 for the former, and *Li v Mr B*, 2018 BCHRT 228 at paras 95–97 [*Li*] for the latter.

Exception: Section 7 does **not** apply to communications that are intended to be private or are related to activities otherwise permitted under the HRC, see s. 7(2) and *Li* at paras 98–104.

2. Discrimination in Accommodations, Services, and Facilities "Customarily Available to the Public"

Section 8 states that a person may not deny or discriminate against any person or class of persons regarding an accommodation, service, or facility customarily available to the public because of that person's Indigenous identity, race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression and/or age.

University of British Columbia v Berg, [1993] 2 SCR 353 at 384–387 [*Berg*] explains the concept of "customarily available to the public". A service is customarily available to the public if the nature of the relationship is public. Courts and tribunals look at the relationship between the facility and the complainant, as well as the nature of the service itself. In *Berg*, the court found that a university has its own public and that the relationships between students and professors, who present the public face of the university, are public in this context. Please refer to *HMTQ v McGrath*, 2009 BCSC 180 at paras 89–93 for a more recent case that discusses when a service is "customarily available to the public".

Additionally, courts have found that services provided to members of a group who come together as a result of a private selection process, based on their personal attributes do not qualify as services "customarily available to the public", and are therefore not subject to section 8 of the HRC. Please refer to *Marine Drive Golf Club v Buntain et al and BC Human Rights Tribunal*, 2007 BCCA 17 at paras 48–56.

While there is no enumerated list of relationships that count as "customarily available to the public," locales such as pubs, night clubs, hotels, theatres, transportation services, education facilities, insurance, medical treatment in hospitals and clinics, strata council and property management services in condominiums, services provided by police, access to sidewalks and public space, government services, and participation in sporting events have all been found to entail public relationships. Licensing services and facilities may also involve public relationships. For example, discrimination prohibited by section 8 was ultimately found when the BC Motor Vehicle Branch maintained a blanket refusal to issue driver's licenses to those with certain visual impairments regardless of actual driving ability: *BC (Superintendent of Motor Vehicles) v BC (Council of Human Rights)*, [1999] 3 SCR 868 [*Grismer*].

Legislation is not a "service customarily available to the public" and bare challenges to legislation can't proceed at the HRT, see e.g. *Phillips v BC Ministry of the Attorney General*, 2019 BCHRT 76 at paras 11–12.

For a recent case setting out the three-part test for *prima facie* discrimination in a services context, see *Moore v British Columbia (Education)*, 2012 SCC 61, a Supreme Court of Canada case about a school district that cancelled a special education program, requiring a dyslexic student to enroll in specialized private school. The Supreme Court of Canada reviewed whether the school district discriminated against the student by failing to provide necessary accommodation, and ultimately upheld the BC Human Rights Tribunal's finding of discrimination.

Moore confirmed the test for *prima facie* discrimination, also known as the "complainant's case" (on the move away from Latin in human rights cases, see *Vik v Finamore (No. 2)*, 2018 BCHRT 9 at para. 48-50). To succeed in their complaint, a complainant must show:

1. That they have a characteristic that is protected under the HRC;
2. That they experienced an adverse impact with respect to an area protected by the HRC; and
3. That their protected characteristic was a factor in the adverse impact they experienced. This is also known as the "nexus".

Defences: If a complainant can prove the three elements of their case set out above, the burden shifts to the respondent to justify their conduct. There are a number of circumstances where adverse treatment on the basis of a protected characteristic is not discrimination, if it can be shown to be supported by a "*bona fide* and reasonable justification" (BFRJ) (as per the wording of section 8(1)). For the most authoritative perspective, see *Grismer*, which applied the three-part *Meiorin* test from the Supreme Court of Canada in an attempt to justify a discriminatory standard by raising a BFRJ. This attempt was unsuccessful (see also **Subsection 6**: Discrimination in Employment and the Duty to Accommodate).

The respondent must justify the standard by satisfying three elements:

1. It adopted the standard for a purpose or goal that is rationally connected to the function being performed;
2. It adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and
3. The standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristic of the claimant without incurring undue hardship.

Exceptions: 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. For a case on the interpretation of public decency in the context of excluding transgender peoples from public washrooms, see *Sheridan v. Sanctuary Investments Ltd. (No. 3),* 1999 33 CHRR 467 in which the Tribunal rejected the argument that it was necessary to exclude a transgender woman from the washroom matching her gender identity in order to maintain "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. Note that statutory exceptions to human rights legislation are to be narrowly construed (*Zurich Insurance Co. v. Ontario (Human Rights Comm.),* [1992] 2 SCR 321).

3. Discrimination in Purchase and Rental of Property

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

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 Indigenous identity, race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, age, and/or lawful source of income.

Defences: Although the text of sections 9 and 10 do not contain language specifically providing for a defence to a claim of discrimination under these provisions, like all respondents, landlords and property sellers may be able to justify *prima facie* discrimination

if they can satisfy the three elements of the *Grismer/Meiorin* test. This will require that they accommodated the complainant to the point of undue hardship.

Exceptions: Section 10(2)(a) says the protection from discrimination in tenancy does not apply if the tenant is sharing the use of any sleeping, bathroom, or cooking facilities with the person making the representation (e.g. as a roommate). Furthermore, the reserving of specific residences for individuals aged 55 or older or for people with disabilities does not constitute discrimination (HRC, s 10(2)(b) and (c)).

4. Discrimination in Employment Advertisements and Interviews

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

Exception: An employment advertisement that expresses a limitation, specification or preference as to a protected characteristic may be permitted if it is based on "*bona fide* occupational requirement(s)" as per the wording of section 11. There are also exceptions for non-profit organizations and employment equity programs (see Exemptions on 6-6).

For case law on discrimination during the interview process, please refer to *Khalil v Woori Education Group*, 2012 BCHRT 186 at paras 29–45. Under section 13, an employer cannot refuse to employ someone on the basis of any of the prohibited grounds of discrimination unless there is a *bona fide* occupational requirement (see **Subsection 6**: Discrimination in Employment and the Duty to Accommodate).

5. Discrimination in Wages

Section 12 states that wage parity between sexes is required for similar or substantially similar jobs. Please refer to *Kraska v Pennock*, 2011 BCSC 109.

Limitation Dates: Section 12(5) of the HRC states:

(a) "[T]he action must be commenced no later than 12 months from the termination of the employee's services, and

(b) [T]he action applies only to wages of an employee during the 12-month period immediately before the earlier of the date of the employee's termination or the commencement of the action."

Most of the remedies under this section are also available under section 13, which does not have a limitation on the period of time during which wages can be claimed.

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.

6. 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 regarding employment or any term or condition of employment on the basis of Indigenous identity, race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, age, and/or because that person has a criminal record that is unrelated to the employment. Please refer to *Ratzlaff v Marpaul Construction Ltd*, 2010 BCHRT 13

for one example of an employment case. This section may extend to volunteers depending on the circumstances *(Nixon).* When determining whether a volunteer is captured by this section of the HRC, the Tribunal will consider the following:

1. If there is a formal process to recruit volunteers;
2. If there is a training process with defined tasks;
3. Whether volunteers have to agree to follow the organizations' policies and practises;
4. If there are requirements about when or how often a volunteer must be available; and
5. The role of volunteers in the organization.

For more information on volunteers, see *Ferri v Society of Saint Vincent de Paul and another*, 2017 BCHRT 123 at paras 29–33.

Because all individuals over 19 are protected by the ground of age, individuals in both the public and private sector are able to choose the age at which they wish to retire and are protected from discrimination based on age (HRC, s 1).

Section 44(2) states that an employer is responsible for the actions of their employees, and an employer will be liable for an employee's actions when the employee is acting within the scope of their authority or job duties.

***Bona Fide* Occupational Requirement (BFOR) Defence:** If a complainant proves the three elements of their case set out in *Moore*, the burden shifts to the respondent to justify their conduct. Adverse treatment on the basis of a protected characteristic may be justified when it relates to a "*bona fide* occupational requirement" (BFOR): see s. 13(4) In British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union, [1999] 3 SCR 3 at para 54 [*Meiorin*], the Supreme Court of Canada established a three-part test for establishing a BFOR:

1. The employer adopted the standard for a purpose rationally connected to the performance of the job;
2. The employer adopted the particular standard with an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
3. The standard is reasonably necessary to fulfil its purpose. The employer must show that it could not accommodate individual employees with the protected characteristic without experiencing undue hardship.

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

.

Undue Hardship: What may be considered undue hardship varies by employer and depends on the circumstances. In *Central Okanagan School District No 23 v Renaud*, [1992] 2 SCR 970 at 985–986, the Supreme Court of Canada held that an undue hardship is more than a minor inconvenience and that actual interference with the employer's business must be established. Factors the court may consider include financial cost, health and safety, and flexibility and size of the workplace. The burden of proving an undue hardship lies on the respondent and will require evidence that all reasonable accommodations, short of undue hardship, have been provided. For more information on the duty to accommodate, please see the BC Human Rights Clinic's *Legal Information* page at https://bchrc.net/legal-information/do-i-have-a-complaint/ and their blog at https://bchrc.net/tag/duty-to-accomodate/.

Exemptions: 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 are permitted 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 (HRC, s 13(3)).

7. Discrimination by Unions, Employer Organizations, or Occupational Associations

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

Since persons are not covered by section 14, protection against denial of membership has been held to apply only against an implicated union, organization, or association, and not against an individual. Please refer to *Ratsoy v BC Teachers' Federation*, 2005 BCHRT 53 at para 23. 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).

There are two limited ways in which unions can be held liable for discrimination. The first is by creating or participating in formulating a discriminatory workplace rule, and the second is by impeding an employer's efforts to accommodate an employee (*Chestacow v Mount St Marie Hospital of Marie Esther Society*, 2018 BCHRT 44 at para 32 [*Chestacow*]). In respect of the latter, a union may be required to waive seniority rights or other collective agreement obligations in order to facilitate the accommodation of an employee with a protected characteristic, such as a disability.

8. Retaliation

Section 43 of the *Code* protects people from retaliation for filing a human rights complaint, or for indicating that they might file a human rights complaint. It also protects from retaliation anyone who assists, or who might assist, someone to make a complaint.

The test for retaliation is set out in *Gichuru v Pallai*, 2018 BCCA 78 at paras 50–58. To prove retaliation, a complaint must show:

a) The respondent was aware that the complainant had made a complaint;

b) The respondent engaged in or threatened to engage in conduct described in s. 43; and

c) There is a sufficient connection between the impugned conduct and the previous complaint. This connection may be established by proving that the respondent intended to retaliate, or may be inferred where the respondent can reasonably have been perceived to have engaged in that conduct in retaliation, with the element of reasonable perception being assessed from the point of view of a reasonable complainant, apprised of the facts, at the time of the impugned conduct.

In *Sales Associate v. Aurora BioMed*, the Tribunal interpreted the meaning of the protection for someone who "might" make a complaint. The Tribunal concluded that the protection applies where the retaliator is aware that a person might pursue some legal recourse for discrimination. It is not necessary to prove that the retaliator was specifically aware of the possibility of a human rights complaint at the Human Rights Tribunal (see paras. 151-163).

C. Prohibited Grounds of Discrimination

1. General

Prohibited grounds of discrimination include Indigenous identity, race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, age (for those 19 and over), criminal record (that is not related to the employment, union, or occupational association), and lawful source of income (in tenancy only). Note that not all of these grounds of discrimination are protected in all of the areas listed in sections 7–14 of the HRC. 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. Please refer to the helpful chart on the following page.

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 BC Human Rights Tribunal website (www.bchrt.bc.ca/law-library/decisions), indexed by year and is also available on CanLII BC.

It should be noted that a complainant might file a complaint on a combination of grounds. A prohibited ground does not need to have been the sole or primary motivating factor behind the discrimination; it need only have been one contributing factor. Please refer to Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center), 2015 SCC 39 at paras 45–52.

Discrimination need not be intentional (HRC, s 2). Any policy or action that has an adverse effect on a protected group and which cannot be justified will be considered discriminatory. Please refer to *Ontario (Human Rights Commission) v Simpsons-Sears Ltd*, [1985] 2 SCR 536 at 549 for an example of indirect discrimination, also known as adverse effect discrimination. The policy or act does not have to affect every person in the group for it to be considered discriminatory. For example, if a policy discriminates against only people who are pregnant it could still be considered sex discrimination. It is also 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.

Discrimination can also be established on an intersectional basis. This means that the discriminatory action had an adverse impact on the basis of multiple protected grounds, occurring simultaneously, which cannot easily be separated from one another. It is not always necessary to establish that each individual ground has been met where intersectional discrimination can be established. Please refer to *Radek v Henderson Development (Canada) Ltd*, 2005 BCHRT 302 at paras 463–467.

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

Protected Grounds	Protected Areas						
	Written Publications	Public Services & Accommodation	Purchase of Property	Tenancy	Employment Advertisement	Employment	Unions & Associations
Race	✓	✓	✓	✓	✓	✓	✓
Colour	✓	✓	✓	✓	✓	✓	✓
Ancestry	✓	✓	✓	✓	✓	✓	✓
Place of Origin	✓	✓	✓	✓	✓	✓	✓
Political Belief	**x**	**x**	**x**	**x**	✓	✓	✓
Religion	✓	✓	✓	✓	✓	✓	✓
Marital Status	✓	✓	✓	✓	✓	✓	✓
Family Status	✓	✓	**x**	✓	✓	✓	✓
Physical or Mental Disability	✓	✓	✓	✓	✓	✓	✓
Sex	✓	✓	✓	✓	✓	✓	✓
Sexual Orientation	✓	✓	✓	✓	✓	✓	✓
Gender Identity or Expression *(NEW)*	✓	✓	✓	✓	✓	✓	✓
Age	✓	✓	**x**	✓	✓	✓	✓
Criminal or Summary Conviction	**x**	**x**	**x**	**x**	**x**	✓	✓
Source of Income	**x**	**x**	**x**	✓	**x**	**x**	**x**
Indigenous Identity	✓	✓	✓	✓	✓	✓	✓

2. Race, Colour, Ancestry, and Place of Origin

The grounds of race, colour, ancestry, and place of origin are included in the HRC as a means to combat racism and racial discrimination. Each of these 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 v Langtry Industries Ltd*, 2009 BCHRT 3.

Discrimination on the basis of race, colour, ancestry, or place of origin can also be established where the respondent caused harm to the claimant by taking advantage of a vulnerability caused by the claimant's race, colour, ancestry, or place of origin. For more information, see *PN v FR and another (No 2)*, 2015 BCHRT 60. In BC, the grounds of race, colour, ancestry, and place of origin are protected in the following areas:

- publication
- public services such as schools, government programs, restaurants and stores
- purchase of property
- tenancy
- employment advertising and employment, and
- membership in a trade union, employer's organization, or occupational association.

For a recent case concerning discrimination on the basis of race in the employment context, please see *Francis v BC Ministry of Justice (No 3)*, 2019 BCHRT 136.

Note that the Tribunal has recognized that racism can be subtle and is sensitive to this fact. Please refer to *Mezghrani v Canada Youth Orange Network Inc*, 2006 BCHRT 60 at para 28.

The Tribunal has acknowledged that while anti-Black racism exists in Canada and continues to create impediments to the full and free participation of Black Canadians in the economic, social, political and cultural life of BC, there is a lack of cases dealing with anti-Black racism at the Tribunal level. Given that anti-Black racism is a "distinct form of racism," the lack of these types of cases has been a factor that supports a complaint being accepted despite being filed late; please refer to *Umolo v. Shoppers Drug Mart and others*, 2021 BCHRT 166 at para 35.

3. Political Belief

The HRC provides protection from discrimination due to political beliefs and/or affiliations in the areas of employment advertising, employment, and membership in a trade union, employer's organization, or occupational association.

In BC, few human rights cases have been decided on the ground of political belief. The Tribunal has, however, identified two key principles in determining whether a claimant's belief should be protected under the HRC:

1. Political belief is to be given a liberal definition; it is not confined to partisan political beliefs. Hence, political beliefs are not limited to beliefs about recognized or registered political parties.
2. Political belief is not unlimited; for example, views about matters such as business or human resources decisions an employer may make do not come within its ambit.

Please refer to *Prokopetz and Talkkari v Burnaby Firefighters' Union and City of Burnaby*, 2006 BCHRT 462 at para 31 and *Fraser v British Columbia (Ministry of Forests)*, 2016 BCHRT 124. See *Bratzer v Victoria Police Department*, 2016 BCHRT 50

for a unique example of how political belief can be framed. In this case, an officer of the Victoria Police Department successfully argued that his stance against the criminalization of illicit drugs and his involvement in a not-for-profit that advocates for such views amounted to a political belief.

In *Wali v Jace Holdings*, 2012 BCHRT 389 at para 117, the Tribunal determined that comments regarding matters affecting the regulation of a profession could constitute a political belief. This was narrowed to the particular legislative framework and mandate of the College of Pharmacists. The Tribunal took into account that the issue was a legislative initiative involving public welfare and was being debated in the community of pharmacists in determining that the belief was a protected political belief.

4. Religion

Religious discrimination cases have helped to define several of the fundamental ideas and standards that comprise human rights law in Canada. Matters before the courts have routinely addressed discriminatory incidents concerning religious faith, beliefs, customs, and practices. In BC, protection from discrimination based on religion is provided in the following areas:

- publication
- public services
- purchase of property
- tenancy
- employment advertising and employment, and
- membership in a trade union, employer's organization, or occupational association.

Section 2(a) of the Charter protects the freedom of conscience and religion. A claimant must show that their religious belief or practice is sincere, but is not required to show that it is objectively required or recognized by a particular religious faith. Please refer to Friesen v Fisher Bay Seafood Limited, 2009 BCHRT 1 at para 57. Atheism is encompassed within the protected ground of religion: Mangel and Yasué obo Child A v Bowen Island Montessori School and others, 2018 BCHRT 281 at para 210.

The duty to accommodate obliges employers to accommodate the religious practices of their employees as long as doing so does not cause undue hardship. Practices requiring accommodation may be linked to customs involving prayer, dietary restrictions, clothing requirements, or time off on religious holy days. Please refer to Renaud v Central Okanagan School District No 23, [1992] 2 SCR 970 at 982.

5. Family Status and Marital Status

Family status generally refers to parent-child relationships but can and does encompass other family relationships including those between siblings, in-laws, aunts and uncles, nieces and nephews, and cousins. For case law on the definition of family status and the test for discrimination on that basis see Miller v British Columbia Teachers' Federation, 2009 BCHRT 34 at para 17.

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.

Protections from discrimination on the basis of marital and family status also confer protection on the basis of the identity of the complainant's spouse or family member: *B v Ontario (Human Rights Commission)*, 2002 SCC 66.

In BC, the grounds of family and marital status are protected in the areas of publication, public services, tenancy, employment advertising, employment, and membership in a trade union, employer's organization, or occupational association. Family status is not protected in the area of purchase of property, meaning adult-only buildings and stratas are permitted.

The ground of family status also protects people from discrimination in respect of their childcare, and possibly other family care obligations. The law regarding the test that applies in the context of family status discrimination cases involving childcare obligations is unsettled in Canada. In BC, the test for family status discrimination in employment was most recently considered in *British Columbia (Human Rights Tribunal) v. Gibraltar Mines Ltd.*, 2023 BCCA 168. Per that case, in order to establish discrimination on the basis of family status, the complainant must show that a term or condition of employment results in a serious interference with a substantial parental or other family duty or obligation of an employee, whether as a consequence of a change in the term of employment or a change in the employee's circumstances (see para. 77).

The Federal Court of Appeal set out its own four-part test for family status discrimination in *Canada (Attorney General) v Johnstone*, 2014 FCA 110, at para. 93 [*Johnstone*]. Under *Johnstone*, a complainant must show that a child is under their care and supervision, the issue engages the individual's legal responsibility for that child as opposed to a personal choice, they have made reasonable efforts to find alternative solutions and no reasonable alternative solution is available, and the impugned workplace rule interferes with the childcare obligation in a more than trivial or insubstantial way.

6. Physical or Mental Disability

Disability is not defined in the HRC. However, the concept of physical disability, for human rights purposes, generally indicates a "physiological state that is involuntary, has some degree of permanence, and impairs the person's ability, in some measure, to carry out the normal functions of life" (*Boyce v New Westminister (City)* (1994), 24 CHRR D/441 at para 50 [*Boyce*]). More recent cases have confirmed that a disability must have a certain level of severity, permanence or persistence: see e.g., Li v Aluma Systems and another, 2014 BCHRT 270 at para 41. In Morris v BC Rail, 2003 BCHRT 14 at para 214 [*Morris*], the Tribunal set out the following three considerations for assessing whether an individual has a physical or mental disability:

1. [T]he individual's physical or mental impairment, if any;
2. [T]he functional limitations, if any, which result from that impairment; and
3. [T]he social, legislative or other response to that impairment and/or limitations… assessed in light of the concepts of human dignity, respect and the right to equality.

Furthermore, according to *Morris* at para 207, proof of impairment and/or limitation, while relevant, will not be required in all cases. See *McGowan v Pretty Estates*, 2013 BCHRT 40 at paras 26–28 for more information.

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. As such, the Tribunal has rejected the application of strict criteria to determine what constitutes a physical or mental disability. For example, protection has been specifically applied to persons with AIDS, persons who are HIV positive, and persons believed to be HIV positive. Please refer to *McDonald v Schuster Real Estate*, 2005 BCHRT 177 at para 24 and *J v London Life Insurance Co* (1999), 36 CHRR D/43 at para 42 [*London Life Insurance*].

As noted above, protection from discrimination due to physical disability extends to discrimination on the basis of a perceived propensity to become disabled in the future. In

London Life Insurance at para 46, the Tribunal found that the HRC prohibited discrimination against a person based on the fact that his spouse was HIV positive. Protection under this ground has also been extended to those who are suffering from addictions issues. For example, *Handfield v North Thompson School District No 26* (1995), 25 CHRR D/452 at paras 139–143 recognized alcoholism as both a physical and mental disability.

Where a behaviour or policy adversely affects a protected group or person, either directly or indirectly due to their disability (or any other protected characteristic), there is a duty to accommodate, meaning that all reasonable efforts must be taken to accommodate the group or person up to the point of undue hardship. Examples include installing wheelchair access (*Walsh v Pink*, 2018 BCHRT 174 at paras 104–111) and safety handrails (*Ferguson v Kimpton*, 2006 BCHRT 62 at para 68). The duty to accommodate may also include allowing workers to return gradually to the workplace after an injury or serious illness.

7. Sexual Orientation

The HRC prohibits discrimination based on sexual orientation. Such discrimination does not require a complainant to prove their sexual orientation nor that a given respondent believed them to have a particular orientation. In *School District No 44 (North Vancouver) v Jubran*, 2005 BCCA 201, Mr. Jubran was a high school student, subjected to homophobic insults and harassment from other students. This conduct was found to constitute discrimination, even though Mr. Jubran did not identify as homosexual and his harassers denied believing that they in fact thought he was homosexual. For a case regarding discrimination on this basis against patrons of a restaurant in the context of services customarily available to the public, please see *Pardy v Earle and others (No 4)*, 2011 BCHRT 101.

In BC, protection on the basis of sexual orientation is provided in the areas of publication, public services, purchase of property, tenancy, employment advertising, employment, and membership in a trade union, employer's organization, or occupational association.

8. Sex (Including Sexual Harassment, Pregnancy)

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 the harassment" (*Janzen v Platy Enterprises Ltd*, [1989] 1 SCR 1252 at 1284 [*Janzen*]).

In *PN v FR and another (No 2)*, 2015 BCHRT 60, the HRT awarded $50,000 for injury to dignity to a domestic foreign worker who was sexually harassed and assaulted. This is among the highest injury to dignity awards the Tribunal has ever ordered This case also involved allegations of discrimination based on family status, race, age, colour, and place of origin.

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 make an internal complaint to their employer before filing a complaint, although this may be relevant to the compensation the employer is ordered to pay if the complaint is successful. There is also no requirement of continuing harassment; a single incident may be sufficient if it is sufficiently egregious.

Whether the conduct was "unwelcome" is assessed on an objective standard: would a reasonable person have known that the conduct was unwelcome? If the respondent knew or ought to have known that the conduct was unwelcome, this part of the test is made out. A target of harassment is not required to expressly object to the conduct for it to be reasonably understood to be unwelcome. The law recognizes that a person's behaviour "may be tolerated and yet unwelcome at the same time" (*Mahmoodi v. University of British Columbia and Dutton*, 1999 BCHRT 56 at para 140).

It must also be shown that the alleged discriminatory conduct is reasonably "perceived to create a negative psychological and emotional environment for work" (*Janzen* at 1263). The test must also take into account the customary boundaries of social interaction in the circumstances. 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.

For a more recent case involving discrimination on the basis of sex, and more specifically sexual harassment in the employment context, see *Araniva v RSY Contracting and another (No. 3)*, 2019 BCHRT 97.

There are also examples of cases involving sex discrimination that did not amount to sexual harassment. Please refer to *Mottu v MacLeod*, 2004 BCHRT 76 at para 41, where the Tribunal found that dress code requirements based on sex could constitute discrimination on the basis of sex. In *Lund v Vernon Women's Transition House Society*, 2004 BCHRT 26, the Tribunal found that an employer's refusal to allow a female employee to breastfeed her child at work could also constitute sex discrimination. See also *The Sales Associate v. Aurora Biomed Inc. and others (No. 3)*, 2021 BCHRT 5.

9. Gender Identity or Expression

This protected ground has been in force since 2016, and therefore few decisions relating to this ground are currently available.

For a recent Tribunal decision issued under the ground of gender identity or expression, please refer to *Oger v Whatcott (No 7)*, 2019 BCHRT 58. Please also see Li v. Mr. B, 2018 BCHRT 228, where the respondent, the complainant's landlord, showed a photograph of the complainant (who was male identifying) in a dress to the complainant's supervisor in an attempt to cause an adverse effect on the complainant's employment. The HRT found that this constituted discrimination based on gender identity and expression. For a case involving a nonbinary person whose coworker refused to use they/them pronouns to refer to them, please see *Nelson v. Goodberry Restaurant Group Ltd. dba Buono Osteria and others*, 2021 BCHRT 137.

Prior to the inclusion of gender identity or expression in 2016, the Tribunal had found that being transgender was a protected characteristic under the ground of sex. Please refer to *Dawson v Vancouver Police Board (No 2)*, 2015 BCHRT 54. *Dawson* establishes that misgendering trans individuals (addressing a trans person using a pronoun, name, or gender marker other than that which the trans person uses to identify themselves) constitutes discrimination. Discrimination may also include the denial of trans-specific medical services (*Dawson*).

10. Age (19+)

Age can refer to an individual's legal age, membership in a specific age-category, or a generalized characterization of a specific age. In BC, age is a protected ground of discrimination in the areas of publication; public services; tenancy; employment advertising; employment; and membership in a trade union, employer's organization, or occupational association. Please refer to *Miu v Vanart Aluminum and Tam*, 2006 BCHRT 219 at para 18.

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.

11. Criminal or Summary Conviction

BC's HRC protects individuals with a criminal or summary conviction in the area of employment, trade unions, employers' associations and occupational associations, so long as the conviction is unrelated to the employment or the intended employment of the individual. This protection includes a perceived conviction (i.e., relating to arrests, stayed charges or acquittals). Please refer to *Purewall v ICBC*, 2011 BCHRT 43 at para 21; *Clement v Jackson and Abdulla*, 2006 BCHRT 411 at para 14; and *Korthe v Hillstrom Oil Company Ltd* (1997), 31 CHRRD/82 at paras 23–28. In an effort to establish whether or not a conviction may affect an employment decision, the Tribunal makes 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 at paras 7–9, 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?

12. Lawful Source of Income

BC's HRC protects against discrimination in tenancy on the basis of an individual's lawful source of income. It applies only in the area of tenancy. This protects the rights of individuals on social assistance or disability pensions, for example, who might otherwise be denied housing. Please refer to *Tanner v Vlake*, 2003 BCHRT 36 at paras 22–26 for further discussion on this protected ground. For a more recent case, please see *Day v Kumar and another (No 3)*, 2012 BCHRT 49.

13. Indigenous Identity

On Nov. 17, 2021, the BC government introduced, and later passed, Bill 18 which added Indigenous identity as a protected ground under the B.C. Human Rights Code. Bill 18 was intended to better reflect forms of discrimination experienced by Indigenous Peoples. Indigenous identity refers to being First Nations, Métis, or Inuit. While there are few cases that feature the Tribunal considering Indigenous identity as its own distinct protected ground, there are many more that look at Indigenous identity as being a protected ground through race, ancestry, or place of origin. One such case is *Smith v Mohan (No. 2)*, 2020 BCHRT 52, where the complainant, an Indigenous woman and member of the Tsimshian

and Haisla Nations, was discriminated against by her landlord, who continually tried to evict the complainant because she was smudging in her apartment unit. See also *Campbell v. Vancouver Police Board (No. 4)*, 2019 BCHRT 275, which involved a finding of discrimination by the Vancouver Police against an Indigenous woman and mother.

D. Procedural Options for Employees

An employee who is dealing with an employment-related legal issue may have more than one procedural option to choose from. These include:

1. Employer's Internal Complaint Procedure

Assuming one exists, this is the most immediate way to obtain a resolution to a workplace issue. Consult the workplace's policies to determine whether an internal complaints process exists and, if so, whether it is likely to yield a helpful resolution of the issue. Note that employees are not required to make use of internal procedures before filing a human rights complaint or other legal proceeding.

2. Grievance and Arbitration

Unionized workers are entitled to representation by their union. Labour arbitrators have jurisdiction to apply the HRC, and grievances often move more quickly than human rights complaints. However, if the union does not pursue a grievance relating to a human rights issue, the worker may wish to file their own 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. Alleging that the union has failed to provide adequate representation will not be sufficient to qualify as a breach of the HRC on its own; the union must have engaged in the discrimination.

As previously stated, (see **Section III.B.7**: Discrimination by Unions, Employer Organizations, or Occupational Associations), there are two ways in which a union may be found liable for discrimination. First by creating or participating in formulating a discriminatory workplace rule, and second by impeding an employer's efforts to accommodate a disabled employee (*Chestacow* at para 32).

Initiating the grievance procedure can be a good starting point and can be followed by initiating a human rights complaint. A grievance and a human rights complaint can also be filed in tandem. 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. The human rights complaint may be placed in deferral while the grievance process proceeds. If the grievance process resolves the worker's human rights issue, the human rights complaint will be dismissed. See *Sebastian v Vancouver Coastal Health Authority*, 2019 BCCA 241 for some of the risks of parallel proceedings in this context.

3. Human Rights Complaint

Another option is to file a human rights complaint with the BC Human Rights Tribunal (see above for the grounds, areas, exemptions, complaint process, etc.) or, under federal jurisdiction with the Canadian Human Rights Commission (see below for the grounds, areas, exemptions, process, etc). The Tribunal can award lost wages, expenses, and damages for injury to dignity, feelings and self-respect. However, note that if a claimant is also seeking severance pay, lost wages, or expenses in a civil suit, they will not be allowed to recover the same damages from both proceedings.

4. Employment Standards Branch

Employees may choose to file a complaint through the Employment Standards Branch (ESB) 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. A complainant can file claims in both the ESB and civil court (either Small Claims or Supreme Court) for employment-related issues, including wrongful dismissal. These actions do not bar the complainant from also bringing a human rights complaint relating to 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. It is important to note that the ESB does not deal with alleged discrimination. If the employee recovers unpaid wages through the ESB, they cannot "double-recover" and seek these same damages in the BCHRT or another forum.

5. Civil Action

A final option is to bring a civil action for wrongful dismissal either in Small Claims Court (see **Chapter 22: Small Claims** of the LSLAP Manual) or the BC Supreme Court, depending on the amounts claimed. However, the Supreme Court of Canada has held that the common law will not provide a remedy for discrimination per se in the employment context. Please refer to *Keays v Honda Canada Inc*, 2008 SCC 39 at para 67 [*Keays*].

The court in *Keays* held that breaches of the HRC must be remedied within the statutory scheme of the HRC itself. Thus, even if the reason for dismissal was discriminatory, in a civil action, the claimant will generally only be able to recover damages based on their wrongful dismissal and/or inadequate notice (severance pay). See **Chapter 6: Employment Law** of the LSLAP Manual. Accordingly, compensation for the discrimination itself must be awarded by the Tribunal.

The court may further compensate the claimant 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 of Canada 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 resident status. However, normal distress and hurt feelings arising from the dismissal itself are not grounds for additional damages.

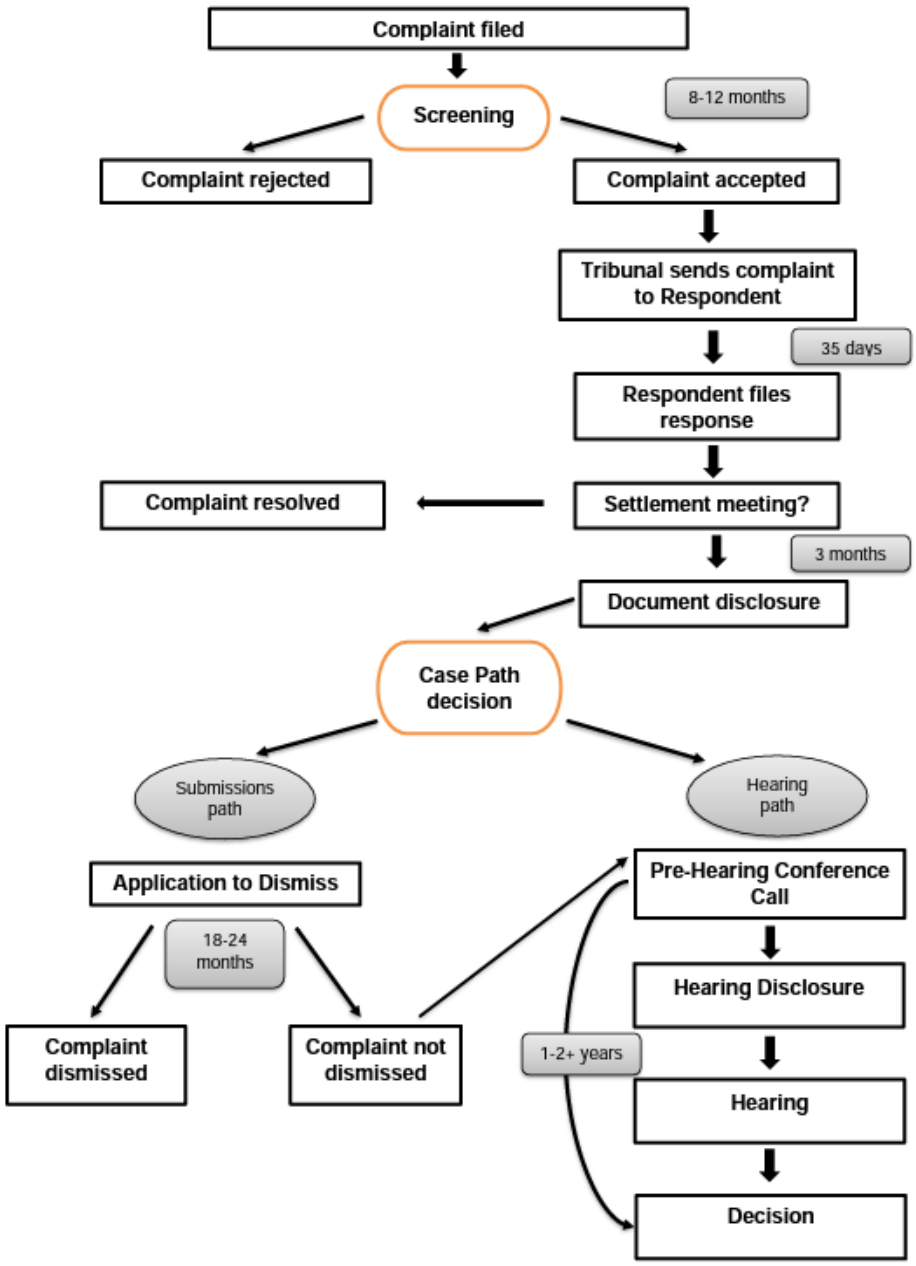
The courts are even more conservative in their approach to awarding punitive damages meant to punish the employer for their conduct in dismissal. Punitive damages will only be awarded if the employer's conduct was harsh, vindictive, reprehensible, malicious, and extreme in nature. Thus, if the claimant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

Whatever procedural route an employee ultimately chooses to pursue, if said employee is experiencing on-going harassment on a prohibited ground of discrimination, they 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.

E. The Process for Human Rights Complaints

The BC Human Rights Tribunal handles complaints made under the HRC. The following chart depicts the process of a complaint at the Tribunal and the time in between the various stages of the process (prepared by the BC Human Rights Clinic, a program of the Community Legal Assistance Society):

The first step in filing a complaint with the Tribunal is to fill out a Complaint Form, which is available at the Tribunal's office, on its website (www.bchrt.bc.ca), or from other local government agent offices. It is also possible to file the complaint online on the Tribunal's website. There are helpful self-help guides to filling out Complaint and Response forms on the Tribunal's website. You should also consult the Tribunal's Rules of Practice and Procedure and Practice Directions for guidance on the various steps in the process.



1. Who Can File a Complaint?

A complaint may be made by an individual, on behalf of a group or class, or by someone acting as a representative of named person(s). If the Complaint Form is being filled out on behalf of another person, group, or class of persons, then a secondary form called the Representative Complaint Form must also be filled out and must accompany the Complaint Form when sent to the Tribunal. The person filling out the Complaint Form is the complainant. The person or organization who has been filed against is called the respondent.

2. How to File a Complaint

The Complaint Form can be filed with the Tribunal via mail or fax. The Complaint Form can also be filled out and submitted online from a computer or a smart phone. Alternatively, the Complaint Form can be submitted to the Tribunal through email. Complainants may access the Complaint Form and other valuable resources at the BC Human Rights Tribunal website (see **Section II.B: Resources**). There are different Complaint Forms depending on whether the complaint is being made by an individual (Form 1.1), or a group (Form 1.3). If you are filling out a Complaint Form on behalf of someone else, then the appropriate form is Form 1.2.

The party filing the complaint should be aware of the time limits. There is a **one-year** limitation period. Complaints alleging continuing contraventions of the *Code* may be accepted as long as at least one incident of alleged discrimination occurred within the one-year limitation period: see *Code* s. 22(2). Late-filed complaints may be accepted if it is in the public interest to do so, under certain very limited circumstances, as per s. 22(3) of the Code In order for a member of the Tribunal to accept all or part of the complaint under s. 22(3), the Tribunal must determine that a) it is in the public interest to accept the complaint, and b) no substantial prejudice will result to any person because of the delay. The Tribunal's assessment of what the public interest means in this context depends on a consideration of a number of factors including: the complainant's interest in accessing the Tribunal, the length and reason for the delay in filing, whether the complainant had access to legal advice, and the novelty or importance of the human rights issues raised: *British Columbia (Ministry of Public Safety and Solicitor General) v. Mzite*, 2014 BCCA 220 at paras. 53-81. It also considers "the respondent's interest in going about its activities without the worry of stale complaints": *Hoang v. Warnaco and Johns*, 2007 BCHRT 24 at para. 26. This list of factors is not exhaustive.

The BC Court of Appeal has found it to be within the public interest to accept a complaint that was filed late if the complainant was operating off erroneous legal advice regarding the one-year limitation date: *The Parent obo the Child v. The School District*, 2020 BCCA 333. The Tribunal has found that it can be in the public interest to accept late complaints where the delay is due to a disabling condition: *Naziel-Wilson v. Providence Health Care and another*, 2014 BCHRT 170 at para. 21. See also *Sheriff v. Fairleigh Dickenson University*, 2023 BCHRT 40 at para. 38, where the Tribunal discussed the impact of trauma on a person's ability to file a complaint within the one-year time limit.

The BC Human Rights Tribunal has been severely backlogged over the last couple of years. Potential complainants should be aware that it may take up to a year for a case to be screened and accepted for filing.

3. Screening

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 **one-year** limitation period. If the Tribunal believes that it may not have the power to deal with the complaint in substance or believes that the complaint has been filed out of time, the complainant will generally 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.

A complainant **must** set out a case of discrimination under the HRC on their initial complaint form. If the elements are not set out, then the Tribunal might not accept the complaint. Even if accepted, it could still be vulnerable to an application to dismiss under section 27 of the HRC at a later stage. In order to set out the complainant's case, the complainant must allege facts that, on their face (that is to say, assuming they are all true), satisfy the following three elements:

1. That they have a characteristic that is protected under the HRC;
2. That they experienced an adverse impact with respect to an area protected by the HRC; and
3. That their protected characteristic was a factor in the adverse impact they experienced.

It is important to note that a complainant need not establish that their protected characteristic was the sole or primary reason for their adverse treatment. It is sufficient to establish that it was one reason for their adverse treatment. For greater analysis of this topic please refer to *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39; and *Moore v British Columbia (Education)*, 2012 SCC 61.

A complainant is not required to provide evidence at the time they file their complaint. The complaint form simply needs to tell the story, identify all of the allegations of discriminatory treatment, and satisfy the three criteria set out above.

4. Disclosure Obligations

Disclosure refers to the sharing of information with the other parties. In order for all parties to prepare for their case it is essential that information is properly shared. Information that must be disclosed includes:

1. All documents relevant to the complaint, response, as well as the remedy being requested. This must be disclosed after a complaint is filed;
2. A list of witnesses. This must be disclosed after a hearing is scheduled;
3. A detailed explanation of the remedy (for the complainant), or a response to the proposed remedy (for the respondent); and
4. Any expert evidence or opinion. All expert evidence must be presented to the other party within 90 days of the hearing.

Evidence that has not been disclosed cannot be presented at a hearing. An attempt to do so may negatively affect a party's case and may even lead to an order for costs by the Tribunal. A failure to disclose can also simply prevent a complaint from going forward, or prevent a respondent from filing an application to dismiss.

5. Settlement Meeting

Parties may agree to a settlement meeting at any time after the complaint has been filed. The Tribunal schedules an Early Settlement Meeting after accepting the complaint for filing, which the parties can opt out of if they choose. Most human rights complaints settle, either through a settlement meeting or direct negotiations between the parties or their counsel. Guides for settlement meetings and hearings are available from the Tribunal on its website.

At the settlement meeting, a neutral and impartial mediator who is knowledgeable in human rights law will work with the parties in order to help them try to reach an agreement. Generally speaking, a settlement will require both sides to compromise, whether that is a complainant accepting less compensation than they initially sought, or a respondent accepting some measure of responsibility. In a settlement meeting, it is important to listen to the other side's perspective and assess how it impacts the strength of your case, and remain open-minded regarding the remedy you are prepared to accept to resolve the complaint.

Additionally, settlements can allow for creativity in determining a resolution. While the Tribunal may be limited in its ability to address the damages, mediation can result in constructive results such as public apologies or a practical solution to the issue at hand.

This process also allows for a quicker resolution of the issue in a more informal setting, where information is kept confidential. Negotiations are without prejudice, meaning they cannot be used in future hearings, and the mediator involved will not be a part of the final hearing. The process is voluntary and the Tribunal cannot force the parties to participate in mediation or enter into a settlement agreement. If the parties do voluntarily agree to settle their dispute, as part of the terms of settlement, the complainant will file a Complaint Withdrawal Form (Form 6). A settlement agreement is a legally binding agreement, and if one side does not comply with its terms, the other party can take to steps to enforce it.

If both parties cannot agree on a resolution, the mediation will end with no settlement agreement.

6. Miscellaneous

Due to the COVID-19 Pandemic, the Tribunal developed a new process for processing complaints about mask wearing in the BC HRT. On April 20, 2022 the Tribunal paused processing complaints about mask requirements in services for one year, partly because of the sheer number of complaints about mask-wearing under s. 8 that the Tribunal was receiving. For complaints filed after March 31, 2022, the HRT will dismiss any complaint that does not include the criteria set out in the Practice Direction. This criteria requires complainants to demonstrate that their protected personal characteristic, if that is a physical disability, actually inhibits the wearing of a mask. If the complainant does not provide this information in their Complaint Form then their complaint will be dismissed without an opportunity to provide more information.

The tribunal encourages people to solve any mask wearing complaints by talking to the service provider or sending them information about the public order requiring masks, and guidance from the Office of the Human Rights Commissioner and WorkSafe BC.

BC declared a state of emergency on March 18th, 2020, due to the pandemic. This did not extend the 1-year time limit to file a complaint, but someone who misses the time limit may explain that their delay was caused by the pandemic on the complaint form, and the Tribunal will consider it.

If the complaint is urgent, a complainant may request a fast-track process. To be eligible for a fast track, you must show that fast tracking or changing the process will help get to a "just and timely resolution" of the complaint. The complainant may want to fast-track the process if the complainant is at risk of losing the appropriate remedy if urgent action is not taken by the HRT (for example, the complaint is about an eviction notice and the complainant will have to move out in 30 days, without a fast-tracked solution). A party may also wish to fast-track the process if they are at risk of losing the chance to prove their case (for example, the respondent's main witness is moving out of Canada soon). For more information on the fast track process, please refer to the BC HRT website: http://www.bchrt.bc.ca/law-library/guides-info-sheets/general-apps/16.htm

F. Remedies

Remedies should be considered early, when deciding whether or not to pursue a claim in any administrative tribunal. Available remedies for a justified complaint are listed in section 37(2) of the HRC.

Non-pecuniary (not financial) 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. People seeking advice on drafting should be directed to the BC Human Rights Tribunal website, which provides detailed information on the availability and applicability of specific remedies (see **Section II.B: Resources**).

Pecuniary (financial) remedies include: compensation for lost wages/salary, expenses incurred due to the discrimination, reinstatement of a lost benefit, and compensation for injury to dignity. Unlike severance pay, compensation for lost wages is not based on the concept of reasonable notice. A successful claimant 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.

The purpose of an award for Injury to dignity is to compensate a person whose rights under the *Code* have been violated. It is not to punish a respondent. Damages awarded for injury to dignity have increased over the last decade, and the tribunal has made it clear that the trend for such damages is upwards (see *Biggings obo Walsh v Pink and others*, 2018 BCHRT 174 [*Walsh*]). Currently, the highest award in BC is $176,000 (*Francis v. BC Ministry of Justice (No. 5)*, 2021 BCHRT 16). Historically, however, most damages in this category are under $10,000. The BC Human Rights Clinic has a compiled list of awards given by the HRT, sorted by ground, updated quarterly and available here: https://bchrc.net/legal-information/remedies/. It is difficult to predict what level of damages the Tribunal will award, as this determination depends on many factors, which are assessed on a case by case basis (see e.g. *Walsh*). The Tribunal generally considers three broad factors: the nature of the violation, the complainant's vulnerability and social context, and the effect of the discrimination on the complainant: *Gichuru v. The Law Society of British Columbia (No. 9)*, 2011 BCHRT 185 at para. 260, upheld in 2014 BCCA 396. Importantly, while injury to dignity awards commonly follow in cases where discrimination is established, this is not guaranteed, as seen in *Holt v Coast Mountain Bus Company*, 2012 BCHRT 28 at para 233. For further information regarding compensation for injury to dignity, feelings, and self-respect, please visit https://bchrc.net/the-trend-is-upwards-recent-injury-to-dignity-awards/

Remember, to claim any type of damage, the complainant must lead evidence. If the complainant fails to lead evidence as to the effect the discrimination had on their emotional state and dignity, the Tribunal may not award any damages. If the respondent is able to prove that the complainant has failed to mitigate their losses, a complainant may not be entitled to wage loss compensation.

The Tribunal may not award damages for lost wages/salary following a discriminatory dismissal during a period for which the claimant was medically incapable of working. Please refer to *Senyk v WFG Agency Network (No 2)*, 2008 BCHRT 376 at para 434. This is because, even absent the discrimination, the claimant would not have been able to earn wages or a salary. (But see *Eva obo others v. Spruce Hill Resort and another*, 2018 BCHRT 238 at para. 214.)

There is no maximum limit on damage awards. Note, however, that if a claimant seeks a remedy at both the Human Rights Tribunal (e.g. for lost wages) and in civil court (e.g. for severance pay), and is successful with both proceedings, they are not entitled to double recovery and will receive the amount through only one of the proceedings. There are several cases where the award for loss of wages was in the range of $300,000. See *Kerr v Boehringer Ingelheim (Canada) Ltd (No 4)*.

Section 37(4) of the HRC gives the Tribunal authority to order costs against either party as condemnation for improper conduct during the Tribunal processes. Additionally, section 37(2) gives the Tribunal the right to award compensation for expenses that are directly caused by the discrimination found, which may include expenses such as counselling fees incurred because of the discrimination, or wage loss due to the need to attend a hearing.

A final order of the Tribunal may be registered in the BC 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; individuals dissatisfied with the Tribunal's decision must seek judicial review in BC Supreme Court pursuant to the *Judicial Review Procedure Act*, RSBC 1996, c 241 (see **Chapter 5: Public Complaint Procedures** of the LSLAP Manual).

G. Costs

The general rule is that costs will not normally be awarded in a human rights case. Pursuant to section 37(4) of the HRC, the purpose of awarding costs is to penalize a party who acts improperly during a hearing, thereby interfering with the objectives of the Tribunal. In these cases, costs are awarded punitively and do not necessarily reflect the actual expenses incurred by the other party due to the improper conduct.

H. Dismissal of a Complaint Without a Hearing

As mentioned above, the Tribunal may refuse to accept a complaint for filing if it does not have jurisdiction due to the nature of the complaint or if it is late filed. Once a complaint has been filed, however, the Tribunal may nevertheless dismiss it prior to a hearing, on application from the respondent or on its own motion, for a variety of reasons (HRC, s 27). The following outlines some of the reasons why the Tribunal may dismiss a filed complaint (check the HRC for a complete list).

1. 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 federal jurisdiction. Even if the Tribunal accepts a complaint for filing, the respondent may still have the option to dispute jurisdiction.

2. 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. The number of other proceedings capable of adequately dealing with a human rights complaint is, however, quite limited.

3. No Reasonable Basis for Holding a Hearing

The Tribunal may dismiss a complaint where the Tribunal is persuaded that the complaint was made in bad faith, would be of no benefit to the complainant, would not further the purposes of the HRC, or has no reasonable prospect of success. The most recent Annual Report from the BCHRT indicates that applications to dismiss under section 27 of the HRC succeeded in fully dismissing the complaint 49% of the time. Please refer to *Marquez v Great Canadian Casinos*, 2011 BCHRT 117 at paras 29–38. No reasonable prospect of success is the most common reason for dismissing a complaint.

If you are responding to an application to dismiss a complaint, it is important in most cases to provide evidence in support of the Complainant's contention that the complaint should be allowed to proceed to a hearing. While the burden of persuading the Tribunal that the complaint should be dismissed is on the respondent, the complainant does need to provide sufficient evidence to take their complaint out of the realm of "speculation and conjecture." An affidavit attaching relevant exhibits from the client is preferable, though an unsworn statement will also likely be acceptable in most cases.

4. Complaint Brought Outside Limitation Period

As mentioned above, there is a **one-year** limitation period for filing a complaint. The **one-year** period begins from the last instance of any continuing discrimination. If at least one alleged incident of discrimination in a complaint falls within the one-year limitation period, other alleged incidents of discrimination dating back farther than one year may be accepted as a continuing contravention of the *Code*. The issue of whether, or how many, multiple instances of discrimination will be considered to constitute a continuing contravention (thus effectively extending the one-year limitation period) is often disputed. See *Bjorklund v BC Ministry of Public Safety and Solicitor General*, 2018 BCHRT 204 at paras 13–14 for a recent discussion of how to define a "continuing contravention"; see also *District v Parent obo the Child*, 2018 BCCA 136 at paras 46–65.

Additionally, under section 22(3) of the HRC, the Tribunal has discretion to accept late-filed complaints regardless of whether there is a "continuing contravention" if it is in the public interest to accept the late complaint and no substantial prejudice will be caused to any party because of the delay in filing: *Chartier v Sooke School District No 62*, 2003 BCHRT 39 at para. 12. Whether it is in the public interest to accept a complaint filed outside the one-year time limit is a multi-faceted consideration, which is governed by the purposes of the HRC, and assessed on a case-by-case basis. Factors that may be important considerations in determining whether it is in the public interest to accept a late-filed complaint include the reasons for the delay, the length of the delay, the significance of the issue raised in the complaint and fairness in all the circumstances. The list of factors that the Tribunal may consider is non-exhaustive: *British Columbia (Ministry of Public Safety and Solicitor General) v Mzite*, 2014 BCCA 220; *Hoang v Warnaco and Johns*, 2007 BCHRT 24.

I. Responding to an Application to Dismiss

When faced with an application to dismiss, it is important to meaningfully engage with the reasons behind the application, providing supporting evidence when necessary. If the complainant does not provide evidence in response to an application to dismiss, it may result in a case being dismissed that did hold legal merit. Evidence can be as simple as a statement, although a sworn affidavit is preferable. The statement or affidavit should attach documents that help support the complainant's argument that the complaint should be allowed to proceed to a hearing. The respondent would then have an opportunity to respond to the arguments raised by the complainant.

If the Tribunal agrees to dismiss the complaint, then it will not continue. Applications to dismiss are subject to judicial review.

J. Case Path Pilot

Unfortunately, the number of applications to dismiss filed by respondents has resulted in significant backlog and delay at the Tribunal. In response, on May 6, 2022 the Tribunal launched a one-year pilot project under s. 27 of the *Human Rights Code*. This pilot project is set to continue for a further six months after May 6, 2023. Under the new Case Path Pilot, the default case path will be for the complaint to proceed directly to a hearing. Only when the Tribunal determines that an application under s. 27 would further the just and timely resolution of the complaint will it permit a respondent to file an application to dismiss. See the Tribunal's Practice Direction on this new process here: http://www.bchrt.bc.ca/law-library/practice-directions/case-path-pilot-practice-direction.htm.

The Tribunal has developed a strategy to address its backlog, which it communicated to the public on June 30, 2023. Case path decisions will be suspended until November, 2023, and many hearings have been adjourned. See: http://www.bchrt.bc.ca/tribunal/news/backlog-strategy-2023-06-30.htm

K. Judicial Review

If an individual disagrees with a decision of the Tribunal, they may ask 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 BC Supreme Court simply decides whether or not there is a ground for review and may only disturb the Tribunal's decision if the applicant 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 unsupported by the evidence;
- Acted unfairly with regards to the rules of procedure and natural justice; or
- Disregarded legislative requirements; used its discretion arbitrarily, in bad faith, or for an improper purpose; or based its decisions on irrelevant factors.

The standards of review applicable to the Tribunal's decisions are set out in s. 59 of the *Administrative Tribunals Act*.

If the Tribunal has made any of these errors, the Court may set aside the decision and will usually direct the Tribunal to reconsider the matter. 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 Tribunal's decision was issued. In order to seek a judicial review, an individual is required to prepare a petition and affidavit, file the petition and affidavit at the BC 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.

IV. THE CANADIAN HUMAN RIGHTS ACT

The *Canadian Human Rights Act* (CHRA) prohibits certain forms of discrimination in areas under federal jurisdiction. As mentioned above in **Section I** of this chapter, that jurisdiction is set out in section 91 of the *Constitution Act, 1867*. The CHRA applies to both public and private bodies, as well as individuals. It covers federal departments and agencies like federal Crown corporations, chartered banks, the broadcast media, airlines, buses, and railways that travel between provinces, First Nations, and other federally regulated industries.

A. Prohibited Grounds of Discrimination

The prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability (mental or physical, including previous or present alcohol dependence), and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered. These grounds apply to all activities covered by the CHRA. Section 3(2) explicitly makes discrimination on the grounds of pregnancy illegal, and section 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 employees of different genders 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 section 65(1), employers are liable for the discriminatory acts of their employees.

B. Activities Where Discrimination is Prohibited

The activities where discrimination is prohibited include:

1. The provision of goods, services, facilities, or accommodation customarily available to the general public (CHRA, s 5)
2. The provision of commercial premises or residential accommodation (CHRA, s 6)
3. Employment, employment applications and advertising, and membership in, or benefit from, employee organizations (CHRA, ss 7–10)
4. Unequal wage payment for male and female employees unless justified under section 27(2) (CHRA, s 11)
5. Publication of discriminatory notices, signs, symbols, emblems, or other representations (CHRA, s 12)
6. Harassing an individual on prohibited grounds of discrimination (CHRA, s 14)
7. Situations where an individual filed a complaint under the CHRA (CHRA, s 14.1)

C. Exceptions

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

Section 16 of the CHRA (similar to section 42 of the BC 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, section 67 of the CHRA stated that the CHRA did not apply to the *Indian Act*, with the result that any action taken by band councils or the federal government under the *Indian Act* was exempt from the CHRA. Section 67 has since been repealed, but this was a contentious move amongst some First Nations leaders.

D. 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 alternative proceedings 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 II.B: Resources** above).

1. How Complaints are Handled

Many cases are resolved through discussions leading to mutual agreement. To facilitate this, the CHRA provides for an investigation stage and where necessary, a conciliation 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 the quasi-judicial Canadian Human Rights Tribunal (CHRT). The Commission has the power to assist the claimant at all stages of the process, and usually represents the claimant at the hearing stage. However, it acts in a more neutral fashion at the investigation and conciliation stages. 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*, RS 1985, c F-7 (see **Chapter 20: Public Complaints Procedures** of the LSLAP Manual). It is an offence, punishable by summary conviction, to obstruct any investigation under the CHRA (s 60).

The CHRA can award punitive damages of up to $20,000 where they believe that the discriminatory conduct was carried out recklessly or with wilful disregard. This represents a difference between the CHRA and the HRC, as the HRC's focus is remedial rather than punitive.

2. 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 complainant will be expected to pursue them); and
e) The complaint was not filed **within one year** of the alleged act of discrimination (the Commission does retain the power to extend this period under certain circumstances).

V. BC CIVIL RIGHTS PROTECTION ACT

British Columbia also has a *Civil Rights Protection Act* (CRPA), which defines prohibited acts and civil remedies or damages that may be available for victims of such acts. The prohibited acts are tortious in nature, and actions will be heard in the Supreme Court of British Columbia.

The more pertinent points of the legislation are the following:

- "Prohibited act" is defined as conduct or communications that interfere with the civil rights of a person or class by promoting hatred or contempt or by promoting the inferiority or superiority of a person or class on the basis of colour, race, religion, ethnic origin, or place of origin (CRPA, s 1),
- A prohibited act is a tort actionable without proof of damage. The action may be brought by the individual targeted by the prohibited act, or, if a class was targeted, by any member of that class (CRPA s 2),
- 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 (CRPA, s 3),
- Remedies include general and exemplary damages. The court may order other types of relief such as an injunction in addition to or in lieu of damages (CRPA, s 4), and
- For an offence under the CRPA, a person may be liable for a fine of up to $2,000 and/or 6 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 (CRPA, s 5).

VI. RIGHTS OF THE CHILD

In addition to any claim under the federal or provincial codes, various protections exist for children under provincial statutes and the *Criminal Code*, RSC 1985, c C-46, concerning educational and medical issues.

A. School

1. Compulsory Attendance and Registration

The *School Act*, RSBC 1996, c 412, states that all children must be enrolled by the first school day of a school year if, on or before December 31 of that school year, the child will have reached the age of 5 years (s 3(1)(a)). Parents may, however, defer enrolment until the first school day of the next school year (i.e. until age 6) (s 3(2)). Once enrolled, children must remain in an educational program until they are 16 (s 3(1)(b)). Whether children attend public or private schools, they must be registered on or before September 30 in each year either with a school or with the Minister of Education (s 13). Students must also comply with the rules, code of conduct, and policies set by the Board of Education or by their particular schools (s 6).

Under section 12 of the *School Act*, parents are authorized to educate their children at home or elsewhere provided they register their children pursuant to section 13.

2. Discipline

Section 43 of the *Criminal Code* allows a schoolteacher to use discipline that is reasonable in the circumstances. This section refers to the use of reasonable force. The definition of reasonable force is "the substantial social consensus on what is reasonable correction, supported by comprehensive and consistent expert evidence on what is reasonable" (*Canadian Foundation for Children, Youth & the Law v Canada*, 2004 SCC 4 at para 2). However, the *School Act* specifically states that discipline of a student must be similar to that of a kind, firm, and judicious parent, and must not include corporal (physical) punishment (s 76(3)).

3. Rights of Parents and Students

Students and parents have the right to consult with a teacher or administrative officer (*School Act*, ss 4 and 7(2)). As well as having the right to information regarding the attendance, behaviour, and progress of their children in school (s 7(1)(a)), parents may request an annual report on the general effectiveness of the program their children are enrolled in, without their children's consent. They are also entitled to belong to a parent's advisory council (s 7(1)(c)). The councils can be formed by application to the Board or Minister of Education and can advise the Board and staff of the school (s 8).

4. School Records

Individual students and their parents are entitled to examine, on request, all records pertaining to that student while accompanied by the principal or a person designated by the principal (*School Act*, s 9). Student records identifying the student will not be released to other parties except when required by law, or if the student or parent consents to the disclosure in writing.

5. Language of Instruction

Every student in BC is entitled to instruction in English (*School Act*, s 5). However, under section 23 of the *Canadian Charter of Rights and Freedoms*, students whose parents are citizens of Canada have the right to receive primary and secondary school instruction in

either English or French if:

- Their parents' first language is that of the English or French-speaking minority population of the province in which they reside, and their parents still understand that language; or
- Their parents received their primary school instruction in Canada in English or French and the parent resides in a province where the language in which they received that instruction is the language of the English or French-speaking minority population of the province.

6. Other Concerns

The *School Act* states that public schools must be conducted on strictly secular and non-sectarian principles (s 76(1)), meaning they cannot be religiously affiliated. For a case that applies s 76(1) please see *Servatius v Alberni School District No. 70*, 2022 BCCA 421. In this case, a mother claimed that her children's school had violated their religious freedom after an elder performed a smudging demonstration, and a hoop dancer said a prayer while performing at the children's school assembly. The BC Court of Appeal ruled that the demonstrations were not religious ceremonies but public demonstrations for the purposes of building community and teaching students about Indigenous culture, practices recommended by Article 15 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

Moore v British Columbia (Education), 2012 SCC 61 at para 36 determined that the BC government had discriminated against a dyslexic boy when it cut the special needs program during a financial crisis. The Supreme Court of Canada found that he was denied a service customarily available to the public. The service denied was meaningful access to education generally, not specific access to a special needs program. Discrimination was found because the cuts disproportionately affected special needs programs and there was no evidence that the BC government considered other options.

Parents are jointly and severally liable for intentional or negligent damage to school property caused by their children (s 10 of the *School Act*). Please see *Nanaimo-Ladysmith School District No. 68 v. Dean* 2015 BCSC 11 for an example of parents being held liable for the negligent destruction of school property by their son. In this case, a 14-year-old student attached their friend's padlock to the head of an overhead sprinkler in their school, which caused the entire sprinkler system to become activated, resulting in extensive damage to the school. Judgement was granted against the parents for $48,630.47 worth of damage.

There is no action against a school board or its employees unless the actionable conduct included dishonesty, gross negligence, malicious or wilful misconduct, or the cause of action is libel or slander (s 94(2)). Note section 94 limits liability but does not absolve a board from vicarious liability.

Any person who believes a child, whether registered or not, is not enrolled in an educational program can make a report to the superintendent of schools (s 14(1)). An action lies against that person only if the report is made maliciously (s 14(3)).

School boards have a duty to provide an educational environment that is free from discriminatory harassment. This rule was affirmed by the Supreme Court of Canada on October 20, 2005, when it dismissed an application for leave to appeal from a BC Human Rights Tribunal finding of discrimination against a BC school board relating to the homophobic harassment of one of its students (see *North Vancouver School District No 44 v Jubran*, [2005] SCCA No 260 and *North Vancouver School District No 44 v Jubran*, 2005 BCCA 201at paras 91–102). Note that while the student was found to have been discriminated against on the basis of sexual orientation, it was irrelevant whether he identified himself as homosexual, or whether his harassers knew or believed him to be

homosexual.

The Ministry of Education has developed the Sexual Orientation and Gender Identity (SOGI) 123 initiative, to guide educators on instruction about sexual orientation and gender identity. The aim of this initiative is to foster inclusion and respect for students who, because of their identity or expression, may face discrimination while attending school. In *Hansman v. Neufeld*, 2023 SCC 14, the Supreme Court of Canada addressed the conflict between freedom of expression and the protection of one's reputation in the context of a critique of SOGI. In this case, Mr. Neufeld, a public school board trustee, made controversial online posts criticizing SOGI. Mr. Hansman, a gay man and teacher, was prominent amongst the dissenting voices and made statements to the media regarding his opposition to Mr. Neufeld's views. Mr. Neufeld subsequently filed a defamation suit against Mr. Hansman. The SCC ruled in favour of Mr. Hansman, writing that "Not only does protecting Mr. Hansman's expression preserve free debate on matters of public interest, it also promotes equality, another fundamental democratic value" (para 9). In this case, the SCC acknowledged that transgender and other 2SLGBTQ+ youth are especially vulnerable to expression like Mr. Neufeld's that reduces their "worth and dignity in the eyes of society and questions their very identity" (para 9).

B. Medical Attention

1. Obligation to Provide Treatment

The *Criminal Code* (s 215) imposes criminal sanctions on parents who fail to provide their children with the necessaries of life until they reach the age of 16. This has been held to include adequate medical treatment, and a court may also extend the duty to an older child who cannot become independent of their parent(s) due to factors including age and illness. Section 218 of the *Criminal Code* imposes criminal sanctions on any person who abandons or exposes a child less than 10 years of age to the risk of permanent injury, damage to their health, or risk to their life.

Under the *Child, Family and Community Service Act*, RSBC 1996, c 46 (CFCSA), children under the age of 19 may be removed if they are deprived of necessary medical attention, but only by a court order (s 29). When a child is removed, emergency medical care can be given at the director's authorization (s 32). In cases where the only issue is the parents' refusal of necessary medical attention, the director can apply for a court order authorizing the medical care without removing the child from the parents' custody (s 29).

2. Consent to Treatment

In Canadian case law, the courts have found that a minor can consent to treatment as a mature minor if that particular person has the mental capacity to understand the nature and risks of that particular treatment (see the *Infants Act*, RSBC 1996, c 223, s 17). A minor who is living away from home, working, or married may be found to be autonomous and free from parental control, and thus capable of consenting to or refusing treatment on their own behalf.

Under the *Infants Act*, (s 17), a minor can consent to surgical, medical, mental, or dental treatment without the agreement of their parents, so long as the health care provider has:

1. Explained to the minor and has been satisfied that the minor understands the nature and consequences and the reasonably foreseeable benefits and risks of the health care; and
2. Has made reasonable efforts to determine and has concluded that the health care is in the minor's best interests. This includes requests for birth control advice and products, and for abortions.

A court of competent jurisdiction may order medical treatment for any child if the court is satisfied that such treatment is required, and that parental consent is being unreasonably withheld. This is part of the inherent *parens patriae* (guardian of persons under a legal disability) jurisdiction of the Supreme Court and is now codified under section 29 of the CFCSA.

VII. LSLAP'S ROLE IN HUMAN RIGHTS PROCEEDINGS

In provincial proceedings, clinicians may assist clients in completing the Complaint or Response Forms at the initial stages. We may also be able to provide full representation to clients at the BC Human Rights Tribunal but are usually limited to less complex cases where the scheduled hearing is set for two days or fewer. Where LSLAP cannot help directly, we can refer claimants to the BC Human Rights Clinic, which may be able to assist. The BC Human Rights Clinic assists hundreds of people every year. This lawyer-run program ranges from providing summary advice to full representation for hearings at the BC Human Rights Tribunal.

The BC Human Rights Clinic accepts applications for assistance made within thirty days after a complaint has been accepted for filing. However, they may be able to offer assistance for those who are applying beyond the thirty-day limit.

In the federal system, the Canadian Human Rights Commission (CHRC) has been set up to assist individuals with drafting complaints and to 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.

VIII. ALTERNATIVE PROCESSES FOR INDIGENOUS COMPLAINTS

On January 15, 2020, the Tribunal released a report titled Expanding Our Vision: Cultural Equality and Indigenous Peoples' Human Rights. It makes recommendations for addressing the serious access to justice concerns for Indigenous Peoples that face human rights violations in BC. It seeks to bring in more Indigenous voices into the Tribunal process. The report can be found here: http://www.bchrt.bc.ca/indigenous/

First Nations, Métis, and Inuit people can now self-identify as Indigenous on the complaint form and ask the Tribunal to contact them. The Tribunal will call to explain the process and options for Indigenous complainants, such as including Indigenous protocols, such as an elder or smudge, and Indigenous ways to deal with the complaint.

Regarding the mediation process, an Indigenous party can tell the Tribunal that they want a traditional ceremony before or after the mediation, such as a smudge, prayer, or song, and they can request an Indigenous mediator, or an Indigenous dispute resolution approach.

In March 2023, in order to fulfill Recommendation 9.2 in the Report, the Tribunal hired four Indigenous Navigators. These Indigenous Navigators are there to guide and support Indigenous Peoples through the Tribunals' process, helping them to address any administrative barriers that might prevent them from protecting their human rights. Indigenous Navigators are there to work with both parties in a complaint, and are familiar with Indigenous protocols, like smudging and incorporating Elders into the dispute resolution process.

IX. ONLINE MEDIATIONS AND HEARINGS

A. Online Hearings

1. The BC HRT

Within recent years, , the BC HRT has begun conducting hearings remotely using Microsoft Teams ("Teams"). Online hearings via Microsoft Teams are set up using email addresses, and one week before the hearing, all parties must provide contact information for anyone attending the hearing on their side. This includes any party, lawyer, advocate, agent, or witness participating in the hearing. The day before the hearing begins, the Tribunal will email each person a link to join.

Each party must give copies of any document they want to have entered as an exhibit to all other parties and the Tribunal before the hearing. The Tribunal Member hearing your case will discuss this with you during the hearing readiness conference.

Typically, you will need to attend any hearing held on Teams using a computer. In exceptional cases you may use a smartphone, subject to the presiding Tribunal Member's discretion. Ensure that all participants to the hearing have a way to attend. If you have technical issues using Microsoft Teams that prevent you from joining the hearing, contact the Tribunal's designated contact person, which is stated in the email with the link to the hearing.

Hearing etiquette is similar to in person proceedings. Cameras must be on at all times, and you may only speak if you are making an argument or submission, questioning a witness, or giving testimony.

2. The CHRT

Similar to the BC HRT, hearings and mediations under the CHRT are also being conducted remotely, using videoconference or telephone. The CHRT will send a notice of the hearing or mediation to the parties as soon as practicable, with information such as the time, link, and information about the event. Regarding documentation, the mediator, the member or the panel will provide more specific instructions about electronic filing of documents for each case.