

CHAPTER SIX: HUMAN RIGHTS

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CHAPTER SIX: HUMAN RIGHTS

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), 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 out the bodies 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 the 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).

See **Section IV** of this chapter for more on matters under federal jurisdiction.

Section 92 of the *Constitution Act, 1867* lists the bodies 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 tend to fall under the provincial legislation. The limitation date under provincial jurisdiction was recently extended to **1 year** from the previous 6-month limitation period. This change was introduced through the *Human Rights Code Amendment Act* 2018, which received Royal Assent on November 27, 2018. See **Section III** of this chapter for more on matters under provincial jurisdiction in BC.

In either case, because human rights legislation is considered to be “quasi-constitutional” in nature, the legislation must be given a liberal and purposive interpretation to advance the broad policy implications underlying it. The CHRC has a useful assessment tool that can assist in determining if an entity falls under federal jurisdiction. It can be found at www.chrc-ccdp.gc.ca/eng/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.

II. GOVERNING LEGISLATION AND RESOURCES

A. *Legislation*

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

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

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, quasi-judicial body 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, 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/).

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 Justice. 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 Drop-In Clinic at the Labour Relations Board on Mondays between 9:30am and 4:00pm.

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 Human Rights Commission – FORTHCOMING

- The *Human Rights Code Amendment Act* recently re-established a Human Rights Commission in British Columbia. The province's original human rights commission was dismantled in 2002.

To date, a Human Rights Commissioner has been appointed and the Commission is in the process of setting up its offices. The Commission will promote human rights, undertake research and offer public education and outreach. It will also examine human rights implications of any policy, program or legislation and make recommendations if aspects of policy, programs or legislation are inconsistent with the *Human Rights Code*. 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.

III. THE BC HUMAN RIGHTS CODE

The BC *Human Rights Code* (HRC) is the legislation currently applicable in BC and is administered by the BC Human Rights Tribunal. The HRC applies to matters within the provincial constitutional heads of power, 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.

NOTE: 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/).

A. *Framework of a Discrimination Complaint*

The following outlines the six-part test that governs human rights complaints.

1. *Complainant*

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

If any one of the three elements are missing, there is no discrimination. If the complainant proves the three elements, 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 occur.

2. *Respondent*

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 set out the three-stage analysis for determining whether a standard is a *bona fide* occupational requirement (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] 2 SCR 868 [*Grismer*] at para. 20, 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.

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

Grounds	Protected Areas						
	Written Publications	Public Services & Accommodation	Purchase of Property	Tenancy	Employment Advertisements	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

B. *Protections, Exceptions and Exemptions*

The HRC provides protection against discrimination in several different contexts, 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 what might otherwise be deemed prohibited discriminatory conduct. It allows charitable, philanthropic, educational, and other not-for-profit organizations to act in a discriminatory manner, if action is taken with the aim of promoting the interests and welfare of a group of people that share a common identifiable characteristic, such as religion, race, or marital status. For more information, please see *Vancouver Rape Relief Society v Nixon*, 2005 BCCA 601 at paras 43-59.

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 race, colour, ancestry, place of origin, physical or mental disability, sex, sexual orientation, or gender identity or expression. Such special programs may obtain

prior approval by the BC Human Rights Tribunal and, if pre-approved, will not be deemed to be in contravention of the HRC. Ultimately, section 42 gives the Tribunal jurisdiction to approve special programs that are aimed at improving the situation of individuals or groups that have suffered historical disadvantage.

Finally, section 43, often referred to as the “retaliation” section, prohibits discrimination against a person because that person complains, has been named, gives evidence, or otherwise assists in a complaint or related proceeding under the HRC. This section was recently amended to include protection of a person who is planning to commence, but has not yet filed a human rights complaint. Please refer to *Gichuru v Pallai*, 2018 BCCA 78 at paras 50-58, which provides the test for proving retaliation under section 43.

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. Please refer to *Oger v Whatcott (No 7)*, 2019 BCHRT 58 at paras 93-97.

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

2. Discrimination in Facilities “Customarily Available to the Public”

Section 8 states that any accommodation, service, or facility customarily available to the public may not be denied to an individual for reasons based on that person’s race, colour, ancestry, place of origin, religion, marital status, 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 paras 59-63 [*Berg*] provides the definition of “customarily available to the public”. A service is customarily available to the public if the nature of the relationship is public. Courts 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 cites the definition for what 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 public, locales such as pubs, night clubs, hotels, theatres, transportation services, education facilities, insurance, medical treatment in hospitals, strata council and property management services in condominiums, 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 drivers licenses to those with certain visual impairments regardless of actual driving ability. Please refer to *BC (Superintendent of Motor Vehicles) v BC (Council of Human Rights)*, [1999] 3 SCR 868 [*Grismer*], which applied the three-part “*Meiorin*” test in the context of a services complaint (see **Subsection 6: Discrimination in Employment and the Duty to Accommodate**).

For a recent case that applied the three-part “*Meiorin*” test, 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 remediation, and ultimately restored the BC Human Rights Tribunal's finding of discrimination.

Ultimately, in the context of services customarily available to the public, section 8 of the HRC states that it is discriminatory if a person, without a *bona fide* and reasonable justification, arbitrarily precludes someone from the benefit of such a service based on an enumerated ground of discrimination. See *Moore v British Columbia (Education)*, 2012 SCC 61 at para 26.

Exceptions: There are a number of circumstances where discrimination is permitted, 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 as discussed above (see **Subsection 6: Discrimination in Employment and the Duty to Accommodate**).

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

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 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 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. Please refer to *Hunter v LaViolette* (No 2), 2007 BCHRT 415.

Exceptions: This section does not apply if the tenant is sharing 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 does not constitute discrimination (HRC, s 2(b)(i)).

4. Discrimination in Employment Advertisements and Interviews

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

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

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 grounds of mental or physical disability 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. 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.

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.”

This seems to be in keeping with the **1-year limitation period** for all human rights complaints. Issues arose when section 12(5) conflicted with the previous general 6-month limitation period for bringing human rights complaints, but the extension has eliminated any confusion.

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 with respect to employment or any term or condition of employment on the basis of race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, 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. This section might extend to volunteers depending on the circumstances (*Nixon v Vancouver Rape Relief Society*, 2002 BCHRT 1). When determining whether a volunteer is captured under the definition of “employee” in 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, see *Ferri v Society of Saint Vincent de Paul and another*, 2017 BCHRT 123 at paras 29-33.

In addition, 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).

Bona Fide Occupational Requirement (BFOR) Exemption: In the case of discrimination on the basis of disability, section 13(4) permits discrimination in employment if the basis for discrimination concerns a “*bona fide* occupational requirement” (BFOR). In *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union*, [1999] 3 SCR 3 at para 54 [*Meiorin*], the Supreme Court of Canada established a three-part test for establishing a BFOR. An initial investigation determines whether the standard, policy, or practice has the direct or indirect effect of excluding or negatively affecting individuals protected by the HRC; the onus of establishing sufficient evidence of the

complainant's case lies with the complainant. Please see *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 at paras 47-53.

Only once evidence has been established by a claimant that there is a case of discrimination (see **Section III.C.3** below), is the onus of proving a BFOR defence transferred to the respondent. The respondent must justify the standard by satisfying three elements:

1. The fundamental purpose of the standard must be rationally connected to the performance of the job;
2. The standard must have been adopted in good faith and with the legitimate belief that it is necessary in order to satisfactorily and safely perform all job related tasks; and
3. The standard is reasonably necessary to performing the job and it is impossible to accommodate the specific claims of the plaintiff without the employer incurring 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.

The BFOR exception applies to age discrimination as it relates to mandatory retirement. Thus, if the employer can establish one or more BFORs related to age, then mandatory retirement can still be imposed.

Undue Hardship: What may be considered “undue hardship” varies by employer depending on the circumstances. In *Central Okanagan School District No 23 v Renaud*, [1992] 2 SCR 970 at paras 21–23, the Supreme Court of Canada noted that it is more than a minor inconvenience, and that actual interference must be established. Factors the court may consider are financial cost, health and safety, and flexibility and size of the workplace. For a more exhaustive guide for employers and employees seeking accommodation, please see the BC Human Rights Clinic’s “FAQ – Duty to Accommodate” at: www.bchrc.net/duty_to_accommodate.

Other 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 will continue to be allowed under *bona fide* retirement, superannuation, or pension plans, and under *bona fide* insurance plans, including those which are self-funded by employers or provided by third parties (HRC, s 13(3)). Mandatory retirement may also not constitute a breach of the HRC when it is part of a *bona fide* pension plan as long as it is not done in order to circumvent the rights of individuals.

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

Section 14 states that trade unions, employers’ organizations, or occupational associations may not deny membership to any person or discriminate against a person on the basis of race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, 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 a disabled employee (*Chestacom v Mount St Marie Hospital of Marie Esther Society*, [2018] BCHRT No 44 at para 32 [*Chestacom*]). 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 disability.

C. *Prohibited Grounds of Discrimination*

1. *General*

Prohibited grounds of discrimination include 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 relevant to the employment, union or occupational association), and lawful source of income. Note that not all of the areas listed in sections 7–14 of the HRC are afforded protection against all forms of discrimination. For example, the HRC does not prohibit landlords from discriminating on the basis of a tenant's political beliefs. The grounds of discrimination that apply depend on the section of the HRC in question. One must first decide which section is involved and then check to see which grounds are associated with that section. Please refer to the helpful chart on page 6-5 above.

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 searchable based on a variety of criteria. The decisions are also available on CanLII BC.

It should be noted that one might file a complaint on a combination of grounds. Discrimination does not need to have been the sole or primary motivating factor to establish a case on a particular ground, as long as discrimination was a contributing factor to the impugned action. 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 might be considered discriminatory. Please refer to *Ontario (Human Rights Commission) v Simpsons-Sears Ltd*, [1985] 2 SCR 536 at para 14. 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 women that are pregnant it would 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.

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

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 are 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 and 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 areas of publication; public services such as schools, government programs, restaurants and stores; purchase of property; tenancy; employment advertising, 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 51.

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 and, as such, a comprehensive definition of what constitutes a political belief under the HRC has not been established. 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 No 124. See *Bratzer v Victoria Police Department*, [2016] BCHRT No 50 for a unique example of how political belief can be framed. Albeit unsuccessful, an officer of the Vancouver Police Department attempted to argue 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 free speech 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 member took into account that the issue was a legislative initiative involving public welfare and was being debated in the pharmaceutical community 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 areas of publication; public services; purchase of property; tenancy; employment advertising; employment; and membership in a trade union, employer's organization or occupational association. A claimant must show that their religious belief or practice is sincere, but not 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 No 281 at para 210; *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 70; *SL v Commission scolaire des Chênes*, 2012 SCC 7 at para 32; *R v Big M Drug Mart Ltd*, [1985] 1 SCR at paras 346-347)

The duty to accommodate has been firmly established in case law and obliges employers to accommodate the religious practices of their employees as long as doing so does not cause undue hardship. These practices may be linked to customs involving prayer, dietary restrictions, clothing requirements, and time off on religious holy days. Please refer to *Renaud v Central Okanagan School District No 23*, [1992] 2 SCR 970 at para 16.

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.

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. Only marital status is protected in the area of purchase of property.

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 present test for family status discrimination in employment is set out in *Health Sciences Assn. of British Columbia v Campbell River and North Island Transition*, 2004 BCCA 260 [*Campbell River*] at para 39. Per that test, in order to establish discrimination on the basis of family status, the complainant must show:

1. A change in a term or condition of employment imposed by the employer; and
2. That the change results in a serious interference with a substantial parental or other family duty or obligation.

The Federal Court of Appeal rejected the *Campbell River* test and set out its own four-part test in *Canada (Attorney General) v. Johnstone*, 2014 FCA 110, at para. 93. 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.

In Ontario, *Misetich v. Value Village Stores Inc.*, 2016 HRTO 1229 [*Misetich*] is the leading authority. *Misetich* criticized both *Campbell River* and *Johnstone* as creating too narrow of a test. The *Misetich* test requires a complainant to establish a negative impact that results in a real disadvantage to the parent/child relationship, parent/child responsibilities, or to the employees' work.

In Alberta, in *SMS Equipment Inc. v. Communications, Energy and Paperworkers Union, Local 707*, 2015 ABQB 162, the Court of Queen's Bench upheld a labour arbitration decision rejecting the *Campbell River* test. The court held that there were problems with both

Campbell River and Johnstone and ultimately concluded that the correct test for determining discrimination based on family status is the Supreme Court of Canada's general test for establishing discrimination set out in *Moore*. The Moore test was recently reaffirmed by the Supreme Court of Canada in *Stewart v Elk Valley Coal Corp*, 2017 SCC 30.

The BC Court of Appeal recently affirmed that the Campbell River test is the law in British Columbia: *Envirocon Environmental Services, ULC v Suen*, 2019 BCCA 46. Mr. Suen applied for leave to appeal to the Supreme Court of Canada, but this request was dismissed.

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 Westminster (City)* (1994), 24 CHRR D/441 at para 50 [*Boyce*]). See *Beckett v Strata Plan NW 2603*, 2016 BCHRT 27 at para 120 for a more recent case that refers to the definition of physical disability from *Boyce*. In *Morris v BC Rail*, 2003 BCHRT 14 at para 214 [*Morris*], the Tribunal set out the following three aspects 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 para 26 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. This has led to a somewhat expansive definition. For example, protection has been specifically applied to persons with AIDS, persons who are HIV positive, and persons believed to be HIV positive, all of whom are considered to have a physical disability. Please refer to *McDonald v Schuster Real Estate*, 2005 BCHRT 177 at para 24 and *J v London Life Insurance Co* (1999), [1999] BCHRTD No 35 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 addiction issues. For example, *Handfield v North Thompson School District No 26*, [1995] BCCHRD No 4 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, there is a duty to accommodate, meaning that all reasonable efforts must be taken to accommodate the group or person up until 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 also includes allowing workers to take days off on religious holidays.

7. *Sexual Orientation*

The HRC prohibits discrimination based on sexual orientation. Such discrimination does not require a complainant to prove their sexual orientation or 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 *Parly 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 (includes sexual harassment, pregnancy discrimination)*

Discrimination on the basis of sex, which is prohibited under the HRC, includes sexual harassment. Sexual harassment is defined as “unwelcome conduct of a sexual nature that detrimentally affects a work environment or leads to adverse job-related consequences for the victims of the harassment” (*Janzen v Platy Enterprises Ltd*, [1989] 1 SCR 1252 at para 56 [*Janzen*]).

In *PN v FR and another (No 2)*, 2015 BCHRT 60, the HRT increased the damages available for cases of sexual harassment by awarding \$50,000 for injury to dignity to a domestic foreign worker who was sexually harassed and assaulted. 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 expressly object to their harasser before filing a complaint. There is also no requirement of continuing harassment; a single incident may be sufficient if it is egregious.

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

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.

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.

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 new ground of gender identity or expression, please refer to *Oger v Whatcott (No 7)*, 2019 BCHRT 58.

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 transgender discrimination includes misgendering of trans individuals (addressing a trans person using a pronoun, name, or gender marker other than that which the trans person uses to identify themselves). It can also include the denial of trans-specific medical services.

10. Age (19 or over)

Age can refer to an individual's legal age, membership in a specific age-category, or a generalized characterization of a specific age. In 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 convicted of a criminal or summary conviction in the area of employment, trade unions, employers' associations and occupational associations only. This protection includes a perceived conviction (i.e. relating to arrests, stayed charges or acquittals) as long as the offence is unrelated to the employment or the intended employment of the individual. Please refer to *Purewall v ICBC*, 2011 BCHRT 43 at para 21; *Clement v Jackson and Abdulla*, 2006 BCHRT 411 at para 14; and *Kortbe v Hillstrom Oil Company Ltd*, [1997] BCCHR No 37 at paras 23–28. In an effort to establish whether or not a conviction may affect an employment decision, courts require an assessment of the relationship between the conviction and the job description. As such, employers must take into account the circumstances of the conviction in order to determine whether or not the charge relates to the employment. In *Woodward Stores (British Columbia) v McCartney (1983)* 43 BCLR 314 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?; and
- 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. Source of Income

BC's HRC protects against discrimination in tenancy on the basis of an individual's source of income. This safeguards the tenancy rights of individuals on social assistance or disability pensions who might otherwise be denied safe housing. Please refer to *Tanner v Blake*, 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.

D. Procedural Options for Employees

The HRC is particularly useful for those who have been discriminated against in the employment context. Since the BC Human Rights Clinic may potentially be able to handle much of the legal work free of charge, a complaint under the HRC may provide a valuable alternative to proceeding with a claim at the Employment Standards Branch or Small Claims Court for individuals who cannot afford a lengthy wrongful dismissal suit. Additionally, claimants may choose to pursue a wrongful dismissal suit alongside a human rights complaint. Claimants who pursue dual claims will not be able to benefit from “double recovery.” An employee who believes that they were discriminated against in relation to their employment may have more than one procedural option to choose from. These include:

1. Employer’s Internal Complaint Procedure

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

2. Grievance and Arbitration (Union)

Unionized workers are entitled to representation by their union. If the union backs out of its obligation, the worker may wish to file a human rights complaint and may even decide to name the union as a party if the worker has grounds to believe the union is complicit in the alleged discrimination. Generally, 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. However, initiating the grievance procedure is a good starting point, and can be followed by initiating a human rights complaint. A grievance and a 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.

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)

3. Human Rights Complaint

Another option is, of course, 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 and damages for injury to dignity, feelings and self-respect. However, note that if a claimant is also seeking severance pay and/or punitive damages 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 **6-month** limitation period from the date of the breach. A complainant can claim from both the ESB and Small Claims 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.

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, a recent Supreme Court of Canada decision clarified 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 its nature. Thus, if the claimant is primarily concerned with being compensated for injuries to their dignity and/or denouncing their employer's discriminatory behaviour, then they should file a complaint with the Human Rights Tribunal alongside a civil action for 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, he or she should maintain records or a journal with dates, times, places, witnesses, details of particular incidents, and even a description of the emotional effects of the harassment.

E. The Process for Human Rights Complaints

The BC Human Rights Tribunal handles complaints made under the HRC. The first step in filing a complaint with the Tribunal is to fill out a Complaint Form, which is available at the Tribunal's head office, on its website (www.bchrt.bc.ca), or from other local government agent offices. There are helpful self-help guides to filling out Complaint and Response forms on the Tribunal's website.

1. Who Can Lodge 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 must be filed with the Tribunal via mail, fax, or e-mail. Complainants may access the Complaint Form and other valuable resources at the BC Human Rights Tribunal website (see **Section II.B: Resources**). The party filing the complaint should be aware of the time limits. There is a general **1-year** limitation period, which may be extended under certain very limited circumstances.

3. *Review Process*

Once the Complaint Form is filed, the Tribunal will review the form to determine if it fits under the HRC and if it appears to meet the **1-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 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 a 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.

4. *Settlement Meeting*

Parties may agree to a settlement meeting at any time after the complaint has been filed. Guides for settlement meetings and hearings are available from the Tribunal at its office address or on its 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. This process allows for quicker resolution of the issue in a more informal setting, where information is kept confidential. The process is voluntary, and the Tribunal cannot force the parties to 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.

F. Remedies

Remedies should be considered first 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 or expenses, 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. Damages awarded for injuries to dignity have increased over the last decade. Currently the highest award in BC is \$75,000 (*University of British Columbia v Kelly*, 2016 BCCA 271). However, most damages in this category are under \$10,000. 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. 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 <http://www.bchrt.gov.bc.ca/human-rights-duties/remedies/compensation/index.htm>

Remember, to claim any type of damage, the claimant must lead evidence. If the claimant fails to lead strong evidence as to the effect the discrimination had on their emotional state and dignity, the Tribunal may not find any damage. Provided that the respondent is able to prove that the claimant has failed to mitigate his or her losses, the failure to mitigate one's losses can lead to the loss of a claimant's entitlement to wage loss compensation.

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, he or she must forfeit one of the awards, as they are not entitled to double recovery. There are several cases where the award for loss of wages was in the range of \$300,000. See *Kelly* and *Kerr*, *supra*.

The pecuniary remedies available under the HRC are meant to be compensatory in nature, not punitive. Section 37(4) of the HRC gives the Tribunal authority to order costs against either party as condemnation of improper conduct during the Tribunal processes. This order is independent of a finding that the complaint is justified. Additionally, 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 wage loss due to the need to attend a hearing.

The Tribunal will not provide remedies in every situation where there has been real or perceived discrimination. For example, the Tribunal will not award damages for lost wages/salary following a discriminatory dismissal 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.

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, but the *Judicial Review Procedure Act*, RSBC 1996, c 241 may be of some assistance if an individual is dissatisfied with the Tribunal's decision (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. However, pursuant to section 37(4) of the HRC, the purpose of awarding costs has been 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 suffered 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 when it was brought. 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. In addition, 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 discontinue proceedings where the Tribunal is persuaded that the complaint is made in bad faith, would be of no benefit, would not further the purposes of the HRC, and/or has no reasonable prospect of success. The 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.

4. *Complaint Brought Outside Limitation Period*

As mentioned above, there is a **1-year** limitation period. The **1-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 1-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 1-year time limit is a multi-faceted consideration, which is governed by the purposes of the HRC, and done 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. Mz̄ite*, 2014 BCCA 220; *Hoang v. Warnaco and Johns*, 2007 BCHRT 24.

I. Judicial Review

If an individual disagrees with a decision of the Tribunal, he or she 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 it can demonstrate that the Tribunal:

- Made an “error of law”, e.g., an incorrect interpretation of the HRC;
- Made a finding of fact that is unreasonable or based on a lack of 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; and/or based its decisions on irrelevant factors.

The applicable “standards of review” applicable to the Tribunal’s decisions is 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 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 such as mining operations.

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 offense 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 female and male employees for work of “equal value”, even if the work itself is not similar. Factors considered when defining “equal value” include skills required, responsibilities, and working conditions. Pursuant to 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

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

Instead of or subsequent to these stages, the Commission may refer the complaint to a quasi-judicial Canadian Human Rights Tribunal. The Commission has the power to assist the 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 mediation 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 in the amount of \$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 1 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

The Ministry of the Attorney General of British Columbia administers the *Civil Rights Protection Act* (CRPA), which defines prohibited acts and civil remedies or damages that may be available for victims of such acts. The types of actions and remedies available under the CRPA may not be suitable for all complainants, as the prohibited acts are tortious in nature and such cases are often heard in the Supreme Court of British Columbia. Usually the HRC or CHRA, whichever applies, will provide more useful protection for complainants who have suffered discrimination.

The more pertinent points of the legislation are the following:

- “Prohibited act” is defined as conduct or communications that interfere with civil rights by promoting hatred or contempt or by promoting the inferiority or superiority of groups classified by colour, race, religion, ethnic origin, or place of origin (CRPA, s 1),
- The Attorney General may choose to intervene in such actions, but, in any case, the Attorney General must be notified within 30 days of the start of an action (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 school (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 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.

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). 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 upheld a BC Human Rights Tribunal finding of discrimination against a BC school board in the homophobic harassment of one of its students (see *North Vancouver School District No 44 v Jubran*, [2005] SCCA No 260 at paras 91–102 (with costs and without reasons)). 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.

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 necessities 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 his or her health, or risk to his or her 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 his or her 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

A. *LSLAP's Role in Provincial and Federal 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, who 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 HRT.

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.