

DIRECT ACCESS TO PRIVATIZATION:

The Demise of Human Rights under the British Columbia Human Rights Tribunal

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Human rights legislation is the central instrument in the prevention of discrimination and the promotion of tolerance and equality in society.¹ In every Canadian jurisdiction, human rights agencies exist to administer and enforce human rights legislation. With the advent of the *Canadian Charter of Human Rights and Freedoms*, there has been a judicial expansion of equality concepts and an increasing “rights consciousness” in society.² However, this has also been met with a corresponding user and public dissatisfaction with human rights systems.³ In British Columbia (“BC”), this has provided an impetus for major reforms to the human rights framework. On March 31, 2003, Bill 64, the *Human Rights Amendment Act, 2002*, was brought into force, implementing extensive amendments to the *BC Human Rights Code* (“the Code”).⁴ Central amongst these changes was the abolition of the Human Rights Commission (“the Commission”), and the elimination of its gate-keeping and investigative functions.⁵ A pioneer in adopting such a model, the province has advanced it as a “blueprint for a new institutional framework for human rights protection and dispute resolution, designed to pave the way to more fair, efficient, effective and affordable outcomes”⁶

¹ British Columbia, Administrative Justice Project, *Human Rights Review: A Background Paper for the Administrative Justice Project* (Victoria: Ministry of the Attorney General, 2001) at 1 [Human Rights Review].

² *Ibid.*

³ *Ibid.*

⁴ British Columbia, BC Human Rights Coalition, online: <<http://www.bchrcoalition.org/>>.

⁵ Shelagh Day, “Rolling Back Human Rights in BC: An Assessment of Bill 53 – the Government of British Columbia’s Draft Human Rights Legislation” (2002) Canadian Center for Policy Alternatives, BC Office, online: <http://www.policyalternatives.ca/documents/BC_Office_Pubs/human_rights_code_brief.pdf> [Day].

⁶ British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly (Hansard)*, (21 October 2002) at 3890 (Hon. G. Plant).

The abolition of the Commission was notable in providing complainants with an “automatic right” to hearings before the Human Rights Tribunal (“the Tribunal”), removing the risk that legitimate claims would be screened out without ever being heard.⁷ The elimination of the Commission also addressed concerns regarding lengthy delays caused by its investigation and screening process. However, the loss of the Commission has also meant the loss of the body responsible for performing an array of public functions under the *Code*, such as promoting education, conducting research, and monitoring the status of human rights in the province.⁸ The “direct access” framework ultimately takes the form of a private dispute resolution model, narrowing the system’s focus onto resolving individual complaints. While processing complaints and providing remedies to victims of discrimination is an important aspect of human rights agencies, addressing discrimination more broadly is also of critical importance. According to William Black, human rights agencies serve both private and public functions, and each are key components to their overall effectiveness.⁹ However, Black finds that the legislative changes “leave little of the public function of the Commission intact.”¹⁰ This shift away from the broader public function is also contrary to Canada’s international legal obligations. Under the United Nation’s *Paris Principles*, a human rights institution is mandated to include an “independent body ‘vested with a wide competence to *promote* human rights and *prevent* abuse’”, a requirement that is not being met without a body such as the Commission.¹¹ While not legally binding, these Principles “identify key responsibilities and roles for an effective human rights system to operate” and thus provide benchmarks from which to judge the effectiveness of human

⁷ Day, *supra* note 5 at 9.

⁸ *Ibid.*

⁹ William Black, “Human Rights Reform in B.C.” (1997) 31 U. Brit. Colum. L. Rev. 2 at 255 [Black].

¹⁰ *Ibid.* at 4-6.

¹¹ Principles Relating to the Status of National Institutions for the Promotion and Protection of Human Rights (“Paris Principles”), GA Res. 48/134, UN GAOR Supp. No. 49, UN Doc. A/Res/48/49 (1993) [Paris Principles].

rights agencies in promoting and protecting human rights.¹² According to the Canadian Association of Statutory Human Rights Agencies, the amendments “leave the province with virtually none of the standards set out in the *Paris Principles*.”¹³ Moreover, the reduced emphasis on the public purpose of human rights legislation means that human rights matters are being relegated largely to the private sphere, while broader patterns of discrimination are not being adequately addressed. Although the new institutional framework has been heralded as a more efficient means of processing complaints, it has aimed to achieve this by sacrificing the Commission and its vital public interest components. Moreover, in surrendering this public aspect of human rights in the name of efficiency, the government has failed to truly enhance the ability of the human rights system to adequately address complaints at the private level.

This paper, I will evaluate these various limitations of the current human rights system for promoting and protecting human rights and providing greater accessibility, against the conceptual framework of the Paris Principles and the dual public-private purpose of effective human rights agencies. In doing this, a theme of neoliberal privatization and formalistic equality emerges, raising doubts as to whether the recent amendments to BC’s human rights system were truly undertaken out of governmental concern for improving human rights, or are simply another effort to streamline the justice system.

¹² Ontario Human Rights Commission, *Reviewing Ontario's Human Rights System: Discussion Paper* (Ontario Human Rights Commission, 2006) at 5, online: Ontario Human Rights Commission <<http://www.ohrc.on.ca/english/consultations/human-rights-review-discussion-paper.pdf>>[OHRC].

¹³ *House of Commons and the Honourable Gilbert Parent v. Satnam Vaid and Canadian Human Rights Commission*, (Factum of the Respondent), online:http://www.chrcccdp.ca/legislation_policies/factum/Vaid_toc/tm-en.asp>. (CASHRA is composed of representatives of all of Canada’s human rights commissions. This information was presented in their submission to the BC government regarding Bill 53, the precursor to Bill 64).

PART I: DIRECT ACCESS AWAY FROM PUBLIC INTEREST

I. EDUCATION & MONITORING

The United Nations has repeatedly recognized the importance of human rights education as the primary means of promoting respect for human rights, enabling the development of human dignity, and allowing all individuals to participate in a free society.¹⁴ The educative function of human rights legislation is a large part of why it is afforded quasi-constitutional status,¹⁵ and is ultimately, “the foundation upon which the whole human rights project rests”.¹⁶ In *Blencoe v. British Columbia (Human Rights Commission)*, the Supreme Court of Canada identified the *promotion of equality* and the *elimination of discrimination* as central aspects of human rights legislation.¹⁷ Public education and monitoring are crucial to the realization of these goals. In his introductory speeches to Bill 64, Attorney General Geoff Plant declared that “[p]ublic information and understanding are...key components of a successful human rights system”.¹⁸ However, the mandate for public education and monitoring is significantly weakened under the new *Code*.¹⁹ The objective of creating mechanisms for providing information, education and advice, as well as the goal of monitoring progress in achieving equality are no longer “purposes” of the *Code*.²⁰ In addition, the “purpose” of education and research has been reduced to promoting “understanding” of the Code, and no longer at promoting its “acceptance”.²¹

In addition to weakening the mandate for various public interest components of the human rights system, the new legislation transfers responsibility for education, public

¹⁴ UN GAOR 51st Sess. UN Doc. A/51/506/Add.1 (1996).

¹⁵ Black, *supra* note 9.

¹⁶ Stan Corbett, “Human Rights Adjudication, Human Rights Education: Two Models of Institutional Independence”, online: Department of Justice <<http://canada.justice.gc.ca/chra/en/edarb.html>>.

¹⁷ *Blencoe v. British Columbia (Human Rights Commission)* (2000), S.C.C. 44; 190 D.L.R. (4th) 513.

¹⁸ British Columbia, Legislative Assembly, *Hansard* (23 October 2002) at 3895 (Hon. Geoff Plant).

¹⁹ *Human Rights Code*, R.S.B.C. 1996, c. 210, s.5 [*Human Rights Code*].

²⁰ *Ibid.*, at s.3.

²¹ *Ibid.*

consultations, and research to the Attorney General. Thus, the responsibilities once entrusted to an independent, expert, human rights agency, are now assigned to a generalized government department. Contrary to the assertions of the Attorney General's office, this really signifies that these activities *are not a priority*, as they are relegated amongst a varied list of duties rather than being the primary objectives of a specific body.²² The rewording of the "purposes" of the *Code* ultimately means there is no longer a public body mandated to provide information and education programs to foster understanding and acceptance of the human rights.²³ Aside from these statutory changes, the difference in delivery of human rights education under the Attorney General does not evidence it being treated as a priority. While the Attorney General insisted that human rights education would continue and proposed a steering committee to oversee education,²⁴ the committee was never developed and there has been relatively little human rights education since.²⁵ Rather than intensify their efforts to establish and implement human rights programs to match its commitment under the UN,²⁶ "the government of BC has weakened the mandate and the capacity to provide this education; [c]learly, human rights and the elimination of equality are not top priorities for the provincial government."²⁷

Transferring the authority to conduct research and consultations from an external third-party onto a government Minister also removes an important layer of independence, which is

²² British Columbia, Legislative Assembly, *Hansard* (19 September 2005) at 1145 (M. Polak).

²³ Day, *supra* note 5 at 10-11.

²⁴ British Columbia, Legislative Assembly, *Hansard* (24 October 2002) at 1025 (Hon. Geoff Plant).

²⁵ Maria Montgomery & Barbara Harvey, "See No Evil, Hear No Evil: The State of Human Rights Monitoring in British Columbia," in Devyn Cousineau, ed., *Route 64 – Another Detour on the Road to Equality: An Examination of the Current Human Rights System in British Columbia* (2006)[unpublished] at 45, online: International and Human Rights Law Association <<http://www.hrdefenders.bc.ca/route64.html>> [Montgomery](Authors are referencing comments made by the New Democratic Party of British Columbia in regards to BC's new model for human rights).

²⁶ UN GAOR 51st Sess. UN Doc. A/51/506/Add.1 (1996).

²⁷ Montgomery, *supra* note 26 at 35.

crucial to ensuring accurate reporting and critical evaluation of human rights in the province.²⁸

The research and consultations which were conducted by the Commission frequently involved the investigation of state policies and structures, the identification of shortcomings, and recommendations for improvement.²⁹ However, government Minister's are less likely to be critical of their own activities or make recommendations that may entail budgetary increases. This is particularly problematic in BC, as the provincial government is one of the province's largest employers and frequently carries out activities which may be the subject of human rights complaints.³⁰ An independent and specialized agency is much better equipped to perform research and consultation. Under the *Paris Principles*, independence is identified as "possibly the most crucial factor in assessing the potential effectiveness and the legitimacy of a national human rights institution."³¹

Some of these concerns have been partially addressed by engaging private service providers to assist in these activities. The BC Human Rights Coalition ("the Coalition") is funded by the government to provide client services and public legal education.³² However, the Coalition is non-profit community-based organisation, and its efforts to fill the human rights education gap fall short of what is needed. While the Coalition is an expert in the development and delivery of educational programs, it does not have the resources or staff to devote to human rights education, and its programs do not have the same status or credibility as legislatively enacted programs carried out by government.³³ The Coalition is inevitably a lesser substitute for

²⁸ Montgomery, *supra* note 26 at 45.

²⁹ Devyn Cousineau, "Standing Alone: British Columbia's Human Rights System Under International Law", Devyn Cousineau ed., *Route 64 – Another Detour on the Road to Equality: An Examination of the Current Human Rights System in British Columbia* (2006)[unpublished] at 22, online: International and Human Rights Law Association <<http://www.hrdefenders.bc.ca/route64.html>>[Cousineau].

³⁰ Black, *supra* note 9 at 2-4.

³¹ Paris Principles, *supra* note 11.

³² Cousineau, *supra* note 30 at 21.

³³ *Ibid.*

the Commission, and incapable of adequately performing the public interest function of human rights agencies.³⁴ Furthermore, even with the Coalition, the provincial government still does not have an independent human rights monitor to advise on policy directions in response to emerging concerns.

Since the Commission was abolished, there have been no reports, public hearings or consultations. Attorney General Geoff Plant provided assurances that monitoring of progress in achieving equality would continue, despite its removal as an objective under the *Code*.³⁵ However, since 2002, the Attorney General has not encouraged or conducted research regarding human rights. While the Tribunal is legislated to submit an annual report, it is only required to report on its “activities” and not on human rights issues more broadly.³⁶ The Tribunal is not entrusted with the broad array of functions necessary for the promotion and protection of human rights.³⁷ The West Coast LEAF Association also observes that this is contrary to international law obligations, as “[t]he Paris Principles clearly describe the role of a Human Rights body as one that advises government and other bodies through the production of opinions, recommendations, proposals and report”.³⁸ Neither the Tribunal nor the Coalition fulfills this description. The Coalition’s role is limited to client services and public education, while the Tribunal’s quasi-judicial role virtually precludes it from performing many of these broader functions which could undermine the impartiality necessary to perform its adjudicative function.³⁹ Even taken in tandem, the two bodies fall short of international law requirements for

³⁴ Black *supra* note 9 at 5-7.

³⁵ *Hansard*. *supra* note 18.

³⁶ *Human Rights Code*, *supra* note 19.

³⁷ Black, *supra* note at 4-8.

³⁸ West Coast LEAF: Women’s Legal Education Action Fund (11 September 2002), online:<
<http://www.westcoastleaf.org/index.php?pageID=45&parentid=29#humanrights>> at 3. [LEAF] (In their submissions to Attorney General Geoff Plant on Bill 53, the precursor to Bill 64).

³⁹ *Ibid*.

a human rights institution, and are wholly inadequate in fulfilling the public dimension necessitated of an effective human rights system.

II. SYSTEMIC DISCRIMINATION

In general, human rights commissions are the bodies charged with the responsibility of educating the public about human rights, and monitoring equality and patterns of systemic discrimination.⁴⁰ This also involves the initiation of complaints that have a public dimension, and participation in policy-making, to ensure that human rights disputes are not relegated to the private sphere.⁴¹ In order to represent the public interest, commissions are typically empowered to join as parties in cases, such as those which raise concerns about systemic discrimination.⁴² In its published review of human rights in the province, the Administrative Justice Project stressed the importance of the Commission's investigative function in effectively advancing systemic complaints, noting that "allegations of systemic discrimination can generally only be established through the exhaustive and skilled review of the policies and records of the respondent institution."⁴³ The fact that there is no longer a Commission, nor a similar body resembling one, with the power to file or become a party to complaints in the public interest, makes it less likely that systemic cases will be brought forward, and less likely that they will succeed.⁴⁴

Under the new legislation, persons and organizations whose interests are not directly affected by discrimination may still file systemic complaints, and are given additional powers to intervene, however these provisions have become largely symbolic.⁴⁵ Systemic claims are extremely expensive to bring forward, as they are usually very lengthy, present complex legal

⁴⁰ *Ibid.* at 14.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ Human Right Review, *supra* note 1 at 140.

⁴⁴ LEAF, *supra* note 39.

⁴⁵ *Ibid.*

issues, and often involve the use of expert witnesses. As such, there are “[f]ew, if any, community organizations in B.C. [which] would be in a position to bring such a case.”⁴⁶ According to LEAF, substantial cutbacks and restructuring in recent years make the intervention of non-profit-agencies, non-governmental agencies and public interest organizations impossible.⁴⁷ The groups who experience the most severe discrimination are the least likely to have sufficient resources to litigate systemic cases, and there few organizations in BC that are even mandated to intervene in Tribunal cases.⁴⁸ Thus, while individuals and groups are empowered to bring systemic complaints forward, there are many practical barriers which prevent these powers from being exercised. The government has ultimately “offload[ed] responsibility in removing barriers to equality onto the shoulders of individuals and civil society”, extending the inevitable message that systemic discrimination is the sole concern of private individuals and interest groups, rather than a challenge to be shared and confronted throughout society.⁴⁹ According to Shelagh Day, the human rights system has been “gutted out... effectively removing its public function and reducing it to a mechanism for settlement of private disputes.”⁵⁰ She notes that, “[i]ronically, it is precisely this narrow, individualized system that the Commission and [previous] legislative framework was designed to correct.”⁵¹

PART II: DIRECT ACCESS AS PRIVATE DISPUTE RESOLUTION

I. MERITORIOUS CLAIMS STILL BEING SCREENED OUT

⁴⁶ *Ibid.* at 4-8.

⁴⁷ *Ibid.* at 5.

⁴⁸ *Ibid.*

⁴⁹ Montgomery, *supra* note 26 at 74.

⁵⁰ Day, *supra* note 5 at 12.

⁵¹ *Ibid.*

While narrowing its focus onto individualized dispute resolution, the new institutional framework still fails to accomplish many of the tasks it was purportedly implemented for. First of all, the abolition of the Commission has not necessarily eliminated its gate-keeping function, but simply transferred it by affording the Tribunal greater power to review and dismiss cases without hearing.⁵² Under section 27(1) of the *Code*, the Tribunal has the power to dismiss a complaint without a hearing where: a) it is not within the Tribunal's jurisdiction; b) the acts or omissions alleged do not contravene the *Code*; c) there is no reasonable prospect of success; d) proceeding with the complaint would not (i) benefit the individual or group alleging discrimination, or (ii) further the purposes of the *Code*; e) the complaint was filed for improper motives or made in bad faith; f) the substance of the complaint has been dealt with appropriately in another proceeding; or g) it was not filed in time.⁵³

According to Day, this provides the Tribunal with virtually the same authority for dismissing complaints as the Commission once had.⁵⁴ Moreover, if the intended purpose of the model is to provide direct access, it seems counter-intuitive to provide the Tribunal this much latitude for dismissing complaints without hearings. Many of the grounds for dismissal entail an exercise of discretion in relation to the merits of the case. For example, the ability to dismiss where "the acts complained of do not contravene the *Code*" could become the basis for dismissal where there's found to be insufficient evidence.⁵⁵ However, this is a determination that goes to the merits and may require weighing of the credibility of witnesses.⁵⁶ This inevitably raises concerns that potentially meritorious complaints could be dismissed without hearing.

⁵² Black, *supra* note 5 at 4-8.

⁵³ *Human Rights Code*, *supra* note 19 at s.27.

⁵⁴ Day, *supra* note 5 at 11.

⁵⁵ *Ibid.* at 12.

⁵⁶ *Ibid.*

The Tribunal's statistics on rates of dismissals highlight this concern in demonstrating that only a small percentage of cases are actually receiving hearings on their merits. In the years following the implementation of the direct access model, intake has remained high, but the majority of decisions rendered were on preliminary matters. In 2004-2005, 508 decisions were rendered, and 469 (92%) dealt with procedural matters.⁵⁷ Only 39 "final" decisions were rendered, and 20 of these were dismissals.⁵⁸ In 2005-2006, 620 decisions were rendered, and 567 (91%) were on preliminary matters.⁵⁹ Of these, 287 (45%) were the result of "successful" applications to dismiss complaints pursuant to section 27, on grounds such as having "no reasonable prospect of success" or being "outside the time limit".⁶⁰ As the majority of the Tribunal's caseload is comprised of preliminary matters, the bulk of its work is not actually concerned with substantive human rights issues, but rather with the technical administration of the *Code*.⁶¹ These statistics indicate that the direct access model is not necessarily allowing for more human rights claims to be adjudicated on their merits, and also that the gate-keeping function of the former Commission is still very much intact.

The high number of decisions being rendered on preliminary matters also evidences the additional burdens which are being placed on complainants to establish the merits of their claims at early stages in the process. The various powers of dismissal under section 27, such as the ability to dismiss cases that have no reasonable prospect of success in 27(1)(c), place the legal

⁵⁷ British Columbia, Human Rights Tribunal, *B.C. Human Rights Tribunal Annual Report 2004-2005*, (B.C. Human Rights Tribunal, 2005) at 8, online: B.C. Human Rights Tribunal <http://www.bchrt.bc.ca/annual_reports/Annual_Report_2004-2005.pdf>.

⁵⁸ *Ibid.*

⁵⁹ British Columbia, Human Rights Tribunal, *B.C. Human Rights Tribunal Annual Report 2005-2006*, (B.C. Human Rights Tribunal, 2006) at 9, online: B.C. Human Rights Tribunal <http://www.bchrt.bc.ca/annual_reports/Annual_Report_2005-2006.pdf>.

⁶⁰ *Ibid.*

⁶¹ Heather Dixon, "You're on Your Own: The Impact of Eliminating Human Rights Investigations in B.C.", Devyn Cousineau ed., *Route 64 – Another Detour on the Road to Equality: An Examination of the Current Human Rights System in British Columbia* (2006)[unpublished] at 59, online: International and Human Rights Law Association <<http://www.hrdefenders.bc.ca/route64.html>> [Dixon].

and financial burden on complainants to investigate their own cases in order to be granted full hearings.⁶² Moreover, this is a higher standard than that which was set by the Commission, and complainants must now meet it on their own.⁶³ Day observes that the investigative powers which were stripped from the *Code* appear to have been replaced with the pre-hearing disclosure procedures of the Tribunal.⁶⁴ For example, section 27.3 empowers the Tribunal to make rules respecting practice and procedure for hearings, such as pre-hearing disclosure of evidence and documents.⁶⁵ Given that the Tribunal is an adjudicative body rather than an administrative one like the Commission, there is a higher onus on it to satisfy rules of procedural fairness. This inevitably renders its procedural rules more formal, placing higher evidentiary burdens on parties which make it harder to establish claims as meritorious.⁶⁶

The new legislation also discourages the filing of complaints in the way costs are awarded and the imposition of a more stringent limitation period. Under section 37(4) of the *Code*, there is only a limited ability for the complainants to receive costs where the other party “engages in improper conduct” and “contravenes a rule under 27.3(2) or an order under section 27.3(3).”⁶⁷ However, complainants run the risk of costs being awarded against them if they lose at hearings.⁶⁸ The risk of financial penalty will likely make complainants more hesitant to bring complaints even where they are meritorious. The reduction in the time limit for filing a complaint from one year to six months similarly discourages filing. Section 22(3) does empower the Tribunal to accept a complaint outside of this time limit, if it is “in the public interest” and

⁶² *Human Rights Code*, *supra* note 19 at s. 27.

⁶³ Dixon, *supra* note 62 at 54.

⁶⁴ Day, *supra* note 5 at 12.

⁶⁵ *Human Rights Code*, *supra* note 19 at s. 35.

⁶⁶ Day, *supra* note 5 at 11.

⁶⁷ *Human Rights Code*, *supra* note 5, s.27.3(3).

⁶⁸ Day, *supra* note 5 at 13.

“will not result in substantial prejudice”.⁶⁹ However, the onus is on complainants to satisfy this burden, and the evidence required to establish this places unrealistic expectations on complainants.⁷⁰

II. ACCESS TO JUSTICE BARRIERS

In addition to failing to truly eliminate the risk of meritorious claims not being heard by the Tribunal, the current human rights framework also creates new hurdles for complainants by leaving them on their own to navigate a complex human rights system. The *Paris Principles* recognize that “the complexity of the human rights system may act as a barrier to individuals who are marginalized”.⁷¹ However, complainants no longer have the assistance of the Commission, or direct entitlements to legal representation.⁷² This latter concern arose even before the invocation of the new legislation, when the province drastically reduced the Commission’s budget and it was forced to stop providing legal aid to human rights complainants.⁷³ The *Code* currently provides no statutory obligation to provide complainants with legal representation. While the government made assurances that a legal clinic would be set up to assist parties in this process, the only action taken in this regard has been to provide minimal funding to non-profit organizations such as the Coalition.⁷⁴

In addition to the lack of legal assistance, there is also a lack of structured legal information. Having access to a public source of structured legal information is a necessity for parties to know their legal rights, and what to expect during the administrative process, so that they may make

⁶⁹ *Human Rights Code*, *supra* note 5, s.25(3).

⁷⁰ LEAF, *supra* note 39 at 7.

⁷¹ OHRC, *supra* note 12 at 13.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ Day, *supra* note 5 at 15.

informed decisions about their cases. The Tribunal has taken some steps toward improving accessibility since the Commission's abolition, primarily through expanding the information available on its website. The website now contains, amongst other things, links to five Tribunal Guides and 25 Information Sheets, 16 Forms, the 50 page *Code*, and a 44 page manual of the Tribunal's *Rules of Practice and Procedure*.⁷⁵ While intended to provide greater accessibility, this mass of information can be overwhelming, intimidating and confusing, and its provision is ultimately premised on a very limited and formalistic notion of what is required for accessibility.

The form and manner of presentation of information on the Tribunal's website places an unrealistic amount of responsibility on parties and creates significant barriers to accessibility. The forms, guides and information sheets are only available in three languages (English, Chinese, and Punjabi). Further, as the website is presented in English, to locate the resources available in other languages requires some English language skills. At the initial filing stage, if complainants are able to locate the requisite "complaint" form to be filed, and the proper "information sheet" for completing it, the form itself poses another significant hurdle. Individuals are required to select "ground(s) of alleged discrimination" from amongst choices such as "race", "colour", "ancestry", and "place of origin". Not only is the distinction between such "grounds" not provided in the information sheet, but it forces individuals to determine which "ground" was the *reason* for the discriminatory treatment they received – a difficult, if not impossible task, particularly for intersectional complainants. Moreover, they are then required to explain the incident and why they think what happened was discriminatory, and then "connect" this incident back to the "ground". The difficulty of these tasks is best illustrated through reference to a case example.

⁷⁵ British Columbia, B.C. Human Rights Tribunal, "Contents", B.C. Human Rights Tribunal, online: <<http://www.bchrt.bc.ca/>>.

In *Alexander v. British Columbia*,⁷⁶ a First Nations woman with a partial motor impairment affecting her speech and walk was refused service by a liquor store because the male manager thought she was drunk. Refusing to believe that she had a disability, he called the police, and it was only after speaking with her lawyer that he was willing to believe she was disabled.⁷⁷ In filing a complaint to the Tribunal, how is she to select the proper ground? Certainly she has a disability, but since the manager refused to believe her until later in that regard, is his behaviour truly attributable to this ground, or was it more likely owing to her race, colour, or ancestry? Or could it have been sex discrimination? Upon selecting a ground, how would this be explained as arising in connection the “ground”? How would it be properly attributed to discrimination, and not simply to the manager’s not wanting to serve an individual believed to be intoxicated? In this case, the complainant alleged discrimination on all of these grounds, and was successful on the ground of physical disability. All other grounds were summarily rejected by the tribunal.⁷⁸ While this case arose before the current human right model was instituted, it is illustrative of the difficulties that individuals may be faced with – just at the compliant-filing stage.

In preparing for a hearing, parties are instructed to prepare and summons their witnesses, decide if they need expert evidence, write an opening statement, and conduct legal research.⁷⁹ How is an individual with a non-legal background to determine if they will need an expert witness? Or to decide if they will need to do legal research? The information sheet provides extremely limited guidance in these regards. If parties do choose to do legal research, they are directed to the Tribunal’s website. Yet, in addition to presuming their proficiency in conducting

⁷⁶ *Alexander v. B.C. (Ministry of Labour and Consumer Services, Liquor Distribution Branch)* (1989), 10 C.H.R.R. D/5871.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ British Columbia, B.C. Human Rights Tribunal, “Guide 5: Getting Ready for a Hearing”, B.C. Human Rights Tribunal, online: <http://www.bchrt.bc.ca/guides_and_information_sheets/guides/Guide5_2005.pdf>.

internet research, the Tribunal only provides judgments in PDF form filed by the date the decision was issued. As decisions are not organized in a topical manner, it is extremely difficult to locate relevant cases (presuming one even knows what is *relevant* or *precedential*). This same issue arises with other free online legal databases, so unless parties have access to commercial databases, which community legal assistance organizations are rarely even able to afford, legal research poses a daunting task. The alternative resource recommended by the Tribunal for conducting legal research is the Canadian Human Rights Reporter. However, the published version available in libraries is organized in the same manner as the Tribunal's – by date of decision – while the online, searchable site is restricted to users with a paid subscription. When considered against the backdrop of the growing complexity of human rights legislation and the loss of entitlement to legal assistance, this lack of structured legal information and the unrealistic level of responsibility being placed on parties throughout the complaint process creates serious accessibility and fairness concerns. According to the *Paris Principles*, “accessibility issues are a fundamental concern that should be accounted for in any human rights system”.⁸⁰ While the new model thrives on being *direct*, “having direct access to the Tribunal is not necessarily equivalent to having proper access to the human rights system.”⁸¹

PART III: ALTERNATIVES

I. OTHER JURISDICTIONS

Every other jurisdiction in Canada has a Commission similar to the one was abolished in BC pursuant to Bill 64. These other jurisdictions are also dealing with complaints similar to those

⁸⁰ OHRC, *supra* note 12 at 13.

⁸¹ Roberto Alberto, “Out of Reach: Accessing Equality under B.C.’s Current Human Rights System”, Devyn Cousineau ed., *Route 64 – Another Detour on the Road to Equality: An Examination of the Current Human Rights System in British Columbia* (2006)[unpublished] at 64, online: International and Human Rights Law Association <<http://www.hrdefenders.bc.ca/route64.html>> [Alberto].

that underwrote Bill 64. Thus, it is useful to consider how these concerns are being addressed in some other jurisdictions. In Ontario, for example, the provincial government has reaffirmed its commitment to the retention of its Commission.⁸² Changes to improve the efficiency of Ontario's human rights system have focused on restructuring existing stages, such as investigation.⁸³ Rather than endorsing a model aimed primarily at resolution of private disputes, Ontario has remained committed to improving both the private and public functions of its human rights system.

At the federal level, a "direct access" model was recommended by former Supreme Court of Justice Gerard LaForest and a panel of independent experts to replace the Canadian Human Rights Commission.⁸⁴ However, this model, which has not been implemented, was proposed to provide the Commission with "greater control over its resources in the current individual complaints model, allowing it to act in a proactive way to promote human rights".⁸⁵ Unlike Bill 64, the structural changes proposed under the federal vision of "direct access" did not involve abolition of the Commission. Moreover, the federal model sought to place *greater* emphasis on activities such as education and research, whereas Bill 64 entirely eliminated the proactive research capacities of the Commission.⁸⁶

II. OTHER PROPOSALS

A Commission-less, direct access model is not the only response the BC government could have taken to improve the efficiency of the human rights process. BC could have followed

⁸² OHRC, *supra* note 12 at 14.

⁸³ Alberto, *supra* note 83 at 60.

⁸⁴ Canada, Minister of Justice, *Promoting Equality: A New Vision* (Ottawa: Canadian Human Rights Act Review Panel, 2000) at 132.

⁸⁵ *Ibid.*

⁸⁶ Montgomery, *supra* note 26 at 47.

Ontario's lead, or implemented the federalist model of direct access. Alternatively, the government could have implemented one of the other six models proposed by the Administrative Justice Project, only one which involved the complete abolition of the Commission.⁸⁷ Two proposals entailed an introduction of various efficiency modifications, either into the existing structure, or a more "traditional" structure. Under the former proposal, investigations would be reserved for systemic complaints taken on directly by the Commission, while under the latter the Commission would be afforded full carriage of complaints. Two proposed models also presented a "direct access" design that retained the Commission. One of these was the model detailed in the La Forest Report, which eliminated the investigative and screening functions of the Commission and targeted its efforts toward addressing systemic discrimination. Another variation on this model was to combine an advocacy-oriented Commission with a more inquisitorial and active Tribunal empowered with gate-keeping and discovery functions. All of these alternatives held promise for improving the efficiency of the human rights system without the complete abolition of the Commission or the total loss of the public purpose of the human rights system.

PART IV: CONCLUSION

The government did not need to entirely abolish the Commission to address delays and inefficiency in the human rights process. It could have chosen to follow a number of other proposals provided by the Administrative Justice Project, or it could have sought to improve on its current model as other jurisdictions like Ontario have. This would've allowed retention of an independent body for ensuring crucial public functions of promoting education and monitoring the status of human rights in the province. According to Day:

⁸⁷ Human Right Review, *supra* note 1 at 145-152.

“... the concerns of human rights advocates who have pointed to legitimate problems... such as delays and the Commissions ‘gate-keeper function’ ...have been used by the government to justify eliminating the Commission. To add insult to injury, in spite of using these problems to justify the changes, the government’s proposed legislation fails to do anything about them.”⁸⁸

While the new institutional framework has been heralded as a more efficient means of processing complaints, it has aimed to achieve this through sacrificing the Commission's vital public interest components. Although proclaiming dedication to education and monitoring of human rights in the province, the government has failed to take any actions to this effect. The story this tells of human rights in BC is one of privatization, one which corresponds to larger societal trends occurring under the neoliberal movement. However, in taking a dangerous step back in the protection and promotion of human rights by privatizing these critical social issues, the new framework has also failed to deliver many of the improvements it was purportedly designed to. Not only has it rendered the system less equipped to address systemic discrimination, but it has not truly provided “direct access” to individual complainants. Moreover, the individualized model is promoted as providing better accessibility, but its design and mode of delivery actually create new access to justice barriers which discourage individuals at each stage of the process. Thus, the new “private” model, effectively adopted at the expense of the public interest, has not necessarily even succeeded at improving the system’s effectiveness at the private level.

BC has been at the forefront of human rights amendments in Canada, taking more radical reforms than any other jurisdiction. The government’s stated goal – the better administration of BC’s human rights laws⁸⁹ – is worthy of pursuit. But if this is truly the goal, the government has missed the mark in nearly every respect, save “efficiency” in processing complaints. Many of the changes which have been implemented only make sense against the backdrop of more narrow

⁸⁸ Day, *supra* note 5 at 12.

⁸⁹ Hansard, *supra* note 18.

goals of resolving private disputes by providing parties with “do-it-yourself” tools. They do not make sense when measured against the larger goals of providing access to justice, or promoting human rights and equality through the prevention of discrimination. The current design denies many complainants effective access to the mechanisms in place for protecting human rights. This evidences a disjuncture between its liberal views of accessibility, and the complex experiences of people’s lives throughout the human rights process that are symptomatic of the deep structures of subordination that underwrite our legal culture. If the ultimate goal is to improve human rights, the government needs to focus on implementing changes that actually provide better access by first taking into account the needs of complainants and respondents. It also necessarily entails a legitimate commitment to the pursuit of *both* the public and the private function of human rights. Other jurisdictions should look to BC and consider it a lesson – “direct access” should be approached with caution if human rights are to be properly promoted and protected in accordance with their quasi-constitutional status and Canada’s international legal obligations.

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