



INDIGENOUS HUMAN RIGHTS LAW


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ACKNOWLEDGEMENTS

<https://www.bcafn.ca/first-nations-bc/interactive-map>

OUTLINE

1. Review B.C. Human Right Tribunal (BCHRT) Requirements and Process
 - a) Jurisdiction
 - b) Essential Requirements for a claim
 - c) Process
 2. Discuss “Expanding Our Vision” by: Ardith Walkem Q.C.
 3. Review some recent Case Law
 4. Questions and Discussion
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BC HUMAN RIGHTS TRIBUNAL:

JURISDICTION, REQUIREMENTS AND PROCESS



LEGISLATION AND JURISDICTION

- 1st step is to determine which legislation applies
 - for example if the claim is for discrimination in employment, must determine if the employer is provincially or federally regulated

Provincially:

- *Human Rights Code*, RSBC 1996, c 210, as amended [HRC]
- B.C. Human Rights Tribunal

Federally:

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

LEGISLATION AND JURISDICTION

- To determine jurisdiction, look at whom the claim is against and what category you are claiming under/what legislation applies to the relationship between the parties
 - For example: an Indigenous client who is employed by Telus, as a telephone sales representative, but works from home on reserve
- For Indigenous Clients, this may be hard to determine and they may be covered by BOTH federal and provincial laws
 - For example: employment on reserve, wherein the client may normally be protected by provincial Human Rights Law in relation to their employment, like a receptionist, but if their employer is an Indigenous group/band, then federal legislation may apply



B.C. HUMAN RIGHTS CODE

- Complainant must prove the following 3 elements:
 1. They have a characteristic protected by the Code
 2. They experienced adverse impact with respect to an area protected by the code
 3. There was a nexus between their characteristic and the adverse impact

1. CHARACTERISTIC PROTECTED BY THE CODE

- 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.

1. CHARACTERISTIC PROTECTED BY THE CODE

- NOTE: not all areas listed in section 7-14 of the Human Rights Code are afforded protection against all forms of discrimination
 - Ex. Human Rights Code does not prohibit landlords from discriminating on the basis of a tenant's political beliefs
- Can file on more than one ground
- Must look up which section is involved, then check which grounds are associated with that section

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

1. CHARACTERISTIC PROTECTED BY THE CODE

- Some characteristics will require proof, make sure you ask for evidence of membership in a protected ground EARLY, as expert evidence may be necessary (ex. Mental disability)
- Recent case law suggests that prove of being Indigenous may not be required
- Others will only require the client to testify that they have the characteristic (ex. sexual orientation)
- It is enough to establish a claim if the individual was treated as if they had the protected characteristic, even if they don't actually have that characteristic (ex. Being called derogatory names relating to Indigenous even if they are not)

2. EXPERIENCED ADVERSE IMPACT/NEGATIVE TREATMENT

- Each protected area has different protected grounds, check the table, legislation and case law
 - There are some holes in this area of the legislation, for example: renters who share a bathroom and/or kitchen facility with the landlord/owner are not defined as “tenants” and therefore are not protected from discrimination
- EXCEPTIONS:
 - s.41 (Group Rights Exemption) allows what might otherwise be prohibited conduct IF it is taken with the aim of promoting the interests and welfare of a group of people that share a common identifiable characteristic, by a charitable, educational or other not-for-profit organization
 - s.42 allows employment equity plans (aka affirmative action)

3. NEXUS/CAUSAL CONNECTION

(BETWEEN THE CHARACTERISTIC AND NEGATIVE TREATMENT)

- Must be able to prove that the client received the negative treatment **BECAUSE** of their protected characteristic
 - At least 1% of the reason, other 99% can be based on valid grounds
 - Can be based on *inference*
 - **CANNOT** be based on mere belief or speculation
- Usually requires some overt statements or evidence, but not strictly necessary
 - Oral testimony is evidence, especially if corroborated by others
- For cases involving Indigenous clients, submissions on systemic racism are now widely accepted as relevant evidence to this point



DEFENCES

- Mostly in the area of EMPLOYMENT
- Employers have a DUTY TO ACCOMMODATE
 - ONLY when the employee has notified the employer of the NEED FOR ACCOMODATIONS
 - Sometimes there will be a “Duty to inquire”, for example if the employee is missing a lot of work
 - Employer may also be to argue BONA FINDE OCCUPATIONAL REQUIREMENT or UNDUE HARDSHIP
 - Requires strict proof and difference based on size of employer
- FRUSTRATION of contract can also be argued by employer

BCHRT - PROCESS

1. File a Complaint
 - (1 year limitation, can be extended, and I think easy to argue it should be for many Indigenous clients)
2. HRT Reviews Process
 - initial screening to ensure complaint meets bare requirements
3. Reply filed
 - respondent can apply to dismiss without a hearing
4. Settlement Meeting scheduled
 - May not occur if either side indicates they are not willing
5. Proceed to a hearing



EXPANDING OUR VISION: CULTURAL EQUALITY & INDIGENOUS PEOPLES' HUMAN RIGHTS

BY: ARDITH WALKEM Q.C.



“EXPANDING OUR VISION” RECOMMENDATIONS/FINDINGS:

- Incorporation of Indigenous definitions and international human rights principles (UNDRIP) is essential
- Reasons for not making a complaint: pervasiveness of discrimination/systemic racism, including within BCHRT, and lack of understanding and access to BCHRT
- There needs to be representation of Indigenous Peoples at all levels of BCHRT
- Public outreach to Indigenous Communities and education on pervasiveness of discrimination for Canadian colonial society
- Add Indigenous Identity as a separate protected ground



SPECIFIC DISCRIMINATIONS

- Micro-discriminations: micro-insults, micro-invalidations, micro-assaults
- Over-policing and Police Brutality - becoming widely accepted as occurring, and now we can focus on how to address it
 - Will we start to hear calls to “defund the courts”?
- At pretty much every step of Indigenous People’s lives and every interaction with Colonial society , Indigenous People face discrimination:
 - Child Welfare, Education, Workplace, Healthcare, Residential Tenancy, Statutory Indian Status

SYSTEMIC RACISM IN B.C.

- Definition from ***Radek v. Henderson Development (Canada) and Securiguard Services (No. 3)*** 2005 BCHRT 302 (CanLII), at 501
- Intention doesn't matter – it is the effect
- Lack of representation within the BCHRT staff and claimants = evidence of systemic racism
- Need to establish baseline information and understanding of racism faced by Indigenous Peoples – especially those with intersectionality
- Consider the impact of intergeneration trauma on the ability to bring a complaint



REDUCING PROCEDURAL BARRIERS

- Taking a trauma informed approach
- Indigenous Peoples don't need "special exemptions" (s.42), they need their knowledge base and world view valued and seen as assets in hiring
- Settlement Model AND Gate-Keeping Function BOTH are inherently biased against Indigenous Peoples
- Other recommendations: plain language, time limit exemptions, improve hearings, improved website and access to legal representation (especially with Indigenous lawyers)



RECENT CASES

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA ET AL. V. ATTORNEY GENERAL OF CANADA (FOR THE MINISTER OF INDIAN AND NORTHERN AFFAIRS CANADA)


- Federal government has been discriminating against First Nations people by underfunding child welfare on reserves
- Complaint filed in 2007
- Found there were denials of services and an “incentive to take children into care” (para. 386) and drew a connection to the Residential School system
- When ordered to enter into compensation discussions, Canadian government instead applied for Stay of Proceedings and Judicial Review

MCCUE V. THE UNIVERSITY OF BC (NO. 4), 2018 BCHRT 45

- Lorna McCue was an assistant professor at UBC and a hereditary chief of the Ned'u'ten people
- Claimed discrimination in employment when she was denied tenure
- The Tenure Committee denied based on deficiencies in her scholarship
- Ms. McCue claimed UBC's evaluation standard was culturally inappropriate and should be interpreted more broadly and that UBC had a "duty to enquire" which lead to a failure to accommodate
- Complaint was dismissed – no nexus
- Failure to enquire argument failed because the Tribunal found the request for accommodation came too late

VANCOUVER AREA NETWORK OF DRUG USERS V. DOWNTOWN VANCOUVER BUSINESS IMPROVEMENT ASSOCIATION, 2018 BCCA 132

- “Downtown Ambassadors” were forcing homeless people out of the downtown
- A representative complaint was filed alleging both Aboriginal and persons with disabilities were disproportionately effected
- Complaint was dismissed – no nexus, successful Judicial Review (“JR”), Court of Appeal upheld HRT’s dismissal of complaint
- JR judge found protected characteristic only needed to be a factor and that the BCHRT’s requirements were too “formalistic”
- BCCA based its finding on HRT stating the correct legal standard and then relied on a formalistic standard




“Intuitively, the association between homelessness on the one hand and Aboriginal heritage or disability on the other, does not appear to be mere coincidence. It is, however, a complex association. In the absence of evidence or any articulated theory, the Tribunal found the statistical correlations to be insufficient to demonstrate that prohibited grounds of discrimination were ‘a factor’ for the purposes of establishing prima facie discrimination.”



A tidal shift...?

CAMPBELL V. VANCOUVER POLICE BOARD (NO. 4), 2019 BCHRT 275

- VPD terribly mistreated Ms. Campbell while they were arresting her son
- Tribunal ruled Union of B.C. Indian Chiefs could intervene and ultimately ruled there was discrimination - \$20K in 'insult to dignity damages' and systemic changes ordered
- VPD tried to argue this was a discrete incident / "one bad apple"
- Tribunal found societal context could be helpful in assessing credibility and finding facts
- Tribunal referenced the Truth and Reconciliation Commission's call to the justice sector to provide culturally competent services



“They have been systematically displaced from their lands, excluded from political life, deprived of full cultural expression and suffered intergenerational trauma as a result of residential schools. These legacies continue to contribute to significant disparities between Indigenous and non-Indigenous people in education, employment, income, health, and housing. By referring to “history” and “legacy”, I do not mean to suggest that the oppression of Indigenous people is a thing of the past. There is no question that Indigenous people continue to experience racism individually and as a group.”

Campbell v. Vancouver Police Board (No. 4), 2019 BCHRT 275, para. 108

R.R. V. VANCOUVER ABORIGINAL CHILD AND FAMILY SERVICES SOCIETY (NO. 2), 2019 BCHRT 85

- Complaint of discrimination in their assessment of her ability to parent, which informed their decision to deny custody
- Respondent's application to dismiss was denied – claim survived
- Tribunal found they could find discrimination even where the Society was acting at all times within the scope of its authority, if even some of its decision making was influenced by considerations of the Complainants' protected characteristics – stereotypes of capacity for survivors of intergenerational trauma instead of her actual capacity

CHALIFOUR V. HEPCBC HEPATITIS C EDUCATION AND PREVENTION SOCIETY AND ANOTHER, 2019 BCHRT 216

- Discrimination in employment on the basis of race and mental disability
- Exposure to drug use exacerbated her PTSD and reference letter provided by employer was discriminatory – suggesting she was “too traumatized” as a victim of intergenerational trauma
- Claimant raised issues with non-indigenous people going into Indigenous communities and their lack of cultural understanding and the TRC
- They were also overlooked, belittled and treated as uneducated
- Claim of discrimination was brought to WCB and was dismissed, but BCHRT ruled that those proceedings were substantially different – therefore application to dismiss was denied



QUESTIONS?



QUESTIONS TO LEAVE YOU WITH

- What do we think about the idea of creating an Indigenous Specific stream within the BCHRT?
- Can we incorporate Indigenous Legal Systems' concepts of human rights into colonial framework? If so, how?
- Will we see calls to “defund the justice system”, similar to the calls to “defund the police”?
- Can we incorporate UNDRIP's definition of human rights (which includes the protection of Indigenous Peoples' relationship with their territories, languages and legal orders and cultures) into the current framework?