Background Paper **BP-394E**

THE CANADIAN HUMAN RIGHTS ACT: PROCESSING COMPLAINTS OF DISCRIMINATION

Nancy Holmes
Law and Government Division

December 1994
Revised October 1997

Library of Parliament
Bibliothèque du Parlement

Parliamentary Research Branch

The Parliamentary Research Branch of the Library of Parliament works exclusively for Parliament, conducting research and providing information for Committees and Members of the Senate and the House of Commons. This service is extended without partisan bias in such forms as Reports, Background Papers and Issue Reviews. Research Officers in the Branch are also available for personal consultation in their respective fields of expertise.

CE DOCUMENT EST AUSSI PUBLIÉ EN FRANÇAIS

TABLE OF CONTENTS

PAGE

CANADA

LIBRARY OF PARLIAMENT
BIBLIOTHÈQUE DU PARLEMENT

THE *CANADIAN HUMAN RIGHTS ACT*: PROCESSING COMPLAINTS OF DISCRIMINATION[1]

BACKGROUND

The *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, was enacted in 1977 after human rights legislation had already been implemented in most of the provinces. The federal statute followed its provincial counterparts in establishing a comprehensive scheme for dealing with instances of discrimination in federal public and private sectors. The Act applies to all federal government departments, agencies and Crown corporations, as well as all federally regulated businesses and industries such as banks, airlines and railway companies. It prohibits discriminatory practices on the basis of race, national or ethnic origin, colour, religion, age, sex (including pregnancy and childbirth), sexual orientation, marital status, family status, physical and mental disability (including dependence on drugs or alcohol) and conviction for which a pardon has been granted. The principal contexts in which the Act provides protection are employment, housing and the provision of goods, services or facilities that are customarily available to the public.

On 10 August 1977, Part II of the Act established the Canadian Human Rights Commission as the administrative agency responsible for promoting an understanding of, acceptance of and compliance with the Act. An independent body reporting to Parliament through the Minister of Justice, the Commission comprises two full-time Commissioners, a Chief Commissioner, a Deputy Chief Commissioner, and six part-time Commissioners, all of whom are Governor in Council appointments.

Parts I and III of the *Canadian Human Rights Act*, dealing with rights and procedures, came into force on 1 March 1978. The Act is typical of human rights legislation in that

---

(1) Much of the material for this paper was drawn from Justice W.S. Tarnopolsky and William F. Pentney, *Discrimination and the Law*, DeBoo Publishers, Don Mills, 1991.

it establishes substantive and enforceable rights of non-discrimination, but in an indirect manner. The legislation is not framed in terms of positive declarations of rights, such as "everyone has the right not to be discriminated against in employment on the basis of prohibited grounds," nor does it create rights by means of negative proscriptions such as "no one shall discriminate on the basis of a proscribed ground." Rather, the statute simply states that certain conduct amounts to a "discriminatory practice," which can be the subject of a complaint to the Canadian Human Rights Commission, and, further, that anyone found to be engaging or to have engaged in a discriminatory practice can be ordered to provide a remedy.

As is the case with most human rights statutes, section 15 of the *Canadian Human Rights Act* provides certain exceptions to the general principle of non-discrimination. These exceptions appear to answer the need for some mechanism to balance the individual's right to freedom from discriminatory treatment with other rights considered to be of societal value. The "*bona fide* occupational requirement or qualification" is the most common statutory exception in cases of discrimination in employment. According to this defence, an employment policy, practice or preference is not considered discriminatory where it can be established that it is both subjectively and objectively necessary in the circumstances. Once a *prima facie* case of discrimination has been established, the onus is on the respondent to prove that the limitation was imposed in good faith, that it was reasonably necessary in the circumstances, and that there was no less discriminatory alternative. The Act provides a similar defence, the *bona fide* justification requirement, with respect to discriminatory practices in the provision of goods, services, facilities or accommodation.

COMPLAINTS PROCEDURE

A. General

In the federal human rights system, a complaint of discrimination must be lodged with the Commission by an individual or a group of individuals who believe that they have suffered from a discriminatory practice prohibited by sections 5 to 14 of the Act. It is also possible for the Commission itself to initiate a complaint (on the basis of its own investigation).

The system is self-contained in that there is no direct right to litigate before the courts. The Supreme Court of Canada in the case of *Bhaduria* v. *Board of Governors of Seneca College*, [1981] 2 S.C.R. 183 held that the fact that human rights legislation includes administrative and adjudicative components indicates that enforcement of its discrimination prohibitions is

intended to be restricted to those measures established by the statute itself, with no supplementary enforcement responsibility vested in the courts. This decision effectively eliminated the argument that the existence of anti-discrimination legislation implied that discrimination, in and of itself, could constitute a civil action for damages before the courts.

Under the *Canadian Human Rights Act*, the administrative role is filled by the Canadian Human Rights Commission, which "sifts" complaints to determine whether they fall under the jurisdiction of the Commission and if so, whether they merit adjudication by way of a formal hearing. The adjudicative function under the Act is carried out by a tribunal made up of members of a Human Rights Tribunal Panel, which is independent of the Commission and whose members are appointed by the Governor in Council. Human rights tribunals conduct formal hearings into complaints of discrimination and they have broad statutory powers to fashion remedies to address the unique social problems underlying such complaints.

B. Commission's Jurisdiction to Receive a Complaint

Once a complaint of discrimination is filed, the Commission has a statutory duty to deal with it unless the Act provides otherwise. Sections 40 and 41 of the legislation set forth a number of restrictions on the ability of the Commission to deal with a complaint. For example, section 40(5) stipulates that the act or omission constituting the basis for the complaint must generally have taken place in Canada and the victim of the action must be lawfully present in Canada. Where the practice took place outside Canada, the victim must be either a Canadian citizen or a permanent resident. Section 40(7) also allows the Commission to refuse a complaint relating to the terms and conditions of a superannuation or pension fund or plan if the relief sought would deprive the contributor or member of the fund or plan of any rights that had been acquired under it prior to the coming into force of the *Canadian Human Rights Act*.

Pursuant to sections 41(a) and (b), the Commission may refuse to deal with complaints where the complainant should first exhaust other grievance or review procedures or where procedures under other legislation could deal with the issue more appropriately. Section 42(2), however, states that before dismissing a complainant on the basis of section 41(a), the Commission shall satisfy itself that the failure to exhaust another grievance or review procedure was attributable to the complainant and not to someone else.

Under section 41(c) of the Act, the Commission can dismiss a complaint beyond the jurisdiction of the Commission; for example, where a complaint alleges a discriminatory practice to which the Act does not apply or a prohibited ground of discrimination not set out in the legislation. The provision would also apply to matters that are expressly not covered by the legislation, such as action taken by the Government of the Yukon and any provision made under or pursuant to the federal *Indian Act* (s. 67). As well, where the complaint is considered to be trivial, frivolous, vexatious or made in bad faith, the Commission is justified under section 41(d) of the Act in refusing to accept it. A trivial, frivolous or vexatious complaint is one which in the opinion of the Commission is totally lacking in merit (in other words, the case is clearly unsupported on the facts or is one for which the law provides no remedy).

Finally, section 41(e) of the Act allows the Commission to dismiss a complaint if the acts or omissions complained of occurred more than one year before the complaint was filed. The Act does, however, accord the Commission discretion to bring late complaints into time for the purpose of consideration.

Because it is often difficult to make a determination of the existence of these types of cases when the complaint is received, section 44(3)(b)(ii) allows the Commission to revisit these grounds for dismissal after an investigation into the allegation (see Part D of this paper). In any event, section 42 requires that in all cases where the Commission decides not to deal with a complaint, it give written notice to the complainant, together with a statement of the reasons for the decision. It is currently the practice of the Commission to provide reasons in all cases of complaint dismissal.

C. Form of the Complaint

Section 40(1) of the Act merely refers to the filing of a complaint "in a form that is acceptable to the Commission." Case law has directed that, at minimum, a valid complaint should contain the identification of the complainant, the identification of the victim of the alleged discrimination, the time of the claimed violation of the Act, the location of the violation, the nature of the discriminatory practice, the section of the Act upon which the allegation is based and an affirmation by the complainant that he or she has reasonable grounds to believe that the conduct constitutes a discriminatory practice pursuant to the *Canadian Human Rights Act* (see *Canadian Human Rights Commission* v. *Bell Canada* (1981), 2 C.H.R.R. D/265).

The requirement that only the "aggrieved person" can file a complaint with the Commission no longer exists, but case law has stipulated that the victim of the discriminatory practice must at least be identifiable. Section 40(2) of the *Canadian Human Rights Act* allows the Commission to refuse to deal with a complaint filed by someone other than the alleged victim, without the victim's consent. This may be one of the reasons why class actions have never been very successful under human rights legislation.

Section 40(1) of the Act stipulates that a complaint may be filed with the Commission by any person or group of persons who has reasonable grounds for believing that a discriminatory practice within the meaning of the Act has taken place. As noted earlier, under section 40(3) the Commission itself can initiate a complaint under the Act if it has reasonable grounds to do so. The standard of reasonable grounds is not a high one, as decided in the case of *Latif* v. *C.H.R.C. et al.*, [1980] 1 F.C. 687, (C.A.). The complainant must have an honest belief, based on reasonable grounds, that he or she has suffered or is suffering from a discriminatory practice. Neither the Commission nor the courts, at least initially, need to assess the sufficiency of a complainant's belief or the grounds upon which it is based. The duty of the Commission at the intake stage is simply to confirm that such grounds exist.

To be valid, then, a complaint must offer sufficient information to allow the respondent to know and understand the complaint and to be able to offer a defence. Given that there is no provision in the human rights context for the process of discovery (the exchange of documents and information prior to trial in civil court cases), it is particularly important that the complaint set out the material facts of the case. It is possible for the complaint to be amended at any time prior to a hearing by the human rights tribunal, provided that the changes would not prejudice the interests of the respondent in meeting the case against him or her.

At the actual hearing stage, tribunals rarely consider themselves bound by the technical formalities of the original complaint. They too will permit amendments to the complaint that ensure fairness to the parties. They will even allow a motion for particulars if the circumstances require that more detailed information be provided to the complainant or the respondent. Therefore, as long as both parties to the complaint receive adequate notice and are treated fairly, even serious defects in the complaint form will not prevent a case from being considered by the Commission or being heard by a tribunal.

D. Investigation

In processing a complaint of discrimination, the Commission's first step is usually the appointment of an investigator. The investigator gathers evidence, compiles information and interviews witnesses, a process that may take weeks, months or even years. A case backlog has resulted over time from lengthy complaint investigations; in order to address this, the Commission has established a set of time limits within which complainants and respondents can respond to each others' allegations. Where all the necessary and relevant information has been obtained in this manner, the case may be fast-tracked to the Commission for consideration without the necessity of a formal investigation stage. As a result of this policy, case management is basically kept within a nine-month timeframe.

The Act gives human rights investigators broad powers to carry out their mandate. For example, section 43 permits an investigator to enter premises, carry out reasonably necessary inquiries and require books or other documents relevant to the investigation to be produced for inspection. The procedures for obtaining a search warrant from the Federal Court of Canada, should this be necessary, appear in sections 43(2.1) and 43(2.2). The legislation sets out penalties for anyone who obstructs the investigation of a complaint (see Part H of this paper).

The investigator submits a report to the Commission setting out the nature of the complaint, outlining the evidence collected, reviewing any relevant defence, and making a recommendation for further action. The recommendation may be to dismiss the complaint, to appoint a conciliator or to request the appointment of a tribunal to hold a formal hearing into the matter. The parties are shown the report and given a reasonable period of time to make written representations to the Commission on their own behalf. After considering these representations and the investigator's report, the Commission comes to a decision specified in sections 44(2), 44(3) or 47 of the Act.

Under section 44(2) of the Act, if the Commission thinks that the complainant ought to exhaust other grievance or review procedures or procedures under another Act, it can refer the complainant to the appropriate agency. In the alternative, under section 44(3)(a), if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, it can request the President of the Canadian Human Rights Tribunal Panel to appoint a tribunal to inquire into the complaint.

If, however, the Commission is of the view that an inquiry is not warranted, or if the complaint should be dismissed for one of the reasons set out in section 41 (i.e., lack of jurisdiction; the complaint is trivial, frivolous or vexatious or made in bad faith; or the complaint is out of time), it will dismiss the complaint pursuant to section 43(3)(b).

E. Conciliation and Settlement

Section 47 of the Act allows the Commission to appoint a conciliator to attempt to bring about a settlement of the issue. Although the statute provides that this could be done at almost any stage, in practice the Commission usually does not make the appointment until it has received the investigation report. Conciliation is generally resorted to before a complaint is sent to a tribunal. Where conciliation fails, the Commission retains the power to dismiss the complaint; however, it is more likely to send the matter on to a tribunal.

Under section 48 of the Act, any settlement reached by the parties to a complaint must be approved by the Commission. Any agreement that is not approved will not be legally binding on the Commission, which may continue to deal with the complaint.

The functions of complaint investigation and conciliation or settlement are carried out separately by different individuals in order to ensure the effectiveness of the Commission's work and protect the interests of the parties. A representative of the Commission first investigates the complaint to assess whether the allegations can be sustained. To attempt to effect a settlement at this stage could be seen as an indication that the Commission had already determined that the complaint was justified, and thus create a certain amount of hostility on the part of the respondent. Given the very nature of the investigation process, it is also unlikely that a respondent would be comfortable discussing terms of settlement with a Commission investigator. Moreover, an investigator is considered a competent and compellable witness before a human rights tribunal, but neither the conciliator nor any information obtained by the conciliator in the course of his or her work is admissible at the hearing stage.

As well, at the time of filing, the complaint is only an allegation. In view of the potential for harm to the reputation of the respondent, an investigation should first ascertain that the allegation is sustainable before any attempt at settlement is undertaken. At the same time, the complainant has a right to know as early as possible whether the complaint has been deemed unfounded or without supporting evidence, or has been partially or completely validated.

F. Adjudication

The final stage of the complaints process is a full inquiry by a human rights tribunal. Section 48.1 of the Act creates a panel known as the Human Rights Tribunal Panel. Consisting of a President and such other members as may be appointed by the Governor in Council, the Panel is independent of the Commission. It is the sole responsibility of the President to appoint members to a tribunal requested by the Commission after it has determined that an inquiry into a complaint of discrimination is warranted. Tribunals may comprise one or three persons depending on the importance and complexity of the case. It has, however, been the general practice of late to appoint three member panels.

Counsel for the Commission presents the complaint to the tribunal. Pursuant to section 51, the Commission has a duty to adopt the position it deems to be in the public interest. Commission counsel generally represents the position of the complainant, who is, however, free to have his or her own independent counsel.

To a certain extent, tribunal hearings are conducted like those in a court of law in that tribunals have the statutory power to subpoena witnesses, administer oaths and require subpoenaed witnesses to give evidence. As well, under section 52 of the Act, tribunal hearings are generally to be held in public. While the investigation of a complaint is confidential, once the Commission decides to approve a settlement or send a case to tribunal, the names and essential facts of the case become public unless there are special reasons for keeping them private.

On the other hand, human rights tribunals are accorded a certain amount of flexibility in other areas. For example, they are not restricted to the courts' formal rules of evidence. This more relaxed approach is considered appropriate since discrimination is generally practised in a subtle manner; it is rarely proven by means of direct evidence but more often by such indirect methods of proof as circumstantial and hearsay evidence. In the same vein, it is appropriate that the burden of proof on the complainant be the ordinary civil standard of proving discrimination on the balance of probabilities.

If a tribunal finds that the complaint has not been substantiated, it must dismiss the matter. Where it finds that the complaint has been substantiated, the tribunal may make an order against the person found to have engaged or to be engaging in the discriminatory practice. Under section 57 of the Act, any tribunal order may be enforced as a court order if a copy of the decision is filed with the Federal Court of Canada.

A tribunal can make orders compensating the victim of discrimination for any lost wages, for the cost of obtaining alternative services or accommodations or for any other losses occasioned by the discrimination. As well, section 53(3) of the Act allows the tribunal to make a special award not exceeding $5,000 for injury to the complainant's feelings or self-respect. Tribunals can also direct that the respondent adopt a special program, such as a training program or an employment equity plan, to prevent discriminatory practices in the future.

G. Judicial Review

It is important to understand that decisions of both the Commission and human rights tribunals are reviewable. The Supreme Court of Canada in *Syndicat des Employés de Production du Québec et de l'Acadie* v. *C.H.R.C.*, [1989] 2 S.C.R. 879, held that decisions of the Canadian Human Rights Commission are reviewable by the Federal Court of Canada, Trial Division, under section 18 of the *Federal Court Act*. Previously, Commission decisions had been reviewable as quasi-judicial decisions by the Federal Court of Appeal pursuant to section 28 of the *Federal Court Act*.

In the *Syndicat des Employés* case, the Court noted that, unlike a judicial or quasi-judicial body, the Commission's options for dealing with a complaint are essentially prescribed by statute. Unless a complaint of discrimination is first disposed of for reasons set out in the Act, the Commission is bound to investigate the matter. Then, on the basis of the results of the investigation, the Commission may either dismiss a complaint it concludes is not substantiated, or adopt the investigator's report and request the appointment of a tribunal. According to the Court, this process is not intended to be a determination where the evidence is weighed as in a judicial proceeding. Rather the process moves from the investigatory stage to the judicial or quasi-judicial stage if the tests set out in the legislation are met.

Although there is no obligation for the Commission to hold a judicial or quasi-judicial hearing into the merits of a complaint, the Supreme Court held that the Commission still has a duty to act fairly. Thus, the Commission discloses the investigation report to both the complainant and the respondent and gives them an opportunity to make written representations before it makes its decision. In this way, the Commission maintains a balance between the interests of the complainant and the respondent with its own interest in effectively and efficiently managing a broad administrative system.

Under section 55 of the Act, a decision of a human rights tribunal composed of fewer than three persons may be appealed to a review tribunal of three persons. The review tribunal is constituted and has the same powers as the tribunal but has the discretion to admit additional evidence or testimony in the interests of justice. The Federal Court, Trial Division, can review the decisions of both tribunals and review tribunals under section 18 of the *Federal Court Act*.

H. Offence Provisions

Under sections 59 and 60 of the *Canadian Human Rights Act*, it is an offence for anyone to threaten, intimidate or discriminate against an individual because that person has made a complaint of discrimination or given evidence or assisted in any way in respect of a complaint or other proceeding under the Act. Section 60 specifically provides that anyone who fails to comply with the terms of an approved settlement under the Act, who obstructs a tribunal in carrying out its duties, or contravenes certain statutory prohibitions, such as section 59, is guilty of an offence and subject to a fine. In the case of an employer, employer association or employee organization, this fine is not to exceed $50,000; in any other case, the fine is not to exceed $5,000.

A prosecution for an offence under the Act is by way of summary proceedings, which may be initiated either by the complainant or by the Commission. Once the matter is turned over to the Royal Canadian Mounted Police for investigation, however, it is for the Attorney General of Canada to determine whether or not the case should be prosecuted, and if so, to carry it through the criminal court system. Section 60(4) provides that no prosecution can be instituted without the consent of the Attorney General of Canada.

CONCLUSION

The Canadian human rights system is aimed not at determining fault or punishing conduct, but at changing attitudes. It recognizes that this goal requires a specialized system of redress whereby discrimination can be discouraged through education and persuasion and by ensuring that those who have discriminated bear the costs of compensating the victims of their actions. The system is premised on the realization that the process of confrontation and accusation, which tends to permeate the court system, only serves to reinforce discriminatory attitudes and on

the belief that employers and public service providers must feel free to move away from traditional notions of guilt to ones of social responsibility.

The *Canadian Human Rights Act* attempts to identify and eliminate discrimination at the federal level by means of this remedial and compensatory approach. It also endeavours to maintain the balance between administering a complex complaint administrative process and protecting the interests of both the complainant and the respondent.