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IN BRIEF

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**27 March 2002**

# The *Canadian Human Rights Act* Review Panel – 2000 Report: A Summary

## INTRODUCTION

In April 1999, the former Minister of Justice, Anne McLellan, established an independent Panel to review the *Canadian Human Rights Act*. In the first comprehensive review of the Act since its inception in 1977, the Panel was mandated to determine whether the law had kept pace with the evolution of human rights and equality principles, both domestically and internationally. Chaired by the Honourable Gérard La Forest, the four-person review panel conducted cross-country consultations on the Act as well as the policies and practices of the Canadian Human Rights Commission.

In June 2000, the Panel released its report, *Promoting Equality: A New Vision*, wherein it proposed 165 recommendations for improving the federal human rights system. This paper will provide a summary of the principal recommendations of the *Canadian Human Rights Act* Review Panel (hereinafter referred to as "the Panel"); however, before doing so, it is useful to gain an understanding of how the federal human rights model currently operates.(1)

## THE FEDERAL HUMAN RIGHTS ACT

The *Canadian Human Rights Act* was enacted in 1977 to provide an informal and effective process for resolving cases of discrimination in areas of federal jurisdiction. Like most provincial anti-discrimination laws, the Act establishes a specialized system of redress whereby discriminatory actions and attitudes are discouraged by means of persuasion and education, and by ensuring that those who have discriminated will bear the costs of compensating victims. The Act applies to all federal government departments, agencies and Crown corporations, as well as federally regulated businesses and industries (e.g., banking, transportation and communications).

The human rights system essentially operates on a complaint basis, that is, a complaint of discrimination must be lodged with the Canadian Human Rights Commission before the process can go forward. Moreover, the human rights system is self-contained in that there is no direct right to seek damages before the courts for acts of discrimination. The Supreme Court of Canada, in the case of *Bhadauria* v. *Board of Governors of Seneca College*,(2) held that the comprehensiveness of human rights legislation, with its administrative and adjudicative components, indicates a clear intention to restrict the enforcement of its discrimination prohibitions to those measures established by the statute itself, rather than vest any supplementary enforcement responsibility in the courts.

The Canadian Human Rights Commission is the administrative agency responsible for promoting an understanding of, acceptance of, and compliance with the Act. An independent body, it is made up of one full-time Commissioner (the Chief Commissioner), and up to six part-time Commissioners, all of whom are Governor in Council appointments. Once a complaint of discrimination is filed, the Commission has a statutory duty to deal with it unless the Act provides otherwise. Essentially, the Commission's central role is to "sift" complaints to determine whether they fall within its jurisdiction and, if so, whether they merit adjudication by way of a formal hearing.

The adjudicative function under the legislation is carried out by human rights tribunals comprising members of a Human Rights Tribunal Panel. Tribunal members are appointed by the Governor in Council. Human rights tribunals conduct formal hearings into complaints of discrimination and have the power to fashion broad remedies to address the unique social problems underlying such complaints.

In 1995, the Canadian Human Rights Commission became responsible for enforcing employer obligations under the federal *Employment Equity Act*. Employment equity compliance review officers of the Commission identify situations of non-compliance through on-site audits. Whenever possible, identified issues are resolved through persuasion and the negotiation of written undertakings. As a last resort, an employment equity review tribunal (members of the Canadian Human Rights Tribunal Panel with knowledge and experience in employment equity matters) may hear disputes and issue binding orders at the request of an employer or the Commission.

## PRINCIPAL RECOMMENDATIONS OF THE REVIEW PANEL

### A. Background

Statutory human rights systems in this country, at both the federal and provincial levels, have generated much criticism over the past decade. Surprisingly, critics include those who support or operate within them, as well as those who believe that they should not exist.

The attainability of rights is seen as problematic by complainants, respondents and commission staff, all of whom agree that the operation of human rights commissions across the country is too slow, ineffective and bureaucratic. Some, particularly those seeking equality, feel that the system is still not broad, responsive or tough enough. Part of the problem stems from limited resources. However, it is also argued that commissions are stretching themselves too thin by trying to be all things to all people. Moreover, the commission model (an individualized, complaint-redress mechanism originally designed as a self-contained system prohibiting access to the courts for complaints of discrimination) is said to have become outdated. Giving complainants more control over their cases, with possible access to the courts, has been suggested as a means of alleviating their frustrations. Many respondents are equally dissatisfied with what they perceive as the conflicting roles played by commissions in the resolution of discrimination complaints.

Finally, human rights advocates assert that equality is not achieved by human rights commissions that simply redress isolated instances of bigotry; rather, system-wide patterns and practices of unintentional discrimination affecting members of marginalized groups in society (known as systemic discrimination) must also be addressed. From this standpoint, it is argued that commissions must adopt a radically different and more pro-active approach to eliminating discrimination.

To address these concerns, the *Canadian Human Rights Act* Review Panel was specifically mandated to examine the purpose of the *Canadian Human Rights Act* and the grounds of discrimination listed therein to ensure that the legislation stays current with human rights and equality principles. It was also asked to review the scope and jurisdiction of the Act, including the exceptions contained in it. The mandate also included assessing the current complaints-based model and making recommendations for enhancing or changing the model to ensure the process was both efficient and effective. In this regard, the Panel was asked to address allegations by the former Auditor General, Denis Desautels, in his September 1998 Report, that the human rights system has become cumbersome, time-consuming and expensive. Interestingly, the equal pay provisions of the federal Act were not part of the Panel's mandate.

As this was the first comprehensive review of the federal *Human Rights Act*, the Panel's recommendations range from simple modifications to the existing regime to a fundamental re-conceptualization of the role of the Canadian Human Rights Commission in the promotion and protection of equality rights.

### B. A New Approach to Promoting Equality

An overriding recommendation that runs through the *Promoting Equality* Report is that the human rights system must re-direct its attention away from the conduct of individual complainants and focus on eliminating the attitudes and assumptions that produce discriminatory results in workplaces, services, policies, programs and even legislation. As stated in its media kit on the release of the Report, the Panel suggests that greater emphasis must be placed on prevention (particularly by employers) and education (led by a redefined Canadian Human Rights Commission) rather than on litigation. The Panel believes that in this way, the purpose of the Act would go from the somewhat negative approach of eliminating discrimination, to a more positive one of promoting equality. To this end, the Panel suggested that the Act contain a purpose clause that would advance the principle of equality for everyone in Canada and promote the elimination of all forms of discrimination, including systemic discrimination. The Panel also proposed including references to

Canada's various international human rights commitments from which many of the Act's human rights principles originate.

Finally, the Panel recognized the importance of employment equity in the pursuit of eradicating patterns of disadvantage in our society. The Panel stressed the need for a new human rights Act to work in conjunction with the guiding principles of the *Employment Equity Act,* and it recommended that the relationship between the two statutes be considered in the five-year review that it was proposing for the *Canadian Human Rights Act* (see Part D below).

### 1. Internal Responsibility Systems

In terms of facilitating a pro-active or preventive approach to issues of discrimination in the workplace, the Panel recommended that the *Canadian Human Rights Act* require all employers with more than five employees to establish an internal responsibility system to deal with human rights matters within their control (see Chapter 5 of the Report). Specifically, employers would have to establish and monitor human rights policies and programs, offer training, and resolve complaints internally where possible. Such a system should involve union/employee representatives, and it should also address equality issues in the provision of any services by the employer to the general public.

Most complaints of discrimination before the Canadian Human Rights Commission involve the workplace and, as in the case of occupational health and safety legislation, the Panel believed that the *Canadian Human Rights Act* should hold employers ultimately responsible for ensuring equality without discrimination for employees and applicants for employment in the workplace. Clearly, it is better for all concerned (employers and employees) if equality issues can be resolved within the workplace, thereby leaving the Commission and Tribunal as avenues of last resort should these efforts fail.

The Panel concluded that where an employer could show that it has an effective internal responsibility system in place that incorporates all the elements suggested by the Panel, a claimant before a Tribunal might have to demonstrate why this system failed to properly deal with the human rights issue in his or her claim before being allowed to proceed further. In this way, employers and service providers would not only be able to avoid liability if their systems were shown to be effective, but they would also hopefully contribute to the creation of a culture that is supportive and respectful of human rights.

### 2. The Direct Access to Tribunal Model

The Panel's central proposal for addressing the serious problems facing the current individual complaint process is the creation of a "direct access" claim model (a flow chart of the proposed process is found at Appendix D of the Report) whereby individuals could file complaints of discrimination directly with the Canadian Human Rights Tribunal. The Panel further recommended that a publicly funded Legal Clinic be established to provide claimants whose cases have not been joined by the Commission, with legal assistance in the preparation and presentation of their cases before the Tribunal. Respondents who could demonstrate a financial need would also be able to apply to the Tribunal for legal assistance.

The Canadian Human Rights Commission would continue to exist as a primary contact for individuals who want to know if they have a case and who want assistance in putting together a claim. The Commission would also receive from the Tribunal a copy of the claim and all supporting material in order to determine whether it wished to become a party to the proceedings. However, the Commission would no longer be in charge of deciding whether claimants should be able to present their cases before a Tribunal for a hearing on the matter. In other words, the Tribunal – and not the Commission – would be in charge of the claims resolution process.

The aim of the proposed new system is two-fold: streamline the handling of discrimination claims; and dramatically reduce the current Commission backlog and delays in investigations. It would require the use of case management conferences, pre-hearing processes, alternative dispute resolution, and the vigorous control of hearings by Tribunal members and staff. The Panel believed that a direct access model would prompt parties to resolve their differences early in order to avoid the trouble and expense of going to Tribunal. Moreover, respondents would no longer have the luxury of waiting through Commission investigation and conciliation processes to see if their claim is one of a small percentage of cases that is referred to Tribunal before taking the matter seriously.

### 3. A New Focus for the Commission

According to the Panel, removing the Commission from its central role in the resolution of individual complaints would:

- allow it to focus its resources on priority human rights issues;
- address the real or perceived conflict-of-interest allegations that have plagued the Commission's dual roles of advocate and decision-maker on human rights complaints; and
- increase the Commission's credibility as a human rights advocate, thereby making its other pro-active activities more persuasive.

The Panel therefore recommended that, under a new Act, the Commission concentrate on policy development, rule-making, special inquiries, and employment equity responsibilities, and that it intervene only in significant cases of systemic discrimination or individual complaints that would greatly benefit the public interest. The Panel also emphasized that education about and promotion of equality issues should be among the Commission's most important functions. Indeed, the Panel went so far as to point out that education about human rights is much broader than the brochures, speeches and training sessions provided by a commission. Employers and employees, service providers and service consumers must understand the purpose of the Act, its compliance requirements and the consequences of non-compliance. More broadly, individual members of society must fully appreciate their rights under human rights legislation, as well as the rights of others. The Panel therefore recommended that the Commission be given sufficient resources to undertake effective human rights education and promotion initiatives. As well, the Commission should work towards greater coordination of educational activities between itself and federal government departments, provincial human rights agencies, and organizations interested in human rights issues.

In support of this new direction, the Panel recommended that the Commission be comprised of three members appointed on a full-time basis. Commission members would be assisted in their work by a 12-member Advisory Council drawn from employers and service providers, employee organizations and equality-seeking groups, while maintaining a gender balance.

## C. Scope of the Act

### 1. Grounds of Discrimination

Section 3 of the *Canadian Human Rights Act* prohibits discrimination on the basis of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted. Section 25 of the legislation defines "conviction for which a pardon has been granted" as a conviction of an individual for an offence in respect of which a pardon has been granted by any authority under law and, if granted or issued under the *Criminal Records Act,* has not been revoked or ceased to have effect. Section 25 also defines "disability" to mean any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.

The Panel considered the addition of genetic discrimination, political belief, criminal conviction or charge, gender identity, social condition and language as prohibited grounds under the legislation. It recommended that social condition and gender identity be added to the Act and that amendments be made to existing legislative provisions to address concerns about genetic discrimination as well as criminal charge and conviction. In a related recommendation, the Panel suggested that the prohibition of hate messages in the Act be broadened to encompass the Internet (pp. 133-136 of the Report).

#### a. Social Condition

The most significant Panel recommendation with respect to grounds of discrimination is the addition of "social condition" to the Act. If the federal government adopted this recommendation, the *Canadian Human Rights Act* would become only the second human rights law in Canada to prohibit discrimination on this basis. The Quebec *Charter of Human Rights and Freedoms* is currently the only domestic human rights instrument to use the term, which has been judicially defined in the absence of a statutory definition. Several other provinces and territories do include narrower grounds that would fall within the ambit of social condition (i.e., "source of income," "receipt of public assistance," and "social origin"); however, in addition to their substantive limitations, these grounds are often restricted to certain areas covered by the legislation (e.g., housing).

During its consultations, the Panel heard more about poverty than any other single issue. It concluded that protecting the most destitute in Canadian society against discrimination is essential. Based on research in this area, the Panel determined that, like the other grounds of discrimination under the Act, poverty is immutable in that it is beyond the control of most poor people, at least over considerable periods of their lives. Moreover, characteristics such as poverty and low level of education have historically been associated with patterns of disadvantage. The Panel provided examples of barriers to service in such areas within federal jurisdiction as banking, the telecommunications industry, and housing on Indian reserves that could be eliminated if social condition was added to the Act. As well, the Panel pointed out that factors such as low income and lack of education are barriers facing groups characterized by other grounds of discrimination (e.g., race and disability).

The Panel urged that the ground of social condition be defined similar to the Quebec definition, but with two limitations. First, the definition must pertain to disadvantaged persons so that complaints would not be open to individuals with above-average incomes or prestigious occupations. Second, the government should be able to exempt programs intended for certain categories of underprivileged persons from the Act for a limited, renewable time. In this way, it is hoped that the addition of this new ground would not give rise to considerable litigation over complex government programs, resulting in the government's reluctance to initiate social programs. The Panel also suggested that the ground of social condition be added to the list of grounds in the legislation pertaining to the ability of public and private organizations to carry out affirmative action or equity programs.

### b. Gender Identity

The Panel was asked to consider whether the Act should be amended to specifically prohibit discrimination against persons who have undergone or will undergo treatment and surgery to bring their physical gender in line with their psychological gender (transgendered individuals). Although the Panel recognized that the Act currently protects these individuals from discrimination on the ground of sex or the combined grounds of sex and disability, it felt that the law fails to acknowledge the particular situation of transgendered persons and thereby renders them invisible. In view of the substantial harm that can be suffered by these persons, the Panel recommended that the Act expressly provide them with legal protection. It would then be up to the Tribunal to determine whether a claim fits the concept of gender identity, thereby allowing the term to be defined on a case-by-case basis.

### c. Genetic Discrimination

With respect to genetic discrimination, the Panel recommended that the definition of "disability" in the Act be broadened to include the predisposition to being disabled. The Panel heard arguments that genetic testing could render individuals with genetic disorders a "biological underclass" because their genes brand them poor risks for the purposes of insurance, employment, and the provision of goods and services. The Panel agreed that the law currently offers no clear protection for persons with test results that show a predisposition to a disability, especially when the disability has not and may never become apparent. Moreover, persons with other conditions, such as those who are HIV-positive, may lack recourse to the current Act for similar reasons.

### d. Criminal Convictions

The Panel also recommended that the protection provided by Parliament to pardoned criminal offenders be extended to individuals convicted or charged with a criminal offence. It was concerned about the somewhat arbitrary distinction that the law currently draws between pardoned and unpardoned offenders. Adding criminal charge to the prohibited ground would also acknowledge that under the *Canadian Charter of Rights and Freedoms*, an individual is presumed innocent until proven guilty. The Panel did, however, state that this new protection should only accord claimants who can demonstrate that their conviction or charge was irrelevant to the job or service they were seeking. Moreover, the protection should be subject to the right of government to pass regulations dealing with specific security concerns.

## 2. Exceptions to the Act

In Chapter 18 of the Report, the Panel reviewed the mandatory retirement, pension/insurance and *Indian Act* exceptions to the federal legislation. Of note, is the Panel's recommendation that the *Canadian Human Rights Act* be amended to ensure that Aboriginal peoples are no longer excluded from the protection from discrimination afforded by the legislation. Specifically, the Panel advised that section 67 of the Act be repealed. Section 67

currently provides that "nothing in this Act affects any provision of the *Indian Act* or any provisions made under or pursuant to that Act."

With the removal of this section from the Act, the Panel noted that defences under the legislation would apply. 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 answer the need for some type of mechanism to balance the individual's right to freedom from discriminatory treatment with other rights considered to be of societal value. Pursuant to section 15, the *bona fide* occupational or justification requirement provides that an employment, service or accommodation 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. Thus, for example, actions to ensure the survival of an Aboriginal community's culture, language and land base could come within the meaning of a *bona fide* justification.

However, the Panel stressed that in the absence of section 67, the *Canadian Human Rights Act* must in some manner still provide a balance between the interests of Aboriginal individuals seeking equality and the interests of the Aboriginal community. In this regard, the Panel considered such options as modelling a provision on section 25 of the *Canadian Charter of Rights and Freedoms,* which would expressly recognize the primacy of Aboriginal, treaty and "other" rights over the rights in the Act. However, concerns were raised about how such a provision would be interpreted, let alone applied. The Panel therefore concluded that a more effective approach would be to insert an interpretative provision into the Act. Such a provision would require the taking into account of Aboriginal community needs and aspirations in interpreting and applying rights and defences in cases involving employment and the provision of service provided by Aboriginal governmental organizations.

### D. Review

Due to the new vision advanced in the Report for the promotion and protection of equality rights under federal human rights legislation, the Panel recommended that the Minister of Justice carry out a review of the new Act five years after it comes into force. In this way, the Minister will ensure that the Act remains current with the evolution of human rights and that the Panel's proposed processes, systems and structures are working effectively.

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(1) A more detailed outline of how the *Canadian Human Rights Act* operates is given in the Canadian Human Rights Commission booklet, which is found under "Publications" at the Commission website (www.chrc-ccdp.ca).

(2) [1981] 2 S.C.R. 183.