

NOTE: This article represents the views of the author and not the Department of Justice, Yukon Government.

Lessons Learned: the BC Direct Access Human Rights Tribunal

By Heather MacNaughton

In the Yukon, complaints are filled with the Yukon Human Rights Commission which in most cases, will investigate and, if it is unable to settle the complaint, ask a Board of Adjudication to decide the complaint. The Commission may then appear before the Board of Adjudication to represent the public interest. That model is consistent with the model currently in place under the Canadian Human Rights Act and in other Canadian provinces.

British Columbia has had a direct access Human Rights Tribunal since March 2003, Nunavut since November 2004, and Ontario since June 2008. Ontario also has a Human Rights Commission. In a direct access system, individuals, alleging violations of their human rights, file their complaint directly with the Tribunal and are responsible for shepherding that complaint through to a resolution either by settlement or Tribunal decision.

What are the lessons learned from the BC experience?

Speed

Critics of Canadian human rights systems have often focused on the time the process takes from filing a complaint to result. While Canadian Commissions have worked hard, and been innovative in adapting their processes, that perception of delay continues.

One of the significant benefits of a direct access system is its speed.

The elimination of the investigation stage speeds up the process. In many credibility cases, the Commission investigation merely records the different versions of events and does not reach credibility conclusions, unnecessarily delaying the process. With willing parties, the B.C. Tribunal is able to receive a complaint, screen it, notify the

respondents, and have it to hearing in less than a year. The Tribunal's processes contemplate priority hearings and early scheduling but there has been little demand for either.

Transparency

Direct access tribunals' processes are more transparent than those of Commissions. After an investigation and submissions from the parties, and in decisions released only to the parties, Commissions decide whether to refer a case to hearing. As a result, no clear tests are articulated that would allow parties in similar circumstances to tailor their arguments for or against referral. In contrast, direct access tribunals make their decisions publicly, resulting in the development case law clearly identifying the criteria taken into account thereby enhancing the ability of other parties to tailor their submissions.

Education

A tribunal's adjudicative role prevents it from taking or publicizing a position about human rights issues. A tribunal may only speak through its decisions.

B.C. does not have an agency, independent of government, which is responsible for human rights education. Under the *B.C. Code*, the responsibility for education falls on the Attorney General's Ministry which, apart from providing funding to the B.C. Human Rights Coalition for some educational programs, and providing some general information on its website, does little else to fulfill its statutory mandate. As a result, human rights education in the Province is falling behind some of the other Provinces.

Legal Assistance

Human rights issues are inherently complex. Understanding a legal process and navigating your way through it is daunting for most participants. Many complainants cannot adequately frame or present their case without legal assistance. Because of its adjudicative role, a tribunal cannot advise complainants or respondents about how they should frame, or respond to, a complaint

Early legal support is essential in a direct access system and provides a clear benefit to all participants. Unrepresented parties can cause delay and use more resources. Often, legal support is not available until after a complaint has been filed and the parties are involved in extensive amendments.

At a hearing involving an unrepresented party, Tribunal members must provide explanations about procedural or evidentiary issues adding to the length of the hearing and the cost to all.

Unrepresented parties may be unrealistic about the strength of their position and the likely remedy. Without expert advice, parties may continue with cases that otherwise could be resolved earlier.

Expert legal clinics are more effective than individualized legal aid funding because of the expertise and efficiencies gained from working exclusively in the field. In B.C., the government provides funding to agencies to provide legal support to some complainants and, on a means test, to some respondents. However, unlike Ontario, the *Code* does not guarantee legal support and the level of funding is subject to available budgets. Sufficient resources are necessary to support these agencies and to provide representation to parties in a direct access process.

Process Control

Direct access tribunals must have broad rule making power and effective powers of dismissal for those matters that do not warrant a full hearing.

While rules of procedure are important, so too is flexibility to tailor the process to suit the case and to waive or adapt the rules when appropriate.

Powers of dismissal must be balanced with a process that allows complainants a fair opportunity to present their case. Without investigative powers, there is a risk that subtle and meritorious discrimination cases will be dismissed before complainants have an adequate opportunity to obtain the information they need to prove their case.

Direct access tribunals need broad disclosure and discovery powers including the power to compel disclosure from third parties and, particularly in systemic discrimination cases, to require respondents to compile statistics and documents.

In a direct access system, some complainants will file numerous complaints and parties will file repetitive applications within a complaint. Without a filing fee, which might act as a barrier to access, the power to control potential abuse of the tribunal's process may be necessary. The power to require a party to pay some of the legal costs can provide an important tool.

The B.C. Tribunal's cost ordering power has been defined narrowly and is restricted to situations in which the parties have engaged in improper conduct or broken a rule or order either during the processing of a complaint or during the hearing.

Mediation

Within a statutory mandate of ensuring that the public interest in a human rights dispute is protected, mediation, with adequate safeguards, can be effective in a direct access process. Early mediation, often before a response to the complaint has been filed, can resolve disputes before the parties have invested in litigation. Mediation services should continue to be offered at any stage of the direct access process.

Mediation at a tribunal has certain advantages over mediation by commissions. In particular, there is some disincentive for respondents to settle while a case is before a commission because of the unlikelihood that the complaint would be referred to a Tribunal for hearing. In a direct access model, both parties face a public hearing and are able to fairly assess the costs and risks associated with the hearing process and their respective best interests in resolution.

In B.C., mediations are conducted by members of the Tribunal and others who have been specifically trained. They ensure that participants make informed, uncoerced and voluntary decisions that do not undermine their statutory rights. Most mediations have an evaluative component as members apply their adjudicative experience, knowledge of applicable case law, and authority to assisting the parties to resolve complaints

There is a concern that meritorious complaints, or those that might advance our understanding of human rights and responsibilities, are resolved without a hearing and that the dogged complainant, or unreasonable respondent, will use a disproportionate share of a direct access tribunal's hearing time and resources.

Since direct access in B.C., the statistics might provide some empirical evidence to support concern in this regard. There are a number of responses to that concern. First, even dismissed cases inform the public of their human rights and responsibilities. Second, even if the Tribunal did not provide settlement assistance in those cases that appeared to best further our understanding of human rights and responsibilities, the parties may resolve the complaint on their own. Finally, in the absence of an investigation and a "gate-keeping" decision, it is not surprising that the success rate for complaints at hearing is lower than in a commission system.

That being said, there are complaints that will go to hearing in a direct access system that would not have done so under a commission system. That is in part because it is up to the respondent to apply to dismiss a complaint at an early stage and to mount the case for doing so.

Systemic Complaints

In the absence of a commission, there is no statutory body in B.C. with the mandate to mount systemic complaints. Systemic issues continue to be raised in the context of individual complaints. The Tribunal has not experienced a decline in the number or a change in the types of systemic complaints filed. That is in part because the B.C. Commission, like other Canadian commissions, never had sufficient resources to process the individual complaints filed and mount systemic challenges. Although the previous B.C. Code provided the Deputy Chief Commissioner authority to file systemic cases on his own behalf, in the six years during which that office existed, he never did so. On occasion, he would intervene in an individual complaint to highlight the systemic issues it raised.

In Ontario, the Commission, freed of its responsibility for individual complaints, may have resources available to it to mount systemic complaints. Its 2009-2010 Annual Report refers to it filing one application before the Ontario Human Rights Tribunal.

Complainants control the process

One of the concerns expressed about commission processes was that complainants did not have sufficient control, and decisions could be made about their complaint without their full input. The legitimacy of that criticism may be the subject of debate, but the direct access system gives complainants complete control over the processing of their complaint.

Tribunal Appointments

By statute, appointments to B.C. administrative tribunals are made after a merit-based appointments process. The nature of the merit-based process will vary by tribunal and is designed by the Tribunal Chair in consultation with the responsible Minister.

Appointments to the Human Rights Tribunal are for five years after a rigorous recruitment process. Because of the nature of the adjudication, and the fact that Ministries of government are often a respondent to complaints, longer term appointments are important protections of independence.

In Ontario, the office responsible for Provincial appointments has implemented a merit-based appointments process in which positions are widely advertised and applicants screened on defined skills-based criteria. Unlike B.C., these are practices not yet legal requirements although unproclaimed provisions of the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009* would enshrine the practice.

Judicial Review

Decisions of the B.C. Tribunal are not appealable but are subject to “judicial review”. Judicial review is narrower than a right of appeal and focuses on whether the Tribunal has exceeded its jurisdiction. The standard of review applied by the B.C. Courts is set by statute and because there is no privative clause in the *Code*, the scope of the review

tends to be broader than it is for those tribunal's whose decisions are protected by a privative clause. In Ontario, the Tribunal's decisions are protected by a privative clause.

A privative clause provides greater certainty and finality to Tribunal decision making.

Cost

B.C. reformed its human rights system for ideological reasons, based on an almost universal view that reform was necessary although no universal vision of what that reform would look like. Cost saving was not the motivator. In fact, the system has not generated cost savings, in part because the work of a direct access tribunal is much more legally intensive than the work of commissions and legally intensive processes are more expensive.

Conclusion

The Yukon is to be commended for the thoughtful approach it is taking to human rights reform. I hope that these lessons learned from B.C., together with the other commentary in this series, will assist in making the direction forward clear.

Heather MacNaughton recently completed two five-year terms as Chair of the British Columbia Human Rights Tribunal. Prior to her appointment to the Tribunal, Ms. MacNaughton spent more than five years in the administrative justice field in Ontario where she was Chair of both the Human Rights Board of Inquiry (Now the Ontario Human Rights Tribunal) and the Ontario Pay Equity Hearings Tribunal. Ms. MacNaughton left private legal practice in 1995 to become a Vice Chair of the Ontario Human Rights Board of Inquiry, the Pay Equity Hearings Tribunal and the Employment Equity Tribunal. Prior to that she was a partner with the law firm of Lang Michener Lawrence & Shaw. She has both a Bachelor and Master of Laws from Osgoode Hall Law School.