



OFFICE OF THE CITIZENS' REPRESENTATIVE

SUBMISSION ON AMENDMENTS TO THE HUMAN RIGHTS CODE

Introduction

On December 10, 2008, the Minister of Justice, Thomas Marshall, Q.C., announced that the Department of Justice would be commencing a review of the *Human Rights Code* (the “Code”). Submissions and presentations to officials of the Department were solicited. What follows is the Office of the Citizens' Representative's submission with respect to proposed amendments to the *Code*. The submission focuses on the need to proceed with caution when amending the *Code* to add prohibited grounds of discrimination and definitions for those grounds. Also addressed is the issue of what should be an appropriate reporting model for the Human Rights Commission.

The Current Human Rights Regime

The current program for the protection and advancement of human rights under the current *Code* requires the input of the following four entities. They are the:

- Human Rights Commission
- Panel of Adjudicators
- Department of Justice
- Supreme Court of Newfoundland and Labrador

If a citizen has reasonable grounds to believe that his or her rights pursuant to the Code have been violated, they can file a complaint with the Executive Director of the Commission. The Code prohibits discrimination and harassment with respect to employment and the provision of public services based on a list of enunciated grounds.

Once a complaint is received by the Executive Director, the staff of the Commission will investigate the allegations and attempt to settle the matter. The investigation is initiated by giving notice to the Respondent named in the complaint (that is, the employer or service provider alleged to have violated the *Code*). Historically, complaints have been investigated on a first in, first out basis. While the staff are under a statutory obligation to attempt to settle complaints, formal mediations are seldom utilized.

When an investigation has been completed and no settlement realized, an investigation report is generated. It is then forwarded to the parties involved for comment. If any new material evidence is submitted by a party at this stage, it will be cross disclosed to the opposing party. This practice is in accord with the Commission's common law duty to act with procedural fairness. When the investigation report has been circulated and all replies received, the Commission's legal counsel

will prepare a privileged legal opinion for the Commission members. It may contain opinions about the impact of relevant case law or evidentiary issues arising from the investigation.

The Commission is comprised of community members who sit as a committee to review complaints to determine if a public board of inquiry is warranted and to approve settlements reached during the investigation. The test applied by Commission members is whether there exists a reasonable basis in the evidence to warrant forwarding a complaint to a board of inquiry. No formal test is applied for the process of approving settlements though regard will be had to the fairness of the agreement and the protection of the rights of those who may be vulnerable and thus not have sufficient bargaining power to conclude a fair settlement.

If the Commission dismisses a complaint, a citizen can seek judicial review of that decision to the Newfoundland and Labrador Supreme Court Trial Division. If the Commission determines that a complaint should be forwarded to a board of inquiry, then the Chief Commissioner will write the Chair of the Adjudication Panel to ask that an adjudicator be appointed to hear the matter. An adjudication panel consisting of lawyers is appointed by government under the *Code* to hear complaints. It is the Chair of the Adjudication Panel, not the Commission or its staff, who selects an adjudicator to hear any particular complaint.

A board of inquiry is a quasi judicial proceeding in which evidence is tendered, case law submitted, and legal arguments presented. The board has broad remedial powers and its order has the same force and effect as an Order of the Supreme Court. A party dissatisfied with a judgment or order of a board of inquiry may appeal to the Supreme Court.

While the staff of the Commission report to the Commission on policy matters and general human rights matters, it reports to the Department of Justice on administrative matters. These would include budget preparation and monitoring, human resource and IT support, and accountability and transparency reporting.

Definitions

The primary characteristic of the *Code* is that it is a legal instrument. It outlines the grounds of harassment and discrimination that is prohibited and it sets out the procedures for investigating, settling and adjudicating complaints based upon those grounds. The *Code* is not like any other piece of provincial legislation in that it is routinely characterized as quasi-constitutional¹. That means that while the *Code* does not have the weight and status of the *Charter of Rights and Freedoms*, it is paramount over other provincial legislation. The implication of this elevated status of the *Code* is that care should be taken when discussing possible amendments not to diminish its status or render it a codification of all human rights principles. The *Code* should be permitted to be interpreted by boards and courts to reflect our evolving understanding of human rights.

While it is important that education material be available for citizens of the Province to understand their human rights and obligations under the *Code*, the *Code* itself may not be the best or sole mechanism to achieve that education. It would be more appropriate to have an Annotated *Human*

*Rights Code*² and other collateral educational material to help explain the rights and protection as contained in the *Code*. The definition of disability illustrates this point. ...

In *Quebec (Commission des. droits de la personne des droits de la jeunesse) c. Montreal (Ville)*³ the Supreme Court of Canada defined the concept of “handicap” as found in Quebec human rights legislation. It stated:

Thus, a “handicap” may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all these factors. Indeed, it is the combined effect of all these circumstances that determines whether the individual has a “handicap” for the purposes of the *Charter*. (The human rights legislation in Quebec is called a Charter as opposed to a Code.)

...courts will, therefore, have to consider not only an individual’s biomedical condition, but also the circumstances in which a distinction, *inter alia*, whether an actual or perceived ailment causes the individual to experience “the loss of limitation of opportunities to take part in the life of the community on an equal level with others”. ... The fact remains that a “handicap” also includes persons who have overcome all functional limitations and who are limited in their everyday activities only by the prejudice or stereotypes that are associated with this ground. ...

The Court has also stated:

It is therefore useful to keep distinct the component of disability that may be said to be located in an individual, namely the aspects of physical or mental impairment, and functional limitation, and on the other hand the other component, namely, the socially constructed handicap that is not located in the individual at all but in the society in which the individual is obliged to go about his or her everyday tasks.

These definitions are flexible and therefore capable of addressing unique and nascent disabilities that may not be contemplated by a legislature when amending human rights legislation. Arguably, the potential for boards of inquiry or courts to create these flexible and pragmatic definitions would be limited if the Legislature confined the impact of the *Code* by amending it to include restrictive definitions.

While the current initiative to seek public input into amending the *Code* is to be applauded, there can exist periods when the political will does not exist to make the necessary changes to the legislation and tribunals and courts will take the lead in promoting more appropriate definitions. For example, on August 23, 1995, the Supreme Court of Newfoundland “read into” the *Code* sexual orientation as a ground of discrimination. The Commission from that point onward accepted complaints from citizens on that ground. It was not until two and a half years later that, on December 9, 1997, the Legislature formally amended the *Code* to include sexual orientation as a prohibited ground of discrimination.

Clearly, in an age where tribunals, boards of inquiry and the courts can amplify human rights protection, the need for an ongoing educational outreach by the Commission is critical.

The Citizens' Representative recommends that any new grounds of discrimination or the definitions of those grounds should be carefully assessed to ensure:

- **The problem the new ground of discrimination is attempting to address is sufficiently serious to be included in quasi-constitutional legislation.**
- **That the proposed definitions, if any, be as flexible as possible so as not to restrict the ability of the *Code* to address new and unique human rights challenges.**

Appropriate Reporting Relationships

Within any large bureaucracy, it is inevitable that certain institutional bias and conflicts will arise. The many and varied mandates of government agencies and departments will, occasionally, cause reasonably informed citizens to be concerned that decision makers are not impartial and independent enough to foster public confidences in their rulings. Clearly, some measure of interdependency has to be acceptable given that government funds all these departments and agencies. When the concerns are elevated to a point where public confidence in the institution is undermined, a change in the reporting relationships has to take place.

The Commission receives its budget from the Department of Justice. As well, many of the solicitors who act for government are employed by the Department of Justice. Until recently, the Executive Director of the Human Rights Commission reported to the same Assistant Deputy Minister responsible for the Civil Division of the Department of Justice; that is, the unit which represents government in civil and administrative litigation. The Executive Director now reports to a different Assistant Deputy Minister within the Department of Justice. The fact that the Commission receives its budget from the Department of Justice and that the Department is responsible for defending Government's legal interests renders the current reporting relationship untenable.

The problems associated with the Department providing the budget for the Commission centers around the fact that it is often in an adversarial relationship with the Commission during investigations, at board proceedings, and in court. This can lead to a perception among the public that the Commission staff and members will not act with appropriate vigor when doing their work because they fear reprisal in the form of budget cuts or diminished administrative support. There may be no actual basis for this perception but it is one that would cause a reasonably informed citizen to have concern with respect to the independence of the Commission. Irrespective of where the Commission reports, it will have to receive its budget from some Government entity. The benefit of receiving a budget from some other entity than the Department is that the adversarial investigation and litigation relationship with that entity is considerably lessened.

The effect of the adversarial investigation and litigation relationship that currently exists between the Commission and the Department should not be dismissed lightly. Many citizens, and indeed lawyers, view litigation as a zero sum game in which there are clear winners and losers. This is, of

course, a gross simplification of the litigation process because the investigation of complaints and the litigation which ensues is a process of better understanding individuals' rights and obligations. Still, the perception persists. This is particularly so when one considers not just the number, but the nature, of human rights complaints against Government. They can involve frustrating government initiatives or policies. For example, the Commission has:

- Argued on behalf of widows who remarried prior to 1985 and were refused benefits to that date by the Workplace, Health, Safety and Compensation Commission.⁵
- Successfully sought a reduction in the waitlist for services and programs offered to autistic children.⁶
- Successfully argued that a government lay-off policy that targeted "pension eligible" employees amounted to discrimination based on age.⁷
- Obtained a ruling that declared that Government was the employer for the purposes of human rights legislation in the provision of certain home care programs despite the fact that other provincial legislation declared that the disabled adults were the employer.

The Citizens' Representative recommends that the Human Rights Commission should report, for administrative purposes, to some other Government entity than the Department of Justice.

Where Should the Human Rights Commission Report

Given the conflict - real or perceived – of the Commission reporting to the Department of Justice, an alternate reporting structure has to be adopted. Some have suggested that the Commission should report to the House of Assembly. The House of Assembly currently has the following statutory offices:

- The Office of the Child and Youth Advocate
- The Office of the Citizens' Representative
- The Office of the Auditor General
- The Office of the Chief Electoral Office
- The Office of the Information and Privacy Commissioner
- The Commissioner for Legislative Standards

There are two characteristics of the Commission's work which prevent it from being an easy fit within the operations of the House of Assembly. First, the end result of the complaint process under the *Code* is an order from a Board of Inquiry. The process ultimately determines the legal rights and obligations of citizens, employers and service providers. In contrast, the Statutory Officers ultimately report to the House and have the right to make recommendations within their mandate. They do not adjudicate citizens' complaints and have no order power.

Secondly, the Commission takes complaints from citizens against private individuals and corporations. In contrast, the Statutory Officers report to the House on issues solely within the public service that fall within their respective mandates. They do not deal with complaints against private individuals and companies. It is an open question as to whether employees of the

Legislature should be responsible for investigating and prosecuting complaints against private citizens.

A more suitable reporting relationship can be found within the Labour Relations Agency. The Labour Relations Board currently reports to this Agency. The Labour Relations Board often deals with matters against Government, its departments, agencies and corporations in a manner somewhat similar to that of the Commission; that is, there is a determination of the legal rights and obligations of unions, employees and employers. Because it reports to an agency, one doesn't hear widespread complaints about a conflict between the Labour Relations Board and Government like those being directed at the reporting relationship between the Commission and the Department of Justice.

If the Commission reported to the Agency, certain synergies may occur over time. The Commission could refer complaints to the Labour Relations Board as opposed to the current practice of referring complaints to an ad hoc panel of adjudicators which does have a secretariat or a dedicated hearings room. Additionally, there may be opportunity for the staff of the Commission to avail of the professional mediation expertise of the Labour Relations Division within the Agency.

Any change in the reporting relationship of the Commission will not only require a transfer of the budget of the Commission, but also an adequate budgetary allotment to cover the administrative tasks currently being undertaken by the Department of Justice.

The Citizens' Representative recommends that the Human Rights Commission report to the Labour Relations Agency.

References

1. *Human Rights Commission et al. v. Newfoundland (Minister of Employment and Labour (1995) 134 Nfld. & P.E.I.R. 66 (S.C.T.D.)*
2. *An Annotated Code had been developed during the late 1990's, but due to resource issues has not been updated.*
3. *2000 185 D.L.R. (4th) 385 (SCC)*
4. *Supra Minister of Employment and Labour.*
5. *Newfoundland (Human Rights Commission) v. Workplace Health, Safety and Compensation Commission (2005) 250 Nfld. & P.E.I.R. 124 (NLSCCA).*
6. *Newfoundland and Labrador (Minister of Health and Community Services) v. Sparkes (2004) 234 Nfld. & P.E.I.R. 94 (NLSCCTD).*
7. *Salter v. Department of Forest Resources and Lands*
8. *Tulk v. Department of Health and Community Services*