

The Role of Mediation *in* Human Rights Disputes

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Human rights bodies, including the British Columbia Human Rights Tribunal (BCHRT), are expected to resolve cases before them within the context of a public mandate that includes eradicating discrimination. In the case of the BCHRT, that public mandate is provided for in section 3 of the B.C. *Human Rights Code* which states the purposes of the *Code*:

- (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
- (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
- (c) to prevent discrimination prohibited by this Code;
- (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;
- (e) to provide a means of redress for those persons who are discriminated against contrary to this Code.¹

There is a public interest inherent in any human rights complaint and, unlike purely private disputes, it needs to be recognized that mediation (or any other private settlement process) requires adequate safeguards to ensure compliance with the statutory mandate. Indeed, it is the public nature of the mandate that drives criticism of mediation as inappropriate for human rights complaints. These criticisms include concerns that private settlements do not always protect the public's interest in procedural fairness, nor allow for disclosure of dispute outcomes. Further, in settling an individual complaint, patterns of systemic discrimination may be neither revealed nor remedied. Complainants in human rights cases—often from marginalized

¹ R.S.B.C. 1996, c. 210 [*Code*].

communities or disadvantaged social and economic circumstances, could be further disempowered by a disparity in resources, knowledge and representation, potentially vulnerable to surrendering their human rights for less than their “true” value.

Safeguards can be built into the design of a mediation program to address concerns. These include: ensuring that participants can make informed, uncoerced and voluntary decisions that do not undermine statutory rights; avoiding processes that delay adjudication; and enhancing accessibility for all parties. In addition, access to advisors—legal or otherwise—and to information and technical assistance, protection of confidentiality, availability of qualified mediators, and monitoring and periodic program evaluation are all important elements of program delivery. In this paper I propose to take you through the planning that went into the design of the BCHRT model for dispute resolution.

The first question that must be addressed is whether to offer mediation services at all. In the context of human rights disputes, mediated resolutions may offer benefits to the parties including: reduced legal costs; less stress; speedier resolution; privacy; greater remedial flexibility—including the availability of remedies that may not be achieved through adjudication; greater participant control over, or involvement in, the process; greater acceptance of the resolution and therefore greater long-term sustainability; and avoidance of enforcement costs and expensive judicial reviews of decisions. For those parties with ongoing relationships, the opportunity to mediate their dispute may transform their relationship and have significant benefits beyond resolution of the specific complaint

In addition, human rights disputes, which frequently involve human misunderstandings of rights, obligations and relative positions in society, are ideally suited to a mediated resolution.

At the same time, mediated resolutions may be advantageous to the tribunal involved. Offering mediation may be a way of controlling workloads—the more cases that settle, the less that need to be adjudicated, freeing up resources that can then be focused on the adjudication of complex or potentially precedent setting cases. It is a mistake, however, to overestimate the cost savings; in some cases, a complaint could have been adjudicated in less time than that required to establish the mediation, perform pre-mediation preparation with the parties, and conduct the mediation.

It was with all these factors in mind that the newly-minted direct access tribunal in B.C. designed its dispute resolution model. Under the direct access model, complainants file their complaints directly with the Tribunal and are responsible for conducting all aspects of the litigation of their complaint.

I. THE B.C. MODEL FOR HUMAN RIGHTS DISPUTE RESOLUTION

To put my remarks in context, it is important to understand the dramatic change that occurred in B.C. in 2003 with respect to the resolution of human rights disputes.

Prior to March 31, 2003, there were three independent bodies responsible for human rights dispute resolution: the Human Rights *Commission*, the Human Rights *Tribunal* and the Human Rights *Advisory Council*. The Commission was responsible for the intake, investigation, and mediation of complaints, and was the gate keeper which decided, after an investigation, whether a matter should be referred to the Tribunal for hearing. The Tribunal was an independent adjudicative body whose mandate was to hear and decide cases referred to it by the Commission. The Advisory Council advised government about emerging human rights issues. Within that structure, both the Commission and the Tribunal offered mediation services. Once the matter had been referred to the Tribunal, the Tribunal offered the parties the assistance of a mediator to try and resolve complaints and obviate the need for a hearing. The Tribunal's mediation was often the second attempt at a resolution, and came late in the process, after the investigation and referral to the Tribunal. In 2001/02, the Commission began an "Early Mediation Project" with respect to certain of its complaints. This early initiative project was the subject of a review conducted by University of British Columbia law professors, Bill Black and Phil Bryden,² but was terminated when the amendments to the *Human Rights Code*, which I discuss below, were announced.

The Commission/Tribunal system produced an interesting settlement dynamic. Although the B.C. Commission's referral rate was the highest in Canada, in the last year of its operation the Commission

² Philip Bryden & William Black, "Mediation as a Tool for Resolving Human Rights Disputes: An Evaluation of the B.C. Human Rights Commission's Early Mediation Project" (2004) 37 U.B.C. L. Rev. 73.

referred less than 15% of the filed complaints to the Tribunal. Complainants thus had no guarantee that their matter would ever reach a Tribunal. If delay was a concern, these complainants were motivated to settle while the matter was at the Commission. Respondents on the other hand, appreciated that it was unlikely the matter would be referred to a Tribunal, and so they often only engaged in meaningful settlement discussions if and when a decision was made by the Commission to refer a complaint to the Tribunal. Once a matter was referred to the Tribunal, the dynamic flipped: complainants, finally able to have their “day in court,” had less interest in settlement, while respondents—now facing costs, publicity, and the risk of loss associated with defending a complaint, were more motivated to settle.

On March 31, 2003, amendments to the *Human Rights Code*, eliminated the B.C. Human Rights Commission and the Tribunal as it currently constituted came into existence.³ As a direct access tribunal, the Tribunal is now the exclusive agency responsible for the resolution of human rights disputes in B.C.

The Tribunal is given express legislative authority to conduct mediation in section 27.6 of the *Code*:

A member or person appointed, engaged or retained under section 33 may assist the parties to a complaint, through mediation or any other dispute resolution process, to achieve a settlement.

The Tribunal is also authorized to make rules regarding mediation and other dispute resolution processes.⁴

In the design of the new process, we realized that we had to operate on the basis of a “resolution” model that assumed that most cases would not go to a formal hearing because they would be resolved with the assistance of the Tribunal at an earlier stage. A resolution model

³ Bill 64, *Human Rights Code Amendment Act*, 3d Sess., 37th Parl., British Columbia, 2002 (proclaimed in force 31 March 2003) S.B.C. 2002, c. 62.

⁴ S. 27.3 provides:

- (1) The tribunal may make rules respecting practice and procedure to facilitate just and timely resolution of complaints.
- (2) Without limiting subsection (1), the tribunal may make rules as follows: ...
 - (h) respecting mediation and other dispute resolution processes, including, without limitation, rules that would permit or require mediation of a complaint, whether the mediation is provided by a member or by a person appointed, engaged or retained under section 33;

furthered our view of the ideal suitability of most human rights disputes to consensual resolution.

Focusing on a resolution model was important conceptually because, in the absence of investigative powers, those cases which were not dismissed or resolved at any early stage would proceed to an adjudicative hearing, and the Tribunal's resources would soon become overwhelmed.

II. CORE PRINCIPLES IN THE DESIGN OF OUR DISPUTE RESOLUTION SYSTEM

When designing the BCHRT mediation system, after consultation with stakeholders, we adopted core principles which are detailed in our Settlement Meeting Policy and Procedure, (attached as an Appendix to this paper). Rather than use the term mediation, and to reflect the different processes that may be available to the parties on request, we have used the term settlement meetings.⁵ In the discussion which follows, I explain each of these principles and the role they played in the reform process.

A. THE MEDIATION PROGRAM SHOULD BE VOLUNTARY AND EARLY

It is critical to ensure there is a voluntary buy in to the mediation process, and this is especially important when there is a power imbalance between parties to a human rights dispute. We did not want parties to approach mediation as a meaningless step in the litigation process, with respect to which they were just 'going through the motions.' We also felt the process should be designed on the assumption that most parties would, at some point in our process, participate in mediation. Given that, we built encouragement into the process to make early participation attractive.

Our consultation with stakeholders revealed early settlement opportunities, offered before the respondents had filed a response to the complaint and positions had hardened, produced significant benefits.

⁵ As the Tribunal's *Settlement Meeting Policy and Procedure provides*, the Tribunal can offer the parties various approaches at a settlement meeting. These include: interest and rights-based mediation; early neutral evaluation; and mediation/arbitration.

First, an opportunity to resolve a dispute early in the process gives rise to the possibility that relationships can be salvaged and the discriminatory treatment dealt with quickly. Second, responses to complaints often allege alternative defences which will not in fact be pursued at the actual hearing. Yet these defences can upset complainants, making a resolution less likely. Third, at this early stage, the parties and the Tribunal have not invested a large amount of resources with respect to the complaint; early resolution is cost effective for all participants.

When a complaint is filed, the complainant is asked if he or she has an interest in attending a settlement meeting. If such an interest is expressed, we advise the respondent in the package that is sent notifying of the complaint. We also provide the respondent with a copy of our Guide to Settlement Meetings which explains the process (attached as an Appendix to this paper).

To encourage respondents to participate in an early settlement meeting, we suspend the requirement to file a response to the complaint until after the parties have met and discussed the complaint. In the 2006–07 fiscal year, the Tribunal conducted 180 early settlement meetings. This represents slightly less than 20% of the cases that were filed. The settlement rate exceeded 70%.

In addition to early settlement meetings, the Tribunal offers the parties the option of participating in a settlement meeting at any other stage of our process. In some cases we have provided a mediator in the midst of a hearing, while in others, after the hearing concluded but before a decision was rendered. Most recently, we offer parties the opportunity to discuss a resolution after a judicial review of a Tribunal decision has been filed but before it has been argued.

B. ADJUDICATORS ARE THE BEST CHOICE AS MEDIATORS

Settlement meetings are conducted, for the most part, by Tribunal members. To deal with conflicts and workload concerns, Tribunal counsel and contract mediators may be asked to assist. We believed that whether the mediation model applied is rights or interest based, parties facing a human rights hearing benefit from the assistance of a person who has adjudicated similar disputes and who is familiar with applicable case law.

In addition, if a matter does not settle at a settlement meeting, the member can use the opportunity to discuss the steps that will be necessary before the matter goes to hearing.

C. MEDIATORS SHOULD NOT ADJUDICATE A FILE WHICH THEY HAVE MEDIATED

Traditional theories of mediation suggest it is essential to the integrity of a mediation system that mediators not have a stake in the outcome of the dispute they mediate. The objection is based on the concern that they might—consciously or not—manipulate the mediation to produce a result they believe is the “correct” one.

This classic approach proved to both unworkable and unnecessary in the Tribunal context. Our mediators, who are Tribunal adjudicators, do in fact have a stake in the outcome. First, they are interested in resolving disputes without the need for a hearing. That interest is based on a Tribunal-wide belief that mediated resolutions are often better than adjudicated ones in a human rights context. Second, workloads at the Tribunal are such that the success of our entire human rights system requires that a significant number of filed complaints resolve without the need for a hearing. Third, as explained earlier, Tribunal mediation occurs within the context of a statutory mandate that requires that the mediator make certain the settlement is consistent with the purposes of the *Code*. As a result, Tribunal mediators have an appropriate goal of ensuring that individual settlements are not achieved at the expense of systemic reform. For this reason, Tribunal members can withdraw mediation services if they believe that the process is not furthering the purposes of the *Code*.

D. MEDIATION SHOULD NOT DELAY ACCESS TO ADJUDICATION

One of the concerns we had in the design of our process was that parties not be able to use mediation to delay the processing of a complaint. A lengthy mediation process that led to a delay of several years prior to adjudication is simply not an efficient use of our resources. As a result, it is our view that access to a settlement meeting should delay access to adjudication only to the extent necessary to facilitate the settlement meeting process. With the exception of our early settlement meetings, our mediation program is integrated into the other processing of a complaint and functions effectively while a complaint is proceeding

along the adjudication track. We recognized that some minimal delay was appropriate in exchange for the benefits of an early resolution and, as a result, parties' agreement to an early settlement meeting does somewhat delay the complaint by deferring the deadline for filing the response.

We were careful to ensure that our mediators know when to close their mediation file and let the matter go to adjudication when that is necessary. Otherwise, mediators' optimism that a matter will settle and their reluctance to stop working with the parties may, inadvertently, lead to longer processing overall.

E. MEDIATION SHOULD BE ACCESSIBLE TO ALL PARTIES AND CLEAR INFORMATION SHOULD BE AVAILABLE ABOUT THE PROCESS

There is no charge for the Tribunal's settlement meeting services as these are understood to be integral to its other services. Mediation materials are written in accessible language and explain carefully what the parties can expect from the process.

Access to information about the mediation process contributes to informed and voluntary decisions about whether, and on what terms, a human rights complaint can be resolved. Unrepresented participants may lack the information necessary to inform them of their rights. To that end, and as set out above, the Tribunal has developed a Guide to its mediation process and a Settlement Meeting Policy and Procedure. Both are available on our web site⁶ and in Provincial Government Offices around the province. The Guide is available in Punjabi and Chinese which, in addition to English, are the major language groups represented in British Columbia. Staff is also able to explain the process to participants.

The mediators initially review the file, and contact the participants in advance of a session to canvas their understanding of, and continued interest in attending, mediation. They will advise the participants what they should do in preparation for the settlement meeting. Participants are also directed to the Tribunal's website and be given instruction in how to search for similar cases.

On occasion, it will become apparent to a mediator, in this pre-mediation telephone call, that the mediation is being used for an inappropriate purpose, such as to intimidate the other party or as a form of

⁶ Online: <www.bchrt.bc.ca>.

factual discovery; if so, the mediator has the option of canceling the mediation.

Participants are advised that they can exchange information in advance of a settlement meeting, provide information to the mediator to assist in understanding the issues, and are told what information they should bring to the settlement meeting to assist a resolution. If, for example, the complaint includes an allegation that would, if proven, result in a loss of income claim, participants are advised to bring information about past and current wage rates. Similarly, information that resolves disputes about dates, or medical records, for example, can be crucial, and participants are asked to bring this material to the mediation to facilitate the progress of the settlement meeting.

F. PARTICIPANTS MAY BE ACCOMPANIED BY THE ADVISOR OF THEIR CHOICE

Many of the participants in our process are unrepresented, and we decided it was appropriate that parties attending a settlement meeting be accompanied by a family member, friend or advocate who can assist them in weighing the alternatives available to them to resolve the dispute, and in ensuring the participant is supported and consenting throughout the process. Unrepresented participants are made aware that they do not have to settle the complaint, they can leave at any time, and that they can obtain advice after the settlement meeting and before signing a final agreement. That being said, the mediator has the right to, and does, exclude from the process any person whose behaviour undermines its integrity. Where that behaviour is that of legal counsel for a participant, the mediator may bring the mediation session to an end.

G. MEDIATION MUST BE CONFIDENTIAL

Participants in our settlement meetings have a legitimate expectation that their efforts to resolve a complaint will remain confidential. This allows the parties to be open with the mediator and provide him or her with the information he or she needs to assist a resolution. The Tribunal has clear policies protecting the confidentiality of both written and oral communications in settlement meetings. A separate file is kept and made available to the mediator only. Further, after the session or sessions, the mediator will report only on whether a

matter has settled and any next steps. The mediator's notes do not form part of the Tribunal's file and, apart from a signed settlement meeting agreement, all other information in the mediation file is destroyed, or returned to the parties, after the session.

When a settlement meeting is unsuccessful, mediators do not discuss confidential communications, comment on the merits of the complaint, make recommendations about the complaint or have any role in adjudication of, nor review of, draft reasons for decision after a hearing with respect to the complaint.

Mediators are not compellable as witnesses in any dispute arising from the mediation.⁷ While this has caused difficulty in a handful of cases where there is a dispute about whether a complaint has settled, it is a very important protection for participants and for mediators as well.

H. ADJUDICATORS DO NOT BECOME MEDIATORS WITHOUT TRAINING

The skill set of a good adjudicator is not the same as that of a good mediator. Training is essential so that mediators are knowledgeable about the mediation process and professional ethics, the relevant law, outcomes in similar cases and diversity issues. Mediators need to identify those participants who are, as a result of illiteracy, mental health, emotional issues, and so on, not capable of making an informed decision. In such circumstances, additional care needs to be taken to ensure that the settlement is truly voluntary.

As discussed above, the Tribunal decided to use an adjudicator/mediator model in which all adjudicators are mediators. To a certain extent, the mediators' skills are matched to the dispute although this is not always possible due to workloads. The Tribunal designed and delivered a one week intensive mediation training course which involved extensive discussion, group work and role play. Following the training,

⁷ S. 55 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, which is made applicable to the Tribunal by s. 32 of the *Code*, *supra* note 1, provides:

A tribunal member, a person acting on behalf of or under the direction of a tribunal member or a person who conducts a dispute resolution process on behalf of or under the direction of the tribunal must not be required to testify or produce evidence in any proceeding, other than a criminal proceeding, about records or information obtained in the discharge of duties under the tribunal's enabling Act or this Act.

adjudicators had the option of co-mediating disputes with an experienced mediator. In addition, they had access to the trainer for a period of months to discuss any issues that had arisen. Members also discuss general mediation issues at monthly meetings of adjudicators. After a complaint is resolved through mediation, the mediator may wish to discuss methods he or she used to resolve that particular dispute. The Chair, who has extensive experience in human rights mediation, plays a mentorship role to the Tribunal mediators and debriefs with them regularly.

In the last two years and in the Tribunal's annual report, systemic remedies achieved through our mediation processes, on a non-case-specific and non-identifying basis, are discussed. This helps other mediators and the parties understand the sorts of remedies that might be available.

I. MEDIATION SERVICES NEED TO BE EVALUATED

Any mediation program needs to be regularly reviewed to ensure that it continues to meet the needs of the participants and the Tribunal.

Shortly after the development of our mediation process, and through a federal grant received by the University of British Columbia, the Tribunal participated in a review of its mediation services, conducted by Professors Bill Black and Phil Bryden. For a six month period, participants in Tribunal settlement meetings were administered a written questionnaire designed to elicit information about our mediation services. Those who expressed their willingness to do so were also contacted for an in-depth telephone interview. The results of that review formed the basis of an article, referred to above, which was supportive of our efforts and was very helpful in our understanding of what was working, and not, in our process. The paper was first presented at a CIAJ Roundtable in 2005 and is about to be published by the CIAJ. It is worth reading.

In the fall of 2007, the Tribunal embarked on a second review of its mediation processes through funding made available by the Dispute Resolution and Administrative Justice Offices of the Ministry of the Attorney General. A questionnaire has been developed but will not be used until 2009 due to funding constraints.

III. EXAMPLES OF THE KINDS OF SETTLEMENTS THAT CAN BE ACHIEVED

The Tribunal has been very pleased with the type of resolutions that can be achieved through mediation as opposed to adjudication. Although we have broad remedial authority, in many cases remedies ordered are not designed to achieve broad systemic reform but are nonetheless important to advancing the public interest inherent in human rights dispute resolution. The two examples that follow exemplify this.

A. NON-TRADITIONAL FEMALE WORKPLACE

A group of women employees filed a human rights complaint alleging that the employer lumber mill systemically discriminates against female employees. The women are employed in non-traditional roles in the mill. They claim that the handful of women employed at the mill occupy the lowest paid menial positions from which it was impossible to obtain the necessary skills to be considered for promotion. They assert in addition: foremen, who are also union members, were less likely to offer women “acting” roles as forepersons; they regularly experienced sexist comments associating their complaints about the workplace with their menstrual cycles; they were propositioned and exposed to sexual innuendo; when they raised their concerns with management or reacted to the comments, they were considered trouble makers and not one of the “boys.”

While the employer denied the claim of discrimination, they realized that if its female employees believed that there was systemic discrimination, that belief was itself disruptive; it affected morale and recruitment options in an ever-tightening workforce in the lumber industry.

The parties agreed to an early settlement meeting with a Tribunal member. The mediation was scheduled for a total of four days, spread over three months. The mediation started with the premise that the women were in well-paid jobs and wished to remain employed. The women were asked to “blue sky” or imagine all the things that they would like to see changed in the workplace. The employer was also asked to blue sky its ideas. Both sets of ideas were listed, sorted and a decision was made about which were impossible (for example, firing managers and foremen), which were possible but required further information and

research (for example, tracking recruitment statistics), and which could be implemented immediately (for example, physical changes to the plant's layout).

At the end of the settlement meeting the parties had agreed that one of the problems was the lack of a critical mass of female employees who would, by their sheer numbers, change the workplace culture. As a result the employer agreed to:

1. As a precondition of employment, the employer required all its applicants complete a post secondary educational program.. It agreed that in evaluating job applicants, it had been giving greater credit to graduates from technical programs (male-dominated) than those from early childhood education or administrative support programs (female-dominated). In the future, all applicants with a post-secondary education, in any discipline, would be scored equivalently;
2. post its job openings in non-traditional places more often frequented by women, for example, day care centers, community centres and grocery stores;
3. target women at local high schools for employment recruitment, and use its current female employers to assist in recruiting;
4. establish a mentorship arrangement so that each new female employee was paired with a supportive partner – this could be either another women or a supportive male;
5. review the physical job demands for each position to assess whether the work could be performed in a less physically demanding way, accommodating employees with less physical size and strength;
6. review the plant layout to determine whether it could be improved so that physically demanding tasks could be minimized;
7. install tampax dispensers and feminine hygiene product disposal containers in all washrooms in the plant;
8. establish protocols for job shadow and job training opportunities with clearly defined entitlements;
9. review these initiatives on an ongoing basis to determine what was effective in terms of the women's job satisfaction;

10. track the number of women applicants, hiring data and progress rates, and report to the Tribunal and the complainants about the success of these initiatives;
11. set up a gender equality committee and have some the complainants sit on it.
12. provide mandatory anti-discrimination training to its managers;
13. to publish an article about the terms of the settlement in the mill's staff newsletter; and,
14. keep the mediation file open for two years to assist the parties with implementation.

B. BOUNTIFUL

A group of women filed a complaint alleging that the Ministries of Education, Children and Family Services, and Community Services discriminated against the women and children of the polygamous community of Bountiful, B.C. by failing to ensure that they had access to the same level of services as other B.C. residents.

The complaint was legally complex because there was an issue as to whether the complainants could actually represent the interests of the women and children of Bountiful, as none of those residents of Bountiful were a party to the complaint. After two days in mediation, the following terms were agreed to:

1. The Ministry of Community Services (MCS) would continue to provide quality and accessible services in the Cranbrook and Creston areas to meet the needs of women, and their children, at risk of abuse or fleeing abuse;
2. MCS would commit to monitor service level usage and respond to the needs of the community, within its budgetary constraints;
3. MCS would continue to ensure that there was cross-ministry and agency/community knowledge about the resources funded by it;
4. The Ministry of Children and Family Development (MCFD) would continue to provide services to the residents of the Creston Valley (CV), including the Bountiful and Mormon Hills Communities, in accordance with its obligations;

5. MCFD would continue to work with the residents of the CV, including the Bountiful and Mormon Hills Communities, in the ongoing review of its services, offer refinement of those services, and changes to those services as necessary, to ensure they remained responsive to community needs;
6. MCFD would continue its work with the communities in the CV in accordance with its obligations, in an open, honest, and respectful manner, in order to nurture trust and to develop relationships which would meet the needs of children, families, and the community;
7. Within the parameters of provincial and regional funding, MCFD would maintain the current funding level into the CV for contracted services and the current level of staffing of MCFD offices;
8. MCFD would work with its community partners and existing service providers to inform the community of the accessible available services for youth;
9. MCFD would continue to participate in the Safety Net committee, a committee which provided resources to women and children who wished to leave the Bountiful and Mormon Hills communities, as requested by the communities;
10. MCFD and a former teacher from the Bountiful community agreed to work together to facilitate a Safety Net committee meeting in Creston to review government's offer to provide funding for:
 - a. basic crisis intervention training for interested community members; and
 - i. Safety Net's development of an information package for community based service-providers in order to support the delivery of sensitive and appropriate services;
11. With the agreement of Mormon Hills Elementary School and Bountiful Elementary & Secondary School, information about available services and how to access them would be provided by the Province to the schools;
12. The Ministry respondents would send a letter to the Minister of Education and to the Premier conveying the complainants'

concern that the *Independent School Act* does not prohibit discrimination on the basis of sex; and

13. The Ministry respondents will convey to the Attorney General that the Complainants support the recommendation that the Attorney General file a stated case with the Court of Appeal with respect to s. 293 of the *Criminal Code*; and
14. The Province will take steps to advise school district officials within the Kootenays of the sensitivity of the issues arising from the Bountiful and Mormon Hills Communities.

CONCLUSION

The Tribunal continues to work with the stakeholders in our community to improve its processes. Alternate methods of resolving disputes are essential to that refinement because, given available resources, if every case were fully adjudicated, the resulting delay would undermine the purposes of the *Code*. In addition, for the many cases that do not involve broader patterns of inequality, a relatively quick and fair mediated resolution is consistent with the broader goals of human rights processes.

Settlement Meeting Policy and Procedure
B.C. Human Rights Tribunal
December 1, 2004

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Part 1: Purpose and Application

A. Purpose of the Settlement Meeting Policy and Procedure

The *Human Rights Code* (the “*Code*”) sets out the right of every person to participate fully and without discrimination in British Columbia society. The purposes of the *Code* are broadly stated. They are to eliminate discrimination, to promote a climate of mutual understanding and respect, and to provide a means of redress to individuals who are discriminated against contrary to the *Code*.

The Tribunal offers settlement meeting services as one means of fulfilling these goals. Parties are provided with the opportunity to engage in tribunal-assisted settlement discussions on a voluntary basis, at any time before a Tribunal Member determines if the complaint is justified at a hearing.

B. Public Policy Issues

To further the broader public goals of the *Code*, mediators may identify public policy issues, such as systemic discrimination or new applications of the *Code*, that may be raised by complaints filed with the Tribunal. The *Code* does not authorize the Tribunal to require that public policy issues be addressed; however, parties may be encouraged to explore public policy issues, and to formulate remedies that address them.

C. Application

This policy applies only to the Tribunal's settlement meeting services. Parties to complaints before the Tribunal may, at their own expense, make additional or alternate arrangements between themselves to attempt to resolve the complaint.

Part 2: Conditions of Participation

A. Settlement Meetings are Voluntary

Participation in settlement meetings is voluntary. It is an additional opportunity to try to resolve a complaint. Participating in a settlement meeting has no impact on a party's right to proceed to hearing or to make an application.

B. Settlement Meetings are Confidential

Settlement meetings are confidential. Any document created for the purpose of the settlement meeting and anything said during the settlement meeting is not admissible as evidence if the complaint proceeds to a hearing, without consent of the party on whose behalf the document was created or the matter spoken. All records or documents resulting from settlement meeting are confidential and do not form part of the Tribunal file. The only document the Tribunal keeps on file from the mediation is the *Settlement Meeting Agreement* signed by the settlement meeting participants.

C. Settlement Meeting Agreement

Parties are required to sign the Tribunal's *Settlement Meeting Agreement*, which sets out the terms of participation in the settlement meeting. (Attachment #1)

Part 3: Participants

A. Who Attends?

A settlement meeting is private. The participants in a settlement meeting are the mediator, the parties to the complaint, their

representatives, interpreters, affected third parties and any other person the parties agree may participate. Intervenors may not participate without the agreement of the parties. Support persons may attend the settlement meeting with the consent of the parties.

B. Independent Legal Advice

Although the Tribunal does not require parties to be represented by legal counsel, it is strongly recommended that unrepresented parties obtain independent legal advice both before the settlement meeting and prior to signing an *Agreement to Settle*. Time will be provided to allow parties to obtain independent legal advice.

C. Infant Complainants

The Tribunal may accept complaints filed by mature minors. Contracting by minors is governed by the *Infants Act*, R.S.B.C. 1996, c. 223. A contract made by a minor is unenforceable against him or her, except in limited circumstances. When parties agree to attend a settlement meeting and the Tribunal is aware that the complainant is a minor the Tribunal will refer the respondent to the *Infants Act*. The respondent must notify the Tribunal if it agrees to participate in a settlement meeting with the minor. If the respondent will only agree to the settlement meeting with the participation of the minor's legal guardian, the Tribunal will request that the complainant's legal guardian attend. If the parties are unable to agree on the settlement meeting participants, the settlement meeting will not proceed.

Part 4: Settlement Meeting Services

The Tribunal's settlement meeting services are intended to help the parties resolve all or part of the complaint prior to the complaint going to a hearing. Settlement meetings are categorized as either an **Early Settlement Meeting** or a **Regular Settlement Meeting**.

A. Early Settlement Meetings:

An Early Settlement Meeting is scheduled when the parties agree to attend a settlement meeting after notice of the complaint is delivered to

the respondent and before other steps are taken in the proceedings. In these circumstances, rule 13(4) of the Tribunal's *Rules of Practice and Procedure* provides that the Tribunal will extend the time for the respondent to file a response to the complaint.

It is currently Tribunal policy to allow a maximum of 17 weeks for a settlement meeting to be categorized as an Early Settlement Meeting. The maximum time may be changed by the Tribunal from time to time. The Tribunal will notify parties by letter of the applicable date for filing the response if parties agree to an Early Settlement Meeting. Under rule 13(5) and (6), a respondent must file its response:

(a) within 35 days from the date when the Tribunal is advised that the early settlement meeting did not result in resolution; but

(b) no later than the maximum date set by the Tribunal.

B. Regular Settlement Meetings: All settlement meetings held after the maximum date set by the Tribunal are automatically regarded as Regular Settlement Meetings. The Tribunal will continue to provide Regular Settlement Meeting services to parties making good faith efforts at resolution of the complaint, upon request, throughout the life of the complaint.

Part 5: Role of the Mediator

A. Appointment of Mediator

All mediators are appointed at the discretion of the Tribunal. The Tribunal will not consider requests for particular mediators. A mediator appointed by the Tribunal under this policy may be a Tribunal Member, legal counsel to the Tribunal, or an external mediator.

B. Settlement Meeting Options

The Tribunal's *Rules of Practice and Procedure*, rule 21 offers a variety of approaches by which human rights complaints can be resolved at settlement meetings. The type of approach used in a particular case will be discussed with the participants and by mutual agreement of the parties.

C. Role of the Mediator

The type of settlement meeting will determine the role assumed by the mediator. The mediator may use a combination of approaches. In all cases the mediator is neutral and facilitative. The mediator does not act as a legal representative for any party.

Mediators may provide interest-based mediation where the aim is to move the parties away from conflict, to focus on interests rather than positions, and to generate solutions to the issues raised. The parties themselves generate solutions.

Alternatively, or in addition, mediators may provide early evaluation, also called rights-based mediation, where the mediator reviews the facts with the parties and provides the parties with an assessment of the strengths and weaknesses of the complaint. The mediator may also advise the parties of remedies that might be expected should the matter proceed to hearing and receive a positive determination. In rights-based mediation, the parties can accept or reject the mediator's assessment of the complaint and proposed remedies.

A Tribunal Member/mediator may be asked to provide a final determination on the merits by the parties who have not been able to resolve the human rights complaint in a settlement meeting. In this process the parties consent to the same Tribunal Member adjudicating the matter and making an order based on the information exchanged at the settlement meeting. In order to participate in a settlement meeting that is converted to an adjudication the parties must provide the Tribunal with a written agreement which states that the parties agree to participate in this process, have received independent legal advice or will be represented by legal counsel, agree to the procedure set out in the written agreement, and are prepared to be bound by the terms of the order made by the Tribunal Member.

D. Tribunal Member acting as Mediator

When acting as a mediator, a Tribunal Member has no power to decide the complaint. The Tribunal Member who acted as mediator will not hear or decide the complaint if it is not resolved through a settlement meeting, except in the circumstances set out above, where there is legal representation or independent legal advice, and written agreement by all

parties to convert the settlement meeting to a hearing of the complaint, before the same Tribunal Member.

A Tribunal member appointed to adjudicate a case will not act as a mediator on that case, except in circumstances where there is legal representation, and written agreement by all parties to convert the hearing of the complaint to a settlement meeting with the same member.

E. Mediator Discretion

The mediator retains discretion to withdraw the Tribunal's settlement meeting services at all times. The circumstances where a mediator may decide to terminate the settlement meeting include: if the mediator determines that a party is not abiding by the terms of the *Settlement Meeting Agreement* or following the mediator's directions; or if in the mediator's view the settlement meeting process is unfair, unproductive or abusive.

Part 6: Settlement Meeting Preparation

A. Information Package

Parties who agree to attend a settlement meeting will be sent an information package to assist them to prepare for the settlement meeting.

B. Contact by Mediator

The mediator may contact the parties before the settlement meeting to address preparation for the settlement meeting and to answer questions of the parties. In any event, the parties are expected to be prepared to proceed on the date scheduled.

C. Interpretation Services

Parties are asked to bring their own interpreter to settlement meetings. If a party is unable to provide an interpreter, they may request the Tribunal to provide interpretation services. This request must be made early enough to permit the Tribunal to arrange for the requested services.

Part 7: The Settlement Meeting**A. Conference Call or Personal Attendance**

The Tribunal offers to schedule one day settlement meetings in locations convenient for the parties, in a neutral setting. If the Tribunal is unable to arrange a venue appropriate for the settlement meeting or upon the parties' request settlement meetings may be conducted by conference call arranged by the Tribunal.

B. Parties are Expected to Attend

Every complainant and respondent wishing to resolve the complaint through the settlement meeting process is expected to attend the settlement meeting, unless the parties otherwise agree.

Participants in the settlement process, either in person or by phone, will be required to attend the entire settlement meeting. Parties must provide the names and roles of the persons who will be attending the settlement meeting in advance.

If it is not possible for a party to attend in person, the party may attend by telephone with their legal counsel attending in person.

Part 8: After the Settlement Meeting**A. If Complaint is not Resolved by Agreement**

If all or part of the complaint is not resolved at the settlement meeting, the complaint will continue with the next procedural step in the Tribunal's process. That may include filing a response to the complaint or preparation for a formal hearing before a Tribunal Member. To assist with this process the mediator will confirm the parties' current names and addresses and confirm the next procedural requirement applicable to each party.

B. Agreement to Settle

If the parties agree to settle the complaint, legal counsel, if present, will draft an *Agreement to Settle*. If both parties are

unrepresented the mediator may act as the scribe for the parties and may use the *Agreement to Settle* precedent (Attachment #2).

All *Agreements to Settle* will include the names of the parties to the agreement, the complaint file number, the date, the signature of every party to the agreement or counsel authorized to sign on behalf of a party, and the terms of the agreement set out in numbered paragraphs.

The complainant will keep the original agreement. The respondent will be provided with a copy of the agreement. The Tribunal will not receive a copy of the agreement.

C. Notice of Withdrawal

If all or some of the complaint is resolved the complainant will sign and deliver a Notice of Withdrawal of the complaint, Form 6, to the Tribunal and the Tribunal will issue a Notice of Dismissal for all or that part of the complaint.

D. Enforcement of Agreements

The Tribunal does not approve or enforce settlements. The parties to the settlement are responsible for the resolution of problems arising from the settlement or the settlement agreement. Section 30 of the *Code* addresses enforcement of settlement agreements.

**B.C. HUMAN RIGHTS TRIBUNAL
SETTLEMENT MEETING AGREEMENT**

BETWEEN:

[name of Complainant(s)]

COMPLAINANT[S]

AND:

[name of Respondent(s)]

RESPONDENT[S]

Re: A complaint under the *Human Rights Code*, R.S.B.C. 1996, c. 210 (as amended) and the provision of settlement services by the B.C. Human Rights Tribunal

[Complaint number]

The undersigned participants or their counsel agree as follows:

The Settlement Meeting

1. We agree to use the services of [NAME] to act as Mediator until completion of this settlement meeting or meetings.

Scope of Settlement Meeting

2. This settlement meeting is intended to resolve all or part of this complaint.

Authority to Settle

3. Each participant has full authority to agree to a final settlement of all or part of this complaint at the settlement meeting.

Process

4. We agree to make an honest effort to settle this complaint. We agree to work together to:
 - (a) identify each participants' interests;
 - (b) define areas of agreement and areas of disagreement;
 - (c) explore options for mutual gain;
 - (d) consider other ways to resolve the complaint; and
 - (e) seriously consider all offers to resolve this complaint.

5. We agree to follow the reasonable directions of the Mediator for the effective and efficient conduct of the settlement meeting or meetings.

Independent Legal Advice

6. We agree that the Mediator is not acting as legal counsel for any participant in the settlement meeting.

Without Prejudice and Inadmissibility

7. We agree that the settlement meeting or meetings covered by this agreement are conducted without prejudice to the rights of either party to this complaint. We agree that anything said during the settlement meeting must be kept confidential, is not admissible, and will not be used in any legal proceedings, including a Tribunal hearing, except with the consent of the participant giving that information.

Information from Separate Caucus Sessions

8. We agree that all information received in caucus sessions may be revealed to the other participants unless the participant who provided that information in caucus expressly requests that the mediator treat specific information in strict confidence in which case the mediator agrees to do so.

Failure to Agree

- 9. If we cannot reach a resolution of all or part of this complaint to which the participants agree by the end of our settlement meeting, we may agree on a process for continuing our settlement efforts or we will end the settlement meeting process.
- 10. If any issues arise during the settlement meeting regarding the settlement meeting process itself, we agree to raise the issues with the mediator as soon as practical. We agree to attempt to resolve these process issues in a manner acceptable to all concerned and in a manner that respects the confidentiality of the process.

Complainant

Counsel for Complainant

Respondent

Counsel for Respondent

Respondent

Counsel for Respondent

Mediator

Dated: _____

AGREEMENT TO SETTLE

BETWEEN:

COMPLAINANT

AND:

RESPONDENT

Re: A complaint under the *Human Rights Code*, R.S.B.C. 1996, c. 210 (as amended); Case Number: _____

The undersigned participants agree as follows:

1. _____

2. _____

3. Additional paragraphs may be added.

4. In return, the Complainant agrees to withdraw his human rights complaint, case number #_____, filed against the named Respondent,_____.

5. The Complainant agrees to file the Notice of Withdrawal form with the B.C. Human Rights Tribunal within _____ business days of completion of the terms set out in paragraphs 1, 2..... above.

Signed this _____ day of _____, 2004, in the city of Vancouver:

(Complainant)

(Respondent)

(Complainant)

(Respondent)

original to complainant

copy to respondent

BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL GUIDE 4 – The Settlement Meeting

Please Note:

The information in this guide is an overview of the settlement meeting process under the Human Rights Code. This guide is not intended as a substitute for the Human Rights Code or the tribunal's Rules of Practice and Procedure. This guide is not legal advice. If you have legal questions, you should see a lawyer.

For further information, please see the section of this guide called "Where to Get More Help" (page 5).

Please read the tribunal's Settlement Meeting Policy, available on the Web site or from the tribunal.

Inside:

- page 1 – The Settlement Meeting
- page 2 – Who Attends the Settlement Meeting
- page 2 – When is the Settlement Meeting
- page 3 – Why Agree to a Settlement Meeting
- page 3 – Preparing for a Settlement Meeting
- page 3 – What Will Happen at a Settlement Meeting
- page 4 – When There is a Settlement
- page 5 – When There is No Settlement
- page 5 – Where to Get More Help

The Settlement Meeting

As part of its pre-hearing process, the B.C. Human Rights Tribunal (the **tribunal**) offers parties to a complaint the opportunity to attend a settlement meeting. This is a free service.

In many human rights cases, the parties resolve the complaint through settlement discussions without the need for a hearing.

In a settlement meeting, the parties meet with a mediator whose role is to help the parties to settle the complaint.

The process is flexible, and the parties can agree to a procedure that best suits their needs. Some procedures that might be used include:

- **Mediation**, where you meet with a mediator to discuss your interests and goals and try to resolve all or part of the complaint
- **Early evaluation**, where the mediator tells each party the strengths and weaknesses of their case to help them decide how best to resolve the complaint
- **Structured negotiations**, where you meet and a mediator helps you to negotiate your own settlement
- **Final determination of the merits**, where the tribunal member mediating the complaint makes the final decision, but only if settlement is not achieved and the parties consent

Who Attends the Settlement Meeting

The complainant, respondent, and their lawyers or agents, if they are represented, attend the settlement meeting.

The settlement meeting may be conducted by a member of the tribunal, or by another mediator.

A member who conducts a settlement meeting will not hear or decide the complaint if it does not settle, unless the parties consent.

The meeting is private. Members of the public are not allowed. No one else may participate in the settlement meeting unless the parties agree.

If you want a friend, family member or other person to be with you at the settlement meeting, you should arrange this in advance.

When is the Settlement Meeting

A settlement meeting may be held at any stage of the process. For example:

- First, the parties may want to have an early settlement meeting, before the respondent files a Response to Complaint Form. If you are a complainant, and you are interested in an early settlement meeting, check 'yes' in box M of the Complaint Form. If you are a respondent and the complainant has checked 'yes' for an early settlement meeting, the tribunal will contact you to see if you are also interested.
- Second, a case manager may suggest a settlement meeting. After both the Complaint Form and the Response to Complaint Form have been filed, a case manager may send the parties a letter asking for dates they could come to a settlement meeting.
- Third, a member may propose a settlement meeting.
- Fourth, the parties may ask for additional or different dates for a settlement meeting.

A settlement meeting is scheduled only where both the complainant and at least one respondent agree to attend.

Why Agree to a Settlement Meeting

There are several reasons. Settlement meetings are often the quickest and simplest method of solving disputes, and they are confidential. If there is a settlement, there will not be a public hearing or a decision which is public. Sometimes, parties can figure out a way to resolve the complaint rather than having a tribunal member make a decision.

Preparing for a Settlement Meeting

A settlement only happens if a solution is found that both parties agree to. When preparing, it is helpful to think about the issues you want to talk about and to consider what issues the other party might want to talk about.

You should bring any documents you think relate to the issues that will be discussed.

For example, if the complainant is saying they lost wages, the parties should bring documents that relate to that claim. Documents could include information about the complainant's efforts to find a new job, pay stubs, employer payroll records and records of other income received by the complainant.

Think about what possible solutions you might want. A settlement might include a letter of apology, a letter of reference, going back to a job, or having the employer change its rules.

You do not have to be represented by a lawyer at a settlement meeting. However, the tribunal strongly recommends that you get independent legal advice, or other expert advice, both before and after the settlement meeting. (For further information, please see page 5 – “Where to Get More Help?”)

What Will Happen at a Settlement Meeting

Before the settlement meeting, the tribunal will send you a Settlement Meeting Agreement. You must sign this agreement to take part in the settlement meeting. The agreement says that:

- you will make an honest effort to settle the complaint
- the information exchanged during the settlement meeting will be kept confidential
- people taking part have the authority to settle the complaint

The settlement meeting will be held in an office or meeting room. The tribunal will send you a letter advising you of the time and place. You and your representative will sit down at a table with the person conducting the settlement meeting and the other party and their representative.

What happens at the meeting depends on the type of process the parties have chosen (for example, mediation or structured negotiation), the style of the person conducting the settlement meeting, and the type of case. Usually, there are some common elements in the process:

A. Introduction

First, the mediator will introduce everyone. They will describe the process and their role and will make sure that everyone has signed the Settlement Meeting Agreement. They will also discuss the Agreement, which says specifically that they will not give legal advice to any party and that the process is confidential.

B. Information Gathering

Next, the mediator will ask each of the parties to tell their view of the dispute.

C. Issue Identification

The mediator will help the parties to identify the main issues in dispute.

D. Generating Solutions

The mediator will encourage the parties to identify possible solutions. They may talk to parties separately or together throughout the process.

For the meeting to be successful, all parties must feel able to speak freely to come to a compromise. All discussions during a settlement meeting are “off the record.” That means that a party may put forward a position or state facts and opinions without fear that they will be referred to at the hearing or in public.

E. Agreement

If the parties are able to reach an agreement, the parties, their representatives, or the mediator may write down the details of the agreement.

When There is a Settlement

If you settle all or part of a complaint, the complainant will sign a Complaint Withdrawal Form, and file it with the tribunal. This may be done at the settlement meeting.

When the complainant files a Withdrawal Form, a tribunal member will order that the complaint (or the part of the complaint described in the form) be dismissed. That means that the complainant cannot proceed with all, or the settled part, of the complaint.

If there is a breach of a settlement agreement, a party may apply to the B.C. Supreme Court to enforce it.

When There is No Settlement

In some cases, even where no settlement is reached at the settlement meeting, the parties continue to talk and reach a settlement sometime later. They may also ask the tribunal to set up another settlement meeting so they may try again.

If the settlement process is not successful, the complaint will go to the next procedural step in the tribunal process.

Three months before a hearing, parts of the complaint file (but not the parties' addresses and phone numbers) will be made available to the public, who may be interested in intervening in or attending upcoming hearings.

At a hearing, a member hears evidence and arguments from both sides, and decides whether discrimination occurred and, if so, the appropriate remedy.

For more information about hearings, see the tribunal's Guide 5: Getting Ready for a Hearing.

The discussions at the settlement meeting are confidential. The information exchanged cannot be used as evidence at the hearing unless the party who gave the information consents.

If a tribunal member conducted the settlement meeting, that member will not conduct the hearing unless all the parties consent.

Where to Get More Help

If you need help filling out your form, or advice about whether you should file a complaint, you should contact a lawyer or seek other expert advice. Assistance may be available at:

B.C. Human Rights Clinic
Vancouver Region
Suite 1202-510 West Hastings St.
Vancouver, BC V6B 1L8
Phone: (604) 689-8474
Fax: (604) 689-7511
Toll Free: 1-877-689-8474

The Law Centre
Third Floor-1221 Broad St.
Victoria, BC V8W 2A4
Phone: (250) 385-1221
Fax: (250) 385-1226

UBC Law Students' Legal Advice Program
Room 158, 1822 East Mall
Faculty of Law
University of British Columbia
Vancouver, BC V6T 1Z1
Phone: (604) 822-5791

Western Canada Society to Access Justice
Phone: (604) 878-7400
Fax: (604) 324-1515
Web site: www.accessjustice.ca

You can also find legal information about human rights on the following Web sites:

B.C. Human Rights Tribunal including links on the Web site –
www.bchrt.bc.ca

B.C. government Web site –
www.ag.gov.bc.ca/programs/hrc/index.htm

Canadian Human Rights Reporter – www.cdn-hr-reporter.ca

This guide is one in a series of guides available from the tribunal or your local Government Agent's office. The titles are:

1. The B.C. Human Rights Code and Tribunal
2. Making a Complaint
3. Responding to a Complaint
4. The Settlement Meeting
5. Getting Ready for a Hearing

The tribunal also has a series of information sheets available from the tribunal or your local Government Agent's office. (See contact information below)

B.C. Human Rights Tribunal
1170 – 605 Robson Street
Vancouver, BC, V6B 5J3
Phone: (604) 775-2000
Fax: (604) 775-2020
TTY: (604) 775-2021
Toll free: 1-888-440-8844
Web site: www.bchrt.bc.ca

To find the British Columbia Government Agent's office nearest you, call the tribunal at one of the numbers listed above, or contact Enquiry B.C. for assistance, toll free, at: 1-800-663-7867. You can also check the Government Agents' Web site at: www.governmentagents.gov.bc.ca.