



*EXPANDING
OUR VISION*

*Cultural Equality
& Indigenous Peoples'
Human Rights*

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“Incorporation of Indigenous legal definitions of human rights, and mechanisms for ensuring fairness and freedom from discrimination, is a cornerstone of access to justice.”

These words of Ardith Walpetko We’dalx Walkem, QC from this report, *Expanding our Vision: Cultural Equality and Indigenous Peoples Human Rights*, are a challenge to those of us who have some power to change the institutions that have for so long discriminated against Indigenous Peoples. It is a challenge to begin a journey, together with Indigenous Peoples and communities, to transform the way we provide justice. The provincial government’s legislation to implement the *United Nations Declaration on the Rights of Indigenous Peoples* has made embarking on this journey an immediate obligation.

For me as Chair of the British Columbia Human Rights Tribunal, the journey began with silence. The Human Rights Tribunal receives and reviews complaints about human rights violations in British Columbia under the Human Rights Code. We noticed that Indigenous Peoples were not filing human rights complaints. I wanted to understand why and do something about it.

I would like to thank the Ministry of Attorney General for providing the resources that enabled us to take this first step. I asked Ardith Walpetko We’dalx Walkem, QC to help us, and this research opened the door that allowed us to hear from over 100 Indigenous people who talked about how our institution is experienced by the people it is intended to serve. This research shows that we have work to do.

This report presents not just a challenge, but also an opportunity. I am hopeful that it will open up a dialogue and lead to action beyond the Human Rights Tribunal. As a justice system, we are collectively failing Indigenous Peoples, and we can collectively make a difference. We must engage, we can engage, and we must act together.

I would like to honour Ardith and the voices that she honours in her report. Our Human Rights Tribunal wants to ensure that its processes are safe and accessible for Indigenous Peoples. Your voices and wisdom are central to our efforts. Please join us on this journey as we develop an Indigenous Justice Initiative that is open and responsive to the experiences of Indigenous Peoples.

Together, let’s take the next step.

Diana Juricevic
Chair, BC Human Rights Tribunal

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INTRODUCTION

The discrimination that Indigenous Peoples experience is compounded by the history of Canadian law and policy aimed at controlling Indigenous Peoples and eliminating their rights to lands and resources. Domestic human rights mechanisms do not address Indigenous Peoples' human rights as rights which belong to Peoples. As a result, Indigenous Peoples consider existing human rights mechanisms, including the British Columbia Human Rights Tribunal (BCHRT), an imperfect fit.

Indigenous legal systems have their own human rights concepts that should form part of the human rights framework that is used to assess and resolve complaints brought by Indigenous Peoples. Incorporation of Indigenous legal definitions of human rights, and mechanisms for ensuring fairness and freedom from discrimination, is a cornerstone of access to justice. There can be no true justice where Indigenous Peoples feel that they have no recourse for gross violations of their human rights which occur on a pervasive and ongoing basis, and further, when their own mechanisms for defining and assessing human rights are shut out from the discussion. Human rights, at their core, are about inclusion and honouring the dignity and uniqueness of others, and for Indigenous Peoples, this protection includes the collective expression of those human rights.

The BCHRT is responsible for receiving and reviewing complaints about possible violations of the BC Human Rights Code (Code). Indigenous Peoples are underrepresented among the BCHRT's users. The BCHRT wants to ensure that its processes are safe and accessible for Indigenous Peoples and consistent with the mandate of the Code under s. 3 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;" to "promote a climate of understanding and mutual respect where all are equal in dignity and rights;" and to "identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code."

Expanding Our Vision provides a snapshot of Indigenous Peoples' understanding of the BC human rights framework. The recommendations suggest steps for the BCHRT to develop an Indigenous Justice Initiative that is open and responsive to the experiences of Indigenous Peoples. *Expanding Our Vision* highlights the need for the BCHRT to engage Indigenous communities and nations on a collective basis to develop a shared plan for moving forward.

1.0 GUIDING RECOMMENDATIONS

- 1.1 Broaden the concept of human rights to incorporate international human rights principles as reflected in the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* and Indigenous legal traditions, in the Code and BCHRT operations and practice.
- 1.2 Advocate to add Indigenous identity as a protected ground to the Code. Current grounds of discrimination under the Code (including based on race, colour, ancestry or religion) do not adequately address the discrimination Indigenous Peoples report experiencing. This would send a message of inclusion and reflect the individual and collective nature of Indigenous human rights.
- 1.3 Increase the number of Indigenous Peoples at all levels of the BCHRT, including staff, tribunal members and contractors.
- 1.4 Create education materials and training:
 - a. For Indigenous Peoples, about the Code and BCHRT processes;
 - b. Within the BCHRT, to develop cultural competency and safety among BCHRT staff and tribunal members;
 - c. For the general public, through a proactive campaign to highlight specific areas of discrimination faced by Indigenous Peoples.
- 1.5 Identify and remove procedural barriers within the BCHRT.
- 1.6 Increase the training for and number of lawyers available to support Indigenous Peoples in bringing human rights complaints, with an emphasis on Indigenous lawyers.

Domestic human rights mechanisms do not address Indigenous Peoples' human rights as rights which belong to Peoples. As a result, Indigenous Peoples consider existing human rights mechanisms, including the BCHRT, an imperfect fit.

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Expanding Our Vision provides a snapshot of Indigenous Peoples' understanding of the BC human rights framework.

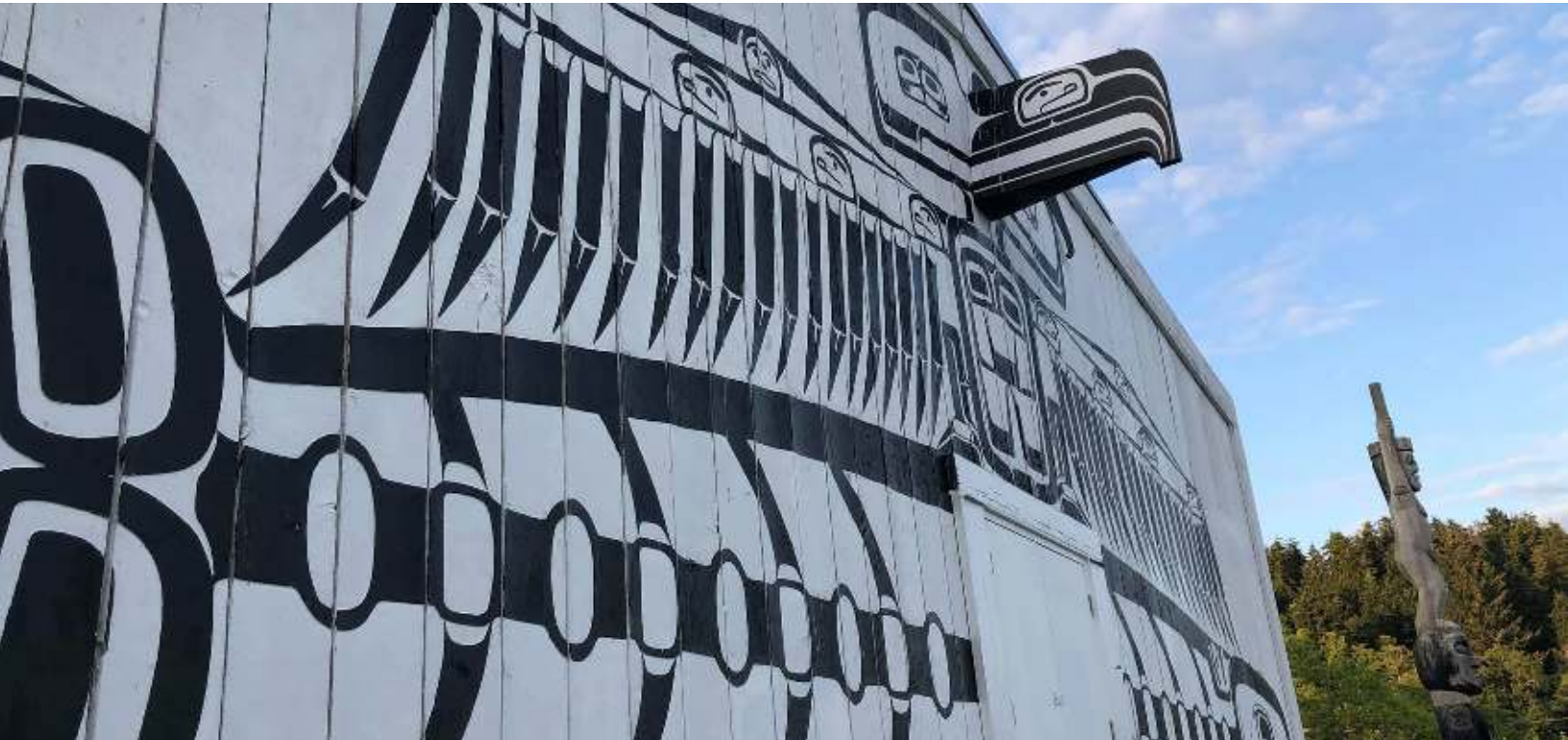
2.0 RECOMMENDATIONS: IMMEDIATE PROCEDURAL STEPS

- 2.1 Consider these recommendations remedial measures, and implement active and concerted efforts to address the underrepresentation of Indigenous complainants accessing the BCHRT. Create an affirmative access program for Indigenous Peoples.
- 2.2 Create a staff/tribunal committee tasked with developing the *Expanding Our Vision* Implementation Plan. Indigenous lawyers and cultural leaders or academics with knowledge of human rights should be recruited to join these efforts. The *Expanding Our Vision* Implementation Plan should include immediate steps to be taken in the first 6 months, and then be renewed on a yearly basis.
- 2.4 The BCHRT should report on the *Expanding Our Vision* Implementation Plan in their annual report.

Methodology

Research supporting *Expanding Our Vision* had several key components: a community survey; review of the BCHRT website; discussion with lawyers who have represented Indigenous Peoples within the BCHRT process; a review of decisions made about claims brought by Indigenous Peoples; and a discussion with Indigenous individuals about their experiences in contemplating or actually filing human rights complaints.

Photo by Arthur Dayu Dick.



The survey (attached as Appendix A) was distributed across Indigenous social media networks, including by Indigenous political organizations, as well as legal and advocacy groups. The survey was designed to explore Indigenous Peoples' knowledge of and experiences with the BCHRT system. A summary of the numerical results is found at Appendix B.

A total of 102 surveys were returned.¹ Of the respondents, 78% identified as First Nations, 15% identified as Métis, and 8% identified as Inuit. Some identified as sharing more than one Indigenous identity. Respondents spoke of discrimination from both Indigenous and non-Indigenous people for being either "dark skinned" or "light skinned"; or, for being too traditional/Indigenous or not traditional/Indigenous enough. These seemingly contradictory areas of discrimination highlight the vulnerability of Indigenous identity that results from law and policy imposed on Indigenous Peoples over generations.

Primary grounds of discrimination that people reported experiencing, in order of frequency named, were: Indigenous identity; Being an Indigenous Woman; Age; Poverty; Family Status; Disability; and, Being Two-Spirited or LGBTQ. The intersectionality of Indigenous Peoples' experiences of discrimination is important to acknowledge, in keeping with the distinctions-based approach urged by the Murdered and Missing Indigenous Women, Girls and Two-Spirited Peoples Inquiry (MMIWG2S Inquiry).

Support for Renewal

The BCHRT is undertaking this process of renewal amidst widespread calls for change in the relationship between Indigenous Peoples and Canadian society. Change has been driven by the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*² which the BC government will implement through the *Declaration on the Rights of Indigenous Peoples Act*, the Truth and Reconciliation Commission Calls to Action³, and the MMIWG2S Inquiry.

UNDRIP

The UNDRIP expresses positive, not merely passive, principles of protection that Indigenous Peoples are entitled to.

The definition of human rights includes rights to protection of Indigenous Peoples' relationship with their territories, languages and laws. Globally, these encompass the protections embodied under UNDRIP.

The UNDRIP's expanded definition of human rights embraces the notion that Indigenous Peoples, as Peoples with territories, languages, legal orders and cultures, have the right to exist and to be protected in that existence. Recognition of human rights on this broader scale remains illusory to most domestic human rights regimes, including the BCHRT.

Presently, Indigenous Peoples must apply under the race, colour, ancestry, or religion grounds which do not reflect how many Indigenous Peoples self-identify.

¹ Where results are reported, they are rounded up/down to nearest percentage point.

² UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*: resolution / adopted by the General Assembly, (2 October 2007), A/RES/61/295 ("UNDRIP"). Endorsed by Canada in 2016.

³ Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action*, (2015).

Many respondents said that racism against Indigenous Peoples is so pervasive that they did not believe it would make any difference to report the discrimination that they experience.

The Code should reflect the broad language of self-definition included in jurisprudence surrounding s. 35 of the *Constitution Act, 1982*.

Other jurisdictions have grappled with the question of how to reflect Indigenous difference in a human rights framework. *To Dream Together*, a joint Indigenous-Ontario Human Rights Commission process, recommended that Ontario “[u]se UNDRIP as the organizing framework for understanding, interpreting and implementing Indigenous Peoples’ human rights”.⁴ The United Nations Human Rights Office of the High Commissioner noted that the UNDRIP gives “expression to the right to cultural equality.”⁵

“Indigenous Peoples have different values than the world. We have our traditions and beliefs; so we have different human rights.”

“Fact that I can’t access my traditional foods without being criminalized is a violation.”

The TRC identified education about human rights as necessary to begin the process of transforming relationships between Indigenous Peoples and Canadian society.

TRC

The Truth and Reconciliation Commission (TRC) identified education about human rights as necessary to transform relationships between Indigenous Peoples and Canadian society. The TRC Calls to Action were directed to the medical and legal professions; federal, provincial, territorial and municipal public servants; and the corporate sector and called on each of these fields to learn about “Aboriginal people and the law, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations” through an education process that involves “skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.”

MMIWG2S Inquiry

The report of the Murdered and Missing Indigenous Women, Girls and Two-Spirited Inquiry (MMIWG2S Inquiry) noted that there is a lack of “accessible and reliable mechanism[s]” within Canada for Indigenous women and girls, and two-spirited people, to address human rights violations.

The MMIWG2S Inquiry recommended the establishment of a Human Rights Ombuds office with authority in all jurisdictions across the country. The MMIWG2S Inquiry also recommended the creation of an independent National Indigenous and Human Rights Tribunal to hear complaints from Indigenous individuals and communities.⁶

4 “To Dream Together: Indigenous Peoples and Human Rights Dialogue Report” (September 2018) Government of Ontario, Ontario Human Rights Commission.

5 Indigenous Peoples and the United Nations Human Rights System Fact Sheet No. 9/Rev.2, at p. 7.

6 Call for Justice 1.7 “Reclaiming Power and Place: The Final Report of the National Inquiry Into Missing and Murdered Indigenous Women and Girls” Vol 1b, page 178.

MY HUMAN RIGHTS ARE NOT YOUR HUMAN RIGHTS— DECOLONIZING HUMAN RIGHTS FOR INDIGENOUS PEOPLES

Research supporting *Expanding Our Vision* revealed that Indigenous Peoples carry an abiding sense of exclusion from the BCHRT process. Fundamental differences in the ways that Indigenous Peoples define human rights, or rights violations, and the BCHRT's current process were brought to light. Indigenous respondents identified the need to consider their human rights through the lens of UNDRIP and with the incorporation of Indigenous laws.

The MMIWG2S Inquiry recommended that the federal, provincial, and territorial governments work with Indigenous Peoples to establish a Human Rights Ombudsperson.

Where Indigenous human rights differences are not acknowledged, credibility is lost. As one respondent said: "My human rights as an Indigenous person are not recognized by the state or by the average Canadian so the concept is weakened."

Indigenous Peoples talked of the need for human rights protection in all aspects of their lived experiences. The lack of basic human needs such as water and housing; or access to justice or protection of the law were seen to undermine the credibility of the human rights framework.

Some respondents tied their decision to not file complaints to larger societal events which are seen to reflect indisputable instances of racism which were either unchallenged or appeared to be sanctioned by society. People cited the MMIWG2S Inquiry, overrepresentation of Indigenous Peoples in the criminal justice and child welfare systems, and cases like Colten Boushie – where an Indigenous youth was killed but there were no legal repercussions to the person who killed him – as reasons they did not file complaints with the BCHRT.

Indigenous Peoples identified that much of the discrimination they experience is a direct result of Canadian law and policies aimed at the dispossession of Indigenous Peoples.

Indigenous Peoples clearly identified that they see their rights, as Indigenous Peoples, to live as Indigenous Peoples and to have that cultural identity protected, as tied to their understanding of human rights.

"I don't think the process considers the historical factors that impact Indigenous Peoples' everyday lives and how we experience the world... It doesn't account for the bias we struggle against in overt but especially subtle ways."

"Indigenous Peoples have experienced multi-generational oppression, and ... may not be comfortable challenging someone when they violate their rights. 'Individual' rights are not talked about in community – usually only focus on 'collective'."

"Indigenous Peoples start from a place of historical and systemic disadvantage, whereas the mainstream is based on the assumption that we are all 'created equal'."

Indigenous respondents reported numerous and repeated incidents of what they believed to be discrimination; yet, in the vast majority of cases, the respondents did not file complaints through the BCHRT. Respondents reported a remarkable similarity in their reasons for not filing a complaint. In summary:

- Discrimination is seen as so pervasive within Canada/British Columbia so as to be a way of life, and
- It is widely perceived that the BCHRT mirrors societal discrimination (in both structure and lack of Indigenous Peoples in its staff and tribunal members), and therefore
- Filing a complaint is seen as futile.



Photo by Arthur Dayu Diek

“As an Indigenous woman, I have a lot of responsibilities (i.e. family, education, culture, language, community) and if my human rights are being violated, I will address the situation in the moment, but taking my concerns further to write a human rights complaint is another step that will take time and energy. ...[I]t is a matter of choosing my battles. Treaty rights are not upheld, Aboriginal rights are being infringed upon, the land question has not been resolved, yet the wheel keeps on turning and none of these laws are being followed by the Provincial or Federal Government. At the end of the day, would filing a complaint with BCHRT make a difference?”

“Growing up Indigenous I’ve become so used to be discriminated against that to me this was another example. No matter what I do to prevent it or what I do to try and deal with it I will always be looked at differently.”

“If I filed a complaint every time, I wouldn’t have time to sleep or eat or live. Plus I need to work, can’t file complaints for every job or it looks bad on me, not the individuals or organizations.”

Indigenous Peoples reported numerous and repeated incidents of what they believed to be discrimination; yet, in the vast majority of cases, the respondents did not file complaints through the BCHRT.

The most common reasons for not filing a complaint, even where people identified that they had experienced discrimination, were (in order of commonality) that they:

- Did not think that filing a complaint would make any difference (68%);
- Did not know they could, or how to do that (53%);
- Did not think they would be believed (45%);
- Experience so much discrimination that this was just another example (40%);
- Were not sure if it was discrimination under the BC Human Rights Code (39%);
- Were scared of retaliation (37%);
- Indicated that the process was too confusing or overwhelming (26%); and
- Ran out of time (10%).

“[Discrimination is] rampant and feels like it’s all been said and heard before so what difference would my complaint make?”

“Racism/hatred is not always considered a violation of Indigenous Peoples human rights.”

“I did not feel a colonial institution would be fair.”

“As if anyone would care.”

Overall results reflect a disconnect between the work the BCHRT does and Indigenous Peoples' experiences of discrimination. It is not that Indigenous Peoples do not experience discrimination, just that they do not see the BCHRT as providing an avenue to address it. The pervasiveness of racism and its historical, intergenerational and structural nature may make it more difficult to bring claims flowing from discrimination based on a person's indigeneity.

Structural change is needed to incorporate Indigenous definitions of human rights, including consideration of Indigenous laws and mechanisms.

Indigenous Laws

For a human rights framework and process to have legitimacy with Indigenous Peoples, it cannot further the denial and exclusion of Indigenous laws. Article 40 of UNDRIP calls for "effective remedies for all infringements of their individual and collective rights" with consideration of "the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights."⁷

"Our ceremonies and songs and dances emulated the honor of all life. It wasn't just on paper and about rules and processes but you were guided in a good way to know how to offer greatest respect for everyone and all life."

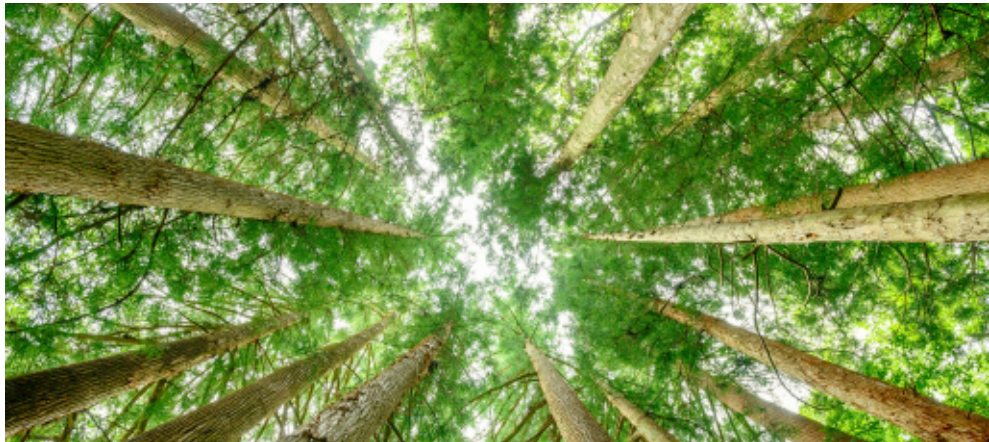


Photo by Blew S. (Shutterstock.com).

3.0 RECOMMENDATIONS: INCORPORATE INDIGENOUS LAWS

- 3.1 The BCHRT should actively engage with Indigenous Peoples, working with the Office of the Human Rights Commissioner, Indigenous lawyers, and law schools, to incorporate Indigenous laws into a renewed human rights process which reflects Indigenous approaches for protecting human rights.
- 3.2 The BCHRT, working in concert with the Canadian Human Rights Tribunal, could approach other human rights agencies to institute an Indigenous ombuds office across jurisdictions, per the recommendation of the MMIWG2S Inquiry.

⁷ See also: Victor, Wenona. "Alternative Dispute Resolution (ADR) in Aboriginal Contexts: A Critical Review" (April 2007) Prepared for Canadian Human Rights Commission.

Systemic Racism

Systemic racism was repeatedly identified as a deterrent to accessing the BCHRT process. One respondent remarked, “Human rights need to be dealt with as systemic discrimination and not just individual human rights violations.”

The BCHRT case of *Radek v. Henderson Development (Canada) and Securiguard Services (No. 3)*,⁸ adopted this definition of systemic discrimination from the Abella Employment Equity Report:

“Discrimination ... means practices or attitudes that have, whether by design or impact, the effect of limiting an individual’s or a group’s right to the opportunities generally available because of attributed rather than actual characteristics ... It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone’s potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.”

Two types of systemic discrimination were identified by respondents. First, Indigenous Peoples are not represented on BCHRT staff or as tribunal members. Second, Indigenous Peoples are filing claims at a disproportionately lower rate, and not having their claims accepted or progress through the BCHRT system. These dual exclusions, on their face, suggest that there is systemic bias at work which has limited Indigenous involvement or engagement within the BCHRT process.

Several lawyers identified that the BCHRT system is weighted toward “privatized” instances of discrimination and less able to address instances of systemic racism experienced by Indigenous Peoples. Respondents identified the need for the BCHRT to address instances of systemic discrimination including Indigenous over representation in the criminal and child welfare systems, as well as denial Indigenous Peoples’ land rights.

Several lawyers identified that the BCHRT system is weighted toward “privatized” instances of discrimination and less able to address instances of systemic racism experienced by Indigenous Peoples.

⁸ 2005 BCHRT 302 (CanLII), at 501.

NEED FOR INDIGENOUS PEOPLES AT ALL LEVELS OF BCHRT

Respondents identified the lack of Indigenous staff at all levels of the BCHRT as a significant barrier. The BCHRT reports that it currently has no self-identified Indigenous people working within it. The irony of a discrimination complaints body that largely fails to include Indigenous Peoples was not lost on many respondents. There was a widely shared call for “better Indigenous representation at all levels of the process – intake staff, advocates and adjudicators.” The lack of Indigenous staff, management and tribunal members provides a powerful disincentive against using the BCHRT.

The exclusion Indigenous Peoples identified was also geographic. The BCHRT is seen as a primarily urban entity which is disconnected from, and unreachable by, Indigenous Peoples in different regions, particularly smaller and more remote communities.

“A first barrier is that the primary service providers, such as the Community Legal Assistance Society or BCHRT, have no Indigenous staff, and are not accessible to Indigenous Peoples. Indigenous Peoples want Indigenous services providers. These resources need to be located in Indigenous communities or spaces, and with low barriers to access.”

4.0 RECOMMENDATIONS: INCREASE INDIGENOUS INVOLVEMENT WITHIN THE BCHRT

- 4.1 Priority should be given to hiring or appointing Indigenous staff and tribunal members.
- 4.2 Audit the current HR process to identify why Indigenous Peoples are not being recruited or hired. Provide specific training to HR staff on how to actively recruit and fairly assess Indigenous applicants. Seek specific mentoring advice from other organizations with higher Indigenous staff ratios about how to address this underrepresentation. The BCHRT should set yearly hiring targets for the first five years, and report on success in meeting those targets in annual reports.
- 4.3 Audit the tribunal appointment process to identify why Indigenous Peoples are not applying or being appointed as tribunal members. Set specific recruitment and appointment goals for BCHRT Indigenous tribunal members.
- 4.4 Implement options for part-time appointments to qualified Indigenous tribunal members, who may not be available full-time. This could provide a way to reflect Indigenous adjudicative and dispute resolution traditions within the tribunal's expertise.
- 4.5 Offer human rights clinics in remote regions (going back regularly) to both teach about human rights and to assist with filing claims. Approach law schools for options to work jointly in providing these clinics regionally and to create regional expertise.

The BCHRT is seen as a primarily urban entity which is disconnected from, and unreachable by, Indigenous Peoples in different regions, particularly smaller and more remote communities.

"Have more Indigenous folks work with/for you. Allow clients to truth tell in reconciliation, acknowledge your agency's short comings, restore the relationship so we can walk together."

"Incorporate an Indigenous unit that specializes in knowing how to reach out to marginalized communities/persons."

"Indigenous mediators and arbitrators, ease of access to services from remote communities, clear communication about BCHRT's position on TRC Calls to Action and other standards/best practices for honouring and respecting Indigenous voices."

PUBLIC OUTREACH TO INDIGENOUS COMMUNITIES

There is a lack of knowledge within the Indigenous community about the BCHRT process. Well over half (62 of 102) respondents reported that they were unaware of the BCHRT process, or of how to file a complaint. A few respondents reported that the survey itself was the first they had heard of the BCHRT. Common observations were: “Didn’t know I could complain”; “I did not even know you can report discrimination, until reading through this survey”; “I didn’t know you could file a complaint, where to or how”; and “I just didn’t know where to start”.

“Workshops to inform communities about their rights as Human Rights, and what a violation looks like, and what they can do about it.”

“An information campaign informing community members about their rights would be awesome!”

“Need to see cases that have been successful for First Nations in BC.”

5.0 RECOMMENDATIONS: PUBLIC OUTREACH TO INDIGENOUS COMMUNITIES

5.1 Create a public education campaign for Indigenous Peoples which addresses human rights from an Indigenous perspective:

- a) *Make materials easily accessible at Band offices, Métis organizations, Friendship Centres, Indigenous political organizations, and universities.*
- b) *Emphasize cases where Indigenous individuals have successfully brought human rights claims.*

5.2 Create a step-by-step process for Indigenous applicants, which includes: what you can ask for; outline what help or resources are available; and what adverse impacts may look like for Indigenous Peoples.

5.3 Create videos or fact sheets to talk about cases that have been successful to assist Indigenous Peoples in situating their experiences as discrimination within the BCHRT framework.

Many respondents highlighted the need to create public awareness about the specific forms and expressions of the discrimination that Indigenous Peoples face, but which are often unacknowledged.



Photo by Blew S. (Shutterstock.com).

SPECIFIC DISCRIMINATIONS THAT INDIGENOUS PEOPLES FACE

Professor Sallie Chisholm identified “micro-discrimination” as “the subtle, mostly nondeliberate biases and marginalizations that ultimately added up to serious assaults.”

Many respondents highlighted the need to create public awareness about the specific forms and expressions of the discrimination that Indigenous Peoples face, but which are often unacknowledged. There is considerable room to make a real difference in this area through public education that sheds light on the racism that Indigenous Peoples experience. Creating public education materials could be a way for the BCHRT and Office of the Human Rights Commissioner to work collaboratively, including with Indigenous Peoples.

Micro-Discriminations (or, Shopping While Indigenous)

Respondents described common experiences of service denial where they were not served, or were served after others, or were followed or stopped by security guards in stores (one person jokingly called this “shopping while Indigenous”). In each of these instances, the discrimination and its impacts in loss of dignity and safety were very real, but likely difficult to prove. This form of discrimination has been likened to a “death by a thousand cuts”. No one example rises to the level of actionable discrimination, but together the damage inflicted can be severe. This form of discrimination is wearing and persistent, and personally costly, yet rarely challenged through a BCHRT complaint.

"We have always been treated like a second or third class citizen everywhere."

"[N]on-marginalized (heteronormative/cis older White middle class masculine people) take human rights for granted and Indigenous people (especially young women & LGBTQ2S+) have to fight to be seen as equally human and deserving to not be violated, to just live. Every. Day."

Professor Sallie Chisholm identified "micro-discrimination" as "the subtle, mostly nondeliberate biases and marginalizations that ultimately added up to serious assaults."⁹ The Abella Employment Equity Report noted that discrimination may not be rooted in a desire to discriminate, but could be "the accidental by-product of innocently motivated practices or systems" which could nonetheless be equally damaging: "If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory."¹⁰

In many cases, the racism that people experience is such that the people who experience it know that it is racism but that it may be difficult to prove.

MICROAGGRESSIONS

In the American Indian context, "micro-discriminations" are more commonly referred to "microaggressions" which are chronic and covert: "They are defined as 'events involving discrimination, racism, and daily hassles that are targeted at individuals from diverse racial and ethnic groups.' Microaggressions are chronic and can occur on a daily basis."¹¹ Wing Sue and his colleagues identify three types of microaggressions, with Indigenous examples added:¹²

- **Microinsults:** "communications that convey rudeness and insensitivity and demean a person's racial heritage" (i.e. eye rolling);
- **Microinvalidations:** "communications that exclude, negate or nullify the psychological thoughts, feelings, or experiential reality of a person of color" (i.e. "I don't see colour" which denies the experiences of racialized people, or asking if someone is "really Indigenous"); and
- **Microassaults:** "explicit racial derogation[s] characterized primarily by a verbal or nonverbal attack meant to hurt the intended victim" (i.e. avoiding people of a particular race, associating Indigenous Peoples with aggressive imagery, alcohol use or theft).

9 Bix, A. S. *Girls Coming to Tech!: A History of American Engineering Education for Women*. (2013) Cambridge, Massachusetts: The MIT Press.

10 Abella, Judge Rosalie Silberman. *Equality in Employment, A Royal Commission Report* (October 1984) Supply and Services Canada ("Abella Employment Equity Report"), at p. 2.

11 Michaels, Carl. *Historical Trauma and Microaggressions: A Framework for Culturally-Based Practice*. (October 2010) eReview Center for Excellence In Children's Mental Health, Child Welfare Series, at p 2, quoting Evans-Campbell, T. Historical Trauma in American Indian/Native Alaska Communities. (2008) *Journal of Interpersonal Violence*, 23(3), pp 316-338.

12 Michaels, Carl. *Historical Trauma and Microaggressions: A Framework for Culturally-Based Practice*. (October 2010) eReview Center for Excellence In Children's Mental Health, Child Welfare Series, at p 2, citing Wing Sue, D., Capodilupa, C., Torina, G., Bucceri, J., Holder, A., Nadal, K., Esquilin, M. *Racial microaggressions in everyday life*. (2007) *American Psychologist*, 62(4) pp. 271-286.

Some respondents felt that human rights protection was for non-Indigenous people, not for themselves. Respondents shared examples that collectively reveal patterns of pervasive discrimination. In many cases, the racism that people experience is such that the people who experience it know that it is racism but that it may be difficult to prove. The difficulty in proving claims of this type does not mean they do not exist, or that there is no role of the BCHRT in addressing them. There has to be a willingness to listen to Indigenous experiences of racism, not attempt to reframe them or dismiss them because they don't fit.

Note the commonality of these reported experiences of micro-discriminations:

"Clerks, cashiers, customer service, and tellers often ignore me or my family when we're trying to pay, ask for assistance, or are seeking information. This past week at a supermarket, we hit the call button to ask for assistance at the self-checkout. There's a big red light that flashes above the checkout when you hit the button. Our checkout was right beside the clerk. Instead of helping us, she went to help another customer who asked for assistance after us. Then she went to another customer, and still did not bother to respond to our flashing red light, until we asked who we could get to help us. It's like we're invisible, unless someone thinks we're a threat or cause for concern... like we might be stealing."

"[A]t a [drug store] I was wrongfully accused of stealing ... by a security guard who followed me around the store from the moment I walked in. After making a verbal complaint asking why I was being followed, I was told it's because I had stolen. I asked what I was supposed to have stolen and he looked me up and down and then said, 'I don't know – probably condoms.'"

"I was shopping for a CD in [a major chain bookstore]. I entered the extra secure area where the CDs were. There was no staff there so I left the area with my CD to look for a staffed register. I walked around for several minutes and could not find anyone. I gave up and tossed the CD into a bin with other items for sale. A plain clothes security guard followed me out to the street and demanded that I return to the store, return the CD that I took and pay for it. I was mortified and apologetic that he thought I stole the CD. I explained that I tossed it into a bin with other items. I asked him for help to find staff to pay. He said that was not his job."

"I always get followed around in stores. ... My children, who are 8 and 6 were asked by the same staff to look in their bags while I was not with them."

When racism is pervasive, unnamed and unacknowledged, Indigenous Peoples' attempts to address it can lead to subtle forms of retaliation or "gaslighting", including disbelief, minimization, or arguments that Indigenous Peoples are "playing the race card".¹³ The BCHRT in *Radek* observed that "Once an individual's actions were labelled in this way, they could be discounted and ignored. Any possibility of consideration of the genuineness of an allegation of racial discrimination was foreclosed after the application of the label."

"What makes these situations so hard is that it happens all the time, and to the average person looking on, it looks like just an innocent oversight. How do you complain when you know in your heart it is because you're Indigenous, but on the surface, it is not perceived as a big deal to others? Sometimes you second guess yourself. Sometimes you can tell by the person's tone that they're biased, but how do you prove that? And it happens all the time. Day after day."

"When I tried to address the situation I was ridiculed and debased."

6.0 RECOMMENDATION: MICRO-DISCRIMINATIONS

6.1 The BCHRT, partnering with the Office of the Human Rights Commissioner, should create public education and awareness about micro-discriminations against Indigenous Peoples. The focus of the education would be to bring unconscious and pervasive bias to light so that it can be addressed.

Photo by Blew S. (Shutterstock.com)



13 Radek, at 524.

Criminal Justice and Policing

In the area of police and justice, Indigenous Peoples identified that they felt “overpoliced” and subject to greater observation and scrutiny when accused or suspected of a crime. Conversely, Indigenous respondents commonly reported incidents of being “under-protected” where police did not take instances where they were victims of crimes seriously. The overrepresentation of Indigenous Peoples in prisons was raised as a concern.

In the area of police and justice, Indigenous Peoples identified that they felt “overpoliced” and subject to greater observation and scrutiny when accused or suspected of a crime.

“I went with an Indigenous woman and spoke to [the] local RCMP detachment. She wanted to make a complaint of sexual abuse by a foster father. This man was previously [known to the RCMP officer]. The Sgt was very dismissive [and said:] “this happened a long time ago”, he did not take any kind of notes that we could observe. Never followed through with anything.”

“I represented a client who was charged for assault in a fight that was recorded. Even though the video clearly shows that there were several people who instigated and participated in the fight, my client, who was the only Indigenous woman involved, was the only one charged. The judge looked at the video and agreed that this was not fair, and my client was found not guilty. But, to me, this illustrates bias in policing decisions and in Crown counsel decisions about who they charge, and who they see as the aggressor and who they see as the victim.”

“I was living with a Caucasian man who became physically abusive when he drank. The neighbours called the police and when they arrived I was arrested and charged with assault despite the neighbours and my account and despite the fact that I had marks but he did not. The charges were dropped but the police would stop me whenever they saw me walking or waiting at the bus stop. They would ask me for my ID and ask what I was doing. I started to take side roads just to avoid encounters with them.”

“The entire justice system is based on pursuing low-hanging, visible fruit – Indigenous and the poor. I would use BCHRT and routinely file a complaint if the staff was representative of those in need of their process. If my clients believed in the BCHRT protecting their rights... they would use it. As it is, they just throw their hands up in despair. Their voices are not being heard.”

Child Welfare

Survey participants identified the overrepresentation of Indigenous children within the child welfare system as an area of widespread discrimination. Parents said that they felt they experienced an undue level of scrutiny or were judged more harshly, or subject to more conditions, than non-Indigenous parents.

"Because I'm a native mother. Ministry has prejudged me and dehumanized me as a mother."

Workplace

Instances of intersectionality were common workplace concerns, and people often reported being discriminated against on multiple grounds. For example, as a woman and Indigenous, or as a youth and Indigenous. Higher rates of unemployment amongst Indigenous communities resulted in the under-reporting of workplace related discrimination for fear of retaliation, or loss of job opportunities in the future.

"My employment was terminated because I questioned the authority of a newly employed non-Native in a higher position and he told me on more than one occasion that Residential School did not happen to my generation and that my older relatives should get over it so my generation gets rid of the entitlement of using it as an excuse or as entitlement..."

"I was paneling for a job and was asked if I drank or had kids."

"My non-Indigenous boss at an Indigenous focused organization (where at I was the only Indigenous staff member) frequently commented on my age, body, and what he perceived as a lack of knowledge of Indigenous topics. He made comments about my breasts, repeatedly called me "kiddo"... He bought me flowers and cried at me and likened me to his wife when I told him that his behaviour was unprofessional and offensive."

"One manager who said ALL Secwepemc women hate white men, and that we're not skinny but "sturdy" - made comments about me being a Native woman often."

Instances of intersectionality were common workplace concerns, and people often reported being discriminated against on multiple grounds.

Healthcare – Hospitals

A common area of vulnerability that people reported was in healthcare, where respondents reported feeling particularly powerless because of the need for medical care and lack of options to get it.

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"[At the] Hospital I passed out from dizziness from a medical condition and the nurse assumed I was a drunk (when I do not ever drink). The nurse immediately asked me what drugs I was on and how much I had to drink. A white woman was also in for lightheadedness and the nurse asked her when was the last time she ate and if she was pregnant."

"I often am asked to take family or community members to doctors or medical appointments. I usually dress sharp when I know that I am going to do that. Can you imagine, having to quickly dress up before taking a loved one to the emergency room? I am aware that our people are often treated badly by doctors, nurses, hospitals and this is a way that I try to protect them. I have a First Nations Health Authority vest that I have worn too, and I feel it helps me get better service."

"I was at the eye doctor with my daughters and they were getting new glasses. The lady who 'helped' us after we saw the optometrist was extremely unfriendly, aloof, did not pay attention to us... She did not try to help us find frames that would fit the girls properly and acted annoyed. I watched this same woman not twenty minutes earlier, fawn and assist another family, who was white, and she was smiling and helpful. When it was our turn she just shut down and was uncaring."



Photo by Arthur Dayu Dick.

Education

Education at elementary, secondary and post-secondary levels was identified as a common area of discrimination. Discrimination ranged from the content taught to the treatment of students, including common instances where bullying of Indigenous students was not addressed.

“Overt racism in Post-Secondary by professors – specific example a ... professor at [university] who said that Indigenous Peoples don’t know how to manage their land, so it is up to “us” (meaning ... “experts”). Or another prof who taught that Indigenous burial grounds are not cemeteries or sacred spaces (because there aren’t churches and fences and tombstones – despite cairns and burial houses, etc.). Another professor ... who, after finding out I was Native, ... clapped her hands and very loudly, in front of the class said, “I’m so excited to have a REAL native in the class” and proceeded to tokenize me...”

“Our daughter was physically attacked by other girls. We went to the school repeatedly to beg them to do something to protect our daughter, I felt they were more concerned about shielding the other non-Indigenous parents and students from us. We were told that the attacks were “girls being girls.” I doubt if our Indigenous child had attacked non-Indigenous children that it would have been ignored or covered up.”

Education at elementary, secondary and post-secondary levels was identified as a common area of discrimination.

Photo by Nadya Kwandibens, RedWorks Studio.



Residential Tenancy

People commonly reported being denied an opportunity to rent homes and reflected on the difficulty of proving that this was because they are Indigenous.

People identified the different legal regimes that Indigenous Peoples live under as examples of ongoing systemic racism, citing the *Indian Act*, reserves, and lack of recognition of Métis status.

"I was in undergrad searching for an apartment at the end of August (crunch time!). The landlord took one look at me and said she wouldn't rent to 'partiers'. I told her I don't drink but she still wouldn't accept my application. I didn't file a complaint – primarily because I was just in urgent need of finding a place. The rental market was (and still is) so competitive that landlords have all of the power (if they have 10+ people lined up to see a place, they can take their pick). Also, I wasn't sure if she was being ageist or racist or both."

"[My then-partner] and I, both Indigenous, found an apartment we liked. A realtor was doing the legwork – showing the apartment and screening the applicants. He liked us and our references checked out, but we had to meet the owner to sign the papers. As soon as she saw us, she refused to sign the papers. The realtor didn't understand why, although [my then-partner] and I sensed that racism was at play. We didn't file a complaint because it would have been difficult to prove (the owner didn't say anything explicit about why she would not sign the papers)."

Statutory Indian Status

People identified the different legal regimes that Indigenous Peoples live under as examples of ongoing systemic racism, citing the *Indian Act*, reserves, and lack of recognition of Métis status. Discriminatory provisions targeting Indigenous women are not seen as being in the past, but as continuing to impact Indigenous Peoples' lived experiences today.

"My mom was talking about the discrimination she has faced as a result of 'enfranchisement' – first losing her status, but also being forced to live off reserve, and not being able to vote in band council elections. Up until 2008 (or effectively 2011), First Nations people were not provided with full access to human rights protection ... under the Canadian Human Rights Act. A person who is not well-versed in the nuances of Canadian law may have believed that s/he was blocked from taking a human rights complaint. For my mom, her 'enfranchisement' letter referenced the Lavell case from the Supreme Court of Canada: that rescinding status upon marrying a non-Indian did not violate a woman's equality rights. That was an indication to her that equality laws weren't meant to protect her as an Indigenous woman."

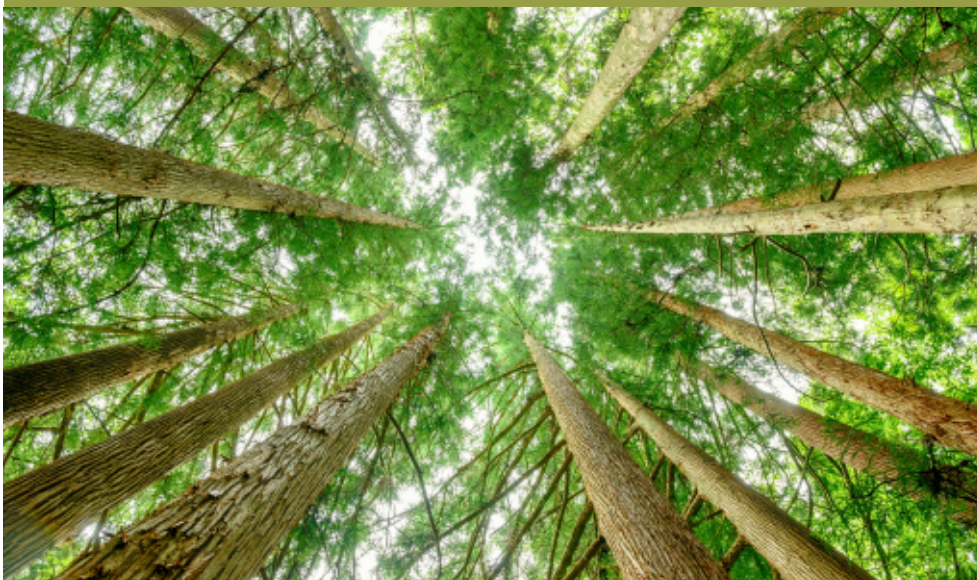
Indigenous Peoples live in a complex web of intermingled jurisdiction and identity. Part of the challenge for Indigenous Peoples in bringing human rights claims is knowing the appropriate legislation (provincial or federal) to bring claims under. Complaints by Indigenous Peoples may involve intersecting jurisdictions.

As one person observed: “I find my rights confusing as I am First Nations and we are considered federal.” The Canadian Human Rights Tribunal addressed this difficulty in the case of *Jordan Rivers*.¹⁴ *Jordan’s Principle*, in essence, calls for federal and provincial/territorial governments to “help kids now, and work out fiscal responsibility later.”

7.0 RECOMMENDATION: COORDINATING HUMAN RIGHTS RESPONSES ACROSS JURISDICTIONS

7.1 The BCHRT should discuss with the Canadian Human Rights Commission (CHRC) a coordinated process for sorting jurisdictions between the federal and provincial bodies when Indigenous Peoples bring a human rights complaint. An agreement to triage claims between the CHRC and BCHRT would assist Indigenous complainants.

Photo by Blew S. (Shutterstock.com).



¹⁴ *First Nation Child and Family Caring Society of Canada et al. v. Canada (for the Minister of Indian and Northern Affairs Canada)* 2017 CHRT14.

The way that Indigenous Peoples' credibility is assessed, the determination of what is a valid complaint, or of what is enough information to ground a complaint, can reflect unacknowledged biases.

SUPPORTING COMPLAINTS OF SYSTEMIC RACISM

The BCHRT remarked on the difficulty of proving racism in ***Mezghrani v. Canada Youth Orange Network (CYONI) (No. 2)***,¹⁵ noting that racial discrimination “is frequently subtle” and that “direct evidence of racial discrimination is rarely available” such that the discrimination “must often be inferred from the conduct in issue.”¹⁶ The burden of proof may be well beyond the capabilities of individual Indigenous complainants.

The BCHRT has said it is not necessary to show that someone intended to discriminate, made racist remarks or expressed racial animus. Instead, racial discrimination can be shown by circumstantial evidence and inference.¹⁷ Yet, many Indigenous complainants find it difficult to the point of impossible, to bring claims of racism, particularly systemic racism.

15 2006 BCHRT 60.

16 *A. v. The Law Society of British Columbia*, 2018 BCHRT 256, at 96.

17 *Radek v. Henderson Development (Canada) and Securiguard Services* (No. 3), 2005 BCHRT 302.

8.0 RECOMMENDATIONS: ADDRESSING SYSTEMIC RACISM

- 8.1 Develop a baseline of information and understanding of the racism that Indigenous Peoples experience so that individual complainants are not put to a process of proof again and again. Advance research or statements about common areas of discrimination experienced by Indigenous Peoples. This would operate similar to judicial notice of facts that are beyond dispute, as encouraged by the Supreme Court of Canada in cases such as *Williams*,¹⁸ *Gladue*,¹⁹ and *Ipeelee*.²⁰
- 8.2 Develop guidelines and education about the intersectional discrimination Indigenous Peoples may face. Intersectional discrimination may be even more difficult to make out, and guidelines and education for how to do this should be provided.
- 8.3 Empower the ability for Indigenous organizations to file collectively, to advance claims on behalf of individuals, similar in context to a “human rights class action.”

A discussion of Indigenous Peoples’ human rights must consider the impact that intergenerational trauma has on Indigenous Peoples’ ability to articulate or bring forward a human rights complaint.

18 *R. v. Williams*, [1998] 1 SCR 1128.
 19 *R. v. Gladue*, [1999] 1 SCR 688.
 20 *R. v. Ipeelee*, 2012 SCC 13.

Photo by Alice Joe (alicejoe.com).



REDUCING PROCEDURAL BARRIERS

The way that Indigenous Peoples' credibility is assessed, the determination of what is a valid complaint, or of what is enough information to ground a complaint, can reflect unacknowledged biases. Some respondents identified "institutional racism" within the BCHRT and suggested that their impression was that "Indigenous people are already profiled and stereotyped before a case is heard."

The BCHRT process was identified as being confusing and very difficult to navigate and a significant barrier to Indigenous Peoples bringing claims.

Of the 25 respondents that had tried to file a complaint: 36% did not continue because the process was too confusing, 28% said their claims did not go through due to a lack of evidence, 20% of complaints did not go ahead because the BCHRT determined there was no discrimination, and 20% said their claim failed on other grounds, such as time limits. The sentiments expressed in this quote were shared by many: "[The BCHRT is a] waste of time and in my experience goes nowhere."

The application process is technical and it can be difficult to successfully submit a claim. One lawyer mentioned a process where they had filed a complaint on behalf of a client, which was rejected, and amending the complaint took eight hours of pro-bono time from a trained lawyer. Another lawyer mentioned spending a significant amount of time filing a complaint, only to have it rejected at the application stage. That lawyer was unable to donate more time to file the claim. The process of amending an application may be prohibitive for self-represented litigants, or for lawyers without dedicated funding or experience in this specialized area.

A brief review shows a series of cases brought by Indigenous Peoples which are not failing on merits, but on technicalities and structural and procedural barriers. An Indigenous Justice Strategy must examine the need for broader systemic changes within the BCHRT to reflect Indigenous reality and foster active participation.

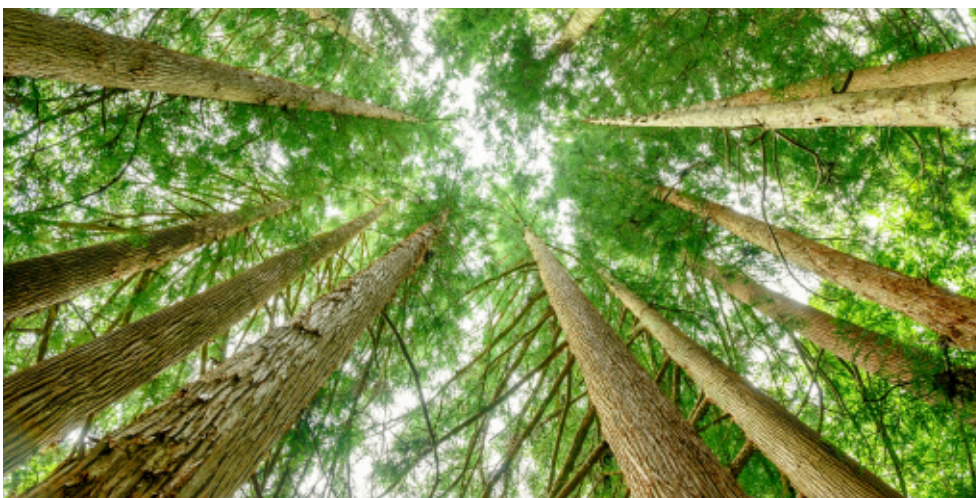
"[BCHRT needs] an Indigenous person and liaison that is familiar with the types of discriminations we face."

"If there was an Indigenous section, maybe an independent liaison or process."

"Support from elders, knowledge keepers, Indigenous people who have gone through the process."

The BCHRT staff and tribunal members should be provided with training on how trauma may impact Indigenous Peoples' actions or interactions within the BCHRT system.

Photo by Blew S. (Shutterstock.com)



9.0 RECOMMENDATIONS: CREATE AN INDIGENOUS SPECIFIC STREAM WITHIN THE BCHRT

- 9.1 Offer specialized training to BCHRT staff and tribunal members, starting with recommendations of the TRC, to reduce and eliminate procedural barriers that Indigenous Peoples face in accessing BCHRT services. The goal should be to develop cultural competency and safety.
- 9.2 Create the position of Indigenous Advocates or Navigators to help guide, support and coach Indigenous Peoples through the BCHRT process, and to help them address administrative barriers.
- 9.3 Create an Indigenous stream for following through with Indigenous Peoples' complaints, from intake through to hearing.
- 9.4 Amend BCHRT forms to contemplate Indigenous Peoples, including Indigenous names, where a delay may be reflective of historic trauma, or to allow for exploration of options to resolve an issue, as required by Indigenous protocols.

Trauma-Informed Practice

A discussion of Indigenous Peoples' human rights must consider the impact that intergenerational trauma has on Indigenous Peoples' ability to articulate or bring forward a human rights complaint. For example, the fear of not being believed could lead to Indigenous Peoples deciding not to bring a complaint, or not following up with requests for additional information.

The experience of discrimination is inherently traumatic. Indigenous respondents overwhelmingly described experiencing fear in response to instances of discrimination, fear of being accused of wrongdoing, not being protected, not being believed, being judged, being told that the discrimination did not matter, or retaliation.

"These experiences happened several years ago and I have held them deep down without being able to let go. After I left the job ... I received a call from the next Indigenous woman they hired. She wanted to know if the work environment was as bad for me as it was for her. I told her what happened to me. She wanted me to write her a letter that could be submitted. I didn't have the courage. I didn't want to risk my new job. I didn't want to revisit the memories that made me feel sick to my stomach. I felt guilty that someone else had to go through what I went through because I didn't speak out."

"Indigenous Peoples, due to residential school and years of being made to feel inferior, ... may think the whole process, like court, may be a waste of time, a waste of time starting the process only to have the complaint thrown out."

"I was dealing with a lot of trauma and just trying to survive."

"I know what an animal is treated like ...that night that's all I was ...a frozen animal the paramedics and RCMP joked about. ... The results of being beaten and left in minus 20 weather was intense pain from nerve damage and frost bite so I was just too traumatized to think of what to do."

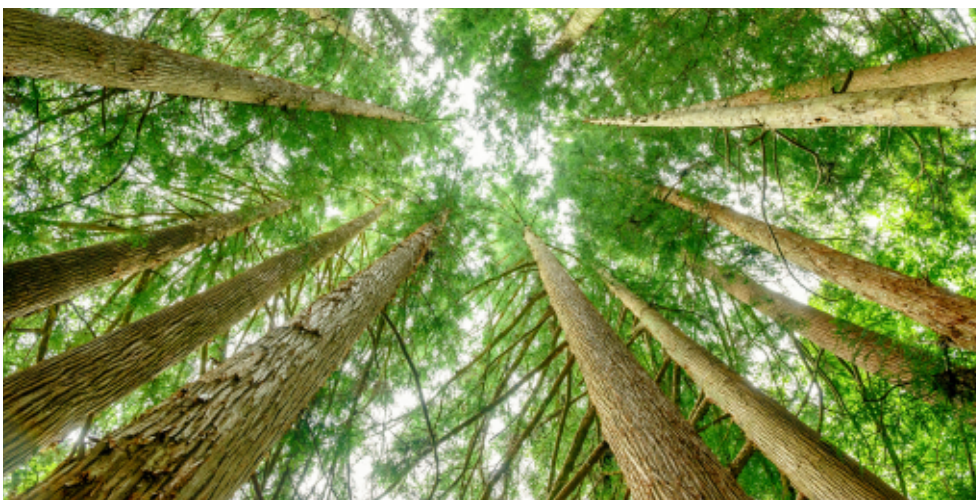
10.0 RECOMMENDATION: TRAUMA-INFORMED APPROACH

10.1 Adopt a trauma-informed practice overall, including for assessing and accommodating delays or requests for extensions. The BCHRT staff and tribunal members should be provided with training on how trauma may impact Indigenous Peoples' actions or interactions within the BCHRT system.

Special Exemption

Indigenous Peoples identified that the special programs approval (s. 42 of the Code) – which provides a defense to any complaint that might be filed about special treatment in hiring an Indigenous person – has had unintended consequences. Respondents said that the exemption suggests that to give due weight to Indigenous experience or cultural knowledge in hiring is an example of “special” treatment and risks a discrimination claim by non-Indigenous applicants. Respondents said s. 42 has had a “dampening” impact on Indigenous hires.

Photo by Blew S. (Shutterstock.com)



Respondents identified the lack of legal representation as very damaging, especially if the claim was against an institution (university, store, government) that had access to legal teams with specialized knowledge in this area.

11.0 RECOMMENDATION: CLARIFY SPECIAL EXEMPTION

11.1 Educate employers about s. 42. Education should highlight where a fair consideration of Indigenous applicants (for example, strongly weighing Indigenous knowledge and experience) does not require an exemption.

Settlement

The BCHRT operates on a settlement model. Indigenous applicants may be at increased disadvantage in settlement discussions, especially those that occur outside of Indigenous traditions. Research suggests that disputants of colour both pay more and settle for less in alternative dispute resolution processes.²¹

12.0 RECOMMENDATIONS: SETTLEMENT

12.1 Include Indigenous dispute resolution models, mediators and peacemakers in BCHRT mediation or settlement discussions. Consider use of co-mediation or joint processes involving Indigenous Peoples.

12.2 Track and report upon instances where Indigenous Peoples settle complaints, and interview them after several months about their reasons for settling and their satisfaction with the resolution.

²¹ Hermann, Michele. “New Mexico Research Examines Impact of Gender and Ethnicity in Mediation” *the Conflict and Culture Reader*, Pat Chew.

Gatekeeping Function of the BCHRT

"The system and questions all seem to be geared towards providing evidence, when most of these situations I experience are more subtle. How can you prove that? Even though it happens all the time and there's a pattern, it's on a societal level involving individual experiences."

"BCHRT is acting like a 'gatekeeper' at present, dismissing complaints preliminarily when only a hearing could really fully assess whether discrimination is going on, and they should not be preliminarily dismissed unless blatantly obvious discrimination not possible. If BCHRT wants to restore faith by Indigenous public ... identify common systemic contributors of racism, ... do outreach with communities [and] hire MORE Indigenous tribunal members and staff ..."

Respondents observed that the BCHRT's gatekeeper function has operated to exclude Indigenous complaints. Discrimination based on race is insidious and rarely clearly stated.

Respondents observed that the BCHRT's gatekeeper function has operated to exclude Indigenous complaints. Discrimination based on race is insidious and rarely clearly stated. Finding language to identify and "prove it" to the degree required for a complaint to proceed may be an impossible task for many applicants. Consequently, many Indigenous complaints are rejected at the preliminary screening stage, reflecting a difficulty in framing their complaint, rather than because they did not experience real discrimination.

Photo by Butterfly Photography.



Photo by Arthur Dayu Dick



In some cases, people reported that they experienced trauma (linked to intergenerational Indian Residential School or child welfare issues) which prevented them from filing on time.

Complaints not Accepted at Filing

The language and process required to tie acts of discrimination to a prohibited ground requires expertise. Strict adherence to the technicality of the BCHRT process may defeat the spirit of the Code. The test applied to have a claim accepted is strict. It is not enough to allege what happened was discrimination. People who have legitimate complaints to make often simply say “forget it” because the system itself is structured to weed out complaints, not to hear them, and have difficulties in having a claim filed.

In ***[D.B.] v. British Columbia (Ministry of Public Safety) and Solicitor General (operating as Okanagan Correctional Centre), Case Number: 19715***, the complaint was by an Indigenous man, held in extended segregation at a prison. He alleged that the institution itself interfered (or that the institution failed to prevent others from interfering) with his medication after he tested positive for a banned medication that he had no access to in solitary confinement. His complaint was dismissed. The complainant self-identified as an Indigenous person with a disability, but failed to say how he was discriminated against on this ground. The BCHRT said: “[Y]ou need to identify your protected characteristic(s) and explain how it was a factor in the respondents’ alleged conduct, which you fail to do in a clear manner.”

The complainant in ***[D.B.]*** had no legal representation, was disabled, and had limited access, if any, to resources in prison. The specificity of proving discrimination is challenging at the best of times. Where complainants are disadvantaged already, that disadvantage could compound through the application process.

Complaints Dismissed as Having No Reasonable Prospect of Success

Section 27 of the Code allows for complaints to be dismissed after they have been accepted where it is found they have no reasonable prospect of success. Section 27 has been referred to as “a gatekeeping function wherein it conducts preliminary assessments of Human Rights complaints with a view to dismissing those that do not warrant the time and expense of a hearing.”²² Respondents identified that the lack of legal representation was very damaging, especially if the claim was against an institution (university, store, government) that had access to legal teams with specialized knowledge in this area.

To succeed in dismissing a complaint, the respondent must show “that the complaint has no reasonable prospect of success”²³ such that the matter does not warrant the time or expense of a hearing.”²⁴ An overview of some rejected applications made by Indigenous Peoples reveal that a trauma-informed approach may well have yielded different results, as would an analysis of Indigenous approaches to identifying harms done.

A case where the complaint of an Indigenous person was dismissed on a finding that there was no reasonable prospect of success is ***The Student v. The University and Others***.²⁵ An Indigenous student alleged that he was discriminated against, including on grounds that he did not look Indigenous. The BCHRT accepted a statement from the respondent that she was not being racist: “[S]he attests that the Student ‘did not grow up on reserve or in Aboriginal communities’ and that his ‘social location’ was as a ‘white privileged male’”.²⁶ Indigenous Peoples would likely be very aware of issues of discrimination based on skin colour or appearance, and of the fact that “Indigenous” identity is not necessarily or primarily a racial definition, and an Indigenous perspective may well have yielded a different result.

13.0 RECOMMENDATIONS: GATEKEEPING FUNCTION

13.1 Track and report on claims made by Indigenous Peoples that are rejected at the application stage or under s. 27, or sent back for further detail and not pursued. An analysis of the claims that are procedurally weeded out may reveal where further action or training is necessary.

13.1 Institute an internal process for screening at first filing, and in s. 27 applications, by staff specifically trained in the issues Indigenous Peoples face as an immediate remedial measure, as so few Indigenous complaints are filed or advance.

²² *Case v. Save on Foods*, 2017 BCHRT 131 at 26, and *Workers’ Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49, para. 27.

²³ *Case v. Save on Foods*, 2017 BCHRT 131 at 26.

²⁴ *Ms. Y v. Clinic and another*, 2018 BCHRT 261 at 32; *Stonehouse v. Elk Valley Coal (No. 2)*, 2007 BCHRT 305.

²⁵ 2019 BCHRT 27.

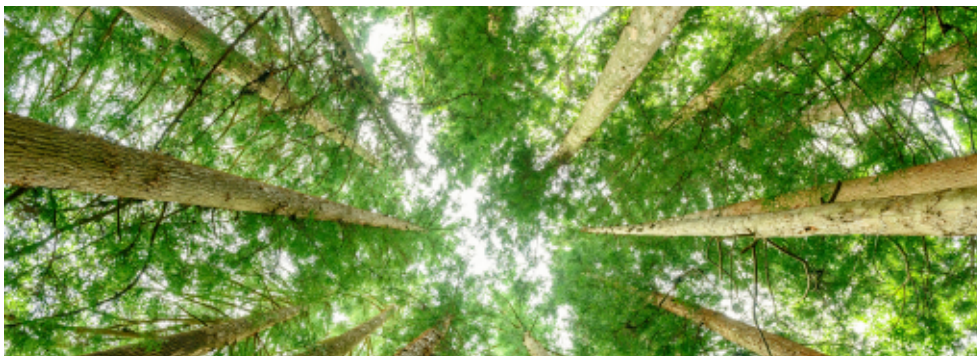
²⁶ *The Student v. The University and Others*, 2019 BCHRT 27 at 58.

Need for Plain Language Communication

The language used by the BCHRT in communications with complainants can close, rather than open, doors. Participants identified the need for plain language in communications from the BCHRT. To illustrate this point, consider this letter sent to a complainant from the BCHRT using deeply technical language, likely incomprehensible to an unrepresented complainant:

“...[I]n order for an applicant to obtain a record, the applicant must make a written request that provides sufficient detail to enable an experienced employee of the public body, with a reasonable effort, to identify the records sought and, is submitted to the public body that the applicant believes has custody or control of the record. Please provide the following: Clarification as to the context of the records you are requesting from the remaining Ministries and to please clarify how this is a new request.”²⁷

Photo by Blew S. (Shutterstock.com).



14.0 RECOMMENDATION: PLAIN LANGUAGE

14.1 Use plain language, easily understood by the average person with a grade five education, when communicating with complainants. Review communications, including forms and template letters, to ensure that they use plain language.

Time Limits

Respondents often cited the time limit for bringing complaints as an issue. In some cases, people reported that they experienced trauma (linked to intergenerational Indian Residential School or child welfare issues) which prevented them from filing on time.

Section 22 of the Code requires a complaint to be filed within one year of the alleged contravention, or of the last alleged instance. Filing outside of the time limit requires permission of the BCHRT and for the applicant to show that a time extension is in the public interest, and that no substantial prejudice will result to any person because of the delay.

²⁷ [D.B.] v. British Columbia (Ministry of Public Safety) and Solicitor General (operating as Okanagan Correctional Centre), Case Number: 19715.

Gagnon v. Thompson Rivers University,²⁸ is an example of a case dismissed due to lack of time. The complainant attempted to resolve his complaint within the university’s internal process and through discussions with the law school administration. During these attempts at resolution, time ran out to file a BCHRT complaint. The Tribunal refused to grant a time extension. Racism or bias against Indigenous Peoples was found not to be unique, novel or unusual enough to support a time extension: “There is no doubt Mr. Gagnon’s complaint raises troubling and serious allegations concerning a vulnerable group in society. However, his submissions are silent on the uniqueness, novelty and unusualness of his complaint.”²⁹

This case illustrates two approaches to justice. From an Indigenous perspective, efforts to repair the situation prior to filing a complaint may have been necessary. Indigenous notions of fairness and interest in maintaining or repairing relationships may have required that the complainant first exhaust these options. Consideration should be given to actions driven by concerns rooted in Indigenous values and traditions in making these decisions.

28 2018 BCHRT 11.

29 *Gagnon v. Thompson Rivers University*, 2018 BCHRT 11 at 28.

Photo by Butterfly Photography.



15.0 RECOMMENDATIONS: TIME LIMITS

- 15.1 Provide public education for Indigenous Peoples that complaints should be filed at the same time that a complainant is pursuing internal or informal processes because the BCHRT time limits are strict.
- 15.2 Assess time extension requests with a trauma-informed lens and consider any circumstances Indigenous applicants raise tied to Indigenous traditions or ways of approaching conflict (such as attempts at relationship repair or restoration).

Hearings

Relatively few cases make their way through to a hearing in the BCHRT process. It is important to ensure that the hearing process is as fair and safe as possible. The TRC observed:

“Establishing respectful relationships ... requires the revitalization of Indigenous law and legal traditions. It is important that all Canadians understand how traditional First Nations, Inuit, and Métis approaches to resolving conflict, repairing harm, and restoring relationships can inform the reconciliation process.”³⁰

16.0 RECOMMENDATIONS: HEARINGS

- 16.1 Hold hearings in spaces that are culturally safe for Indigenous complainants. Though appropriate spaces will vary by Indigenous cultures, examples could include Band offices, friendship centres, cultural spaces at universities, or land-based venues.
- 16.2 Ask participants what culturally appropriate practices they would like to include in hearings, such as smudging the room, swearing on an eagle feather, or sitting in a circle.
- 16.3 Ask if there are cultural supports that are needed during the hearing process. This could include elders, witnesses, or other culturally relevant people which may vary according to the culture of the applicant.
- 16.4 Incorporate Indigenous Peoples (as tribunal members or as co-appointed decision-makers).
- 16.5 Ask participants if there are any Indigenous protocols for how information or evidence may be offered or shared that they would like to incorporate.

30 TRC Summary, at p 16-17.

Website

A significant number of respondents were unaware of the BCHRT website. Most respondents had never used or accessed the website. People who had accessed or tried to use the BCHRT process said that it was cumbersome, wordy, and difficult to use. The website was described as a “wall of words” by one person interviewed. Several people pointed out that the language could be a barrier to Indigenous Peoples and called for “easy access and easy to read for people who can’t read or have limited reading abilities.” Remote communities with spotty internet access or few computers would be unable to access the website at all.

A significant number of respondents were unaware of the BCHRT website.

“Many of our elderly who have told me stories about being treated do not have computers. Is there a way that we could reach out to that demographic?”

17.0 RECOMMENDATION: WEBSITE

17.1 Develop a website using plain and easily accessible language to provide Indigenous Peoples with information and to guide them through stages of the application process. The website should feature case-based examples, specific to Indigenous Peoples; short videos to illustrate the BCHRT process; and a guide to help people through the BCHRT process.



Photo by Blew S. (Shutterstock.com)

NEED FOR LEGAL REPRESENTATION

The BCHRT process, and human rights complaints generally, are a highly technical legal area. Complainants with legal representation are more likely to be successful in filing a claim. Respondents raised the concern that Indigenous complainants need legal representation to file and forward their claims. Lack of legal representation, especially Indigenous lawyers, was identified as a significant access to justice issue. Given the low number of Indigenous claims, a remedial and targeted approach to providing legal representation is needed.

The Community Legal Assistance Society (“CLAS”) has a settlement mandate and many Indigenous Peoples may feel pressured to settle a case and so avoid any larger societal impact that may come from having a case go forward. To qualify for CLAS legal services, a person must have filed a complaint which has been accepted by the BCHRT. CLAS offers a Short Service Clinic where people can get advice about filing. CLAS offers limited assistance to people in the Lower Mainland before a complaint is filed and accepted. Overall, Indigenous Peoples said that there is a strong need for legal help to be offered by Indigenous lawyers, in Indigenous settings. Though there are some community education and outreach efforts by CLAS, Indigenous Peoples strongly identified the need for an Indigenous led and offered approach that is broader in mandate than short-term and limited legal advice.

Culturally knowledgeable and appropriate legal help is required for Indigenous applicants. Lack of adequate legal representation is a considerable procedural and practical barrier to Indigenous applicants.

Respondents raised the concern that Indigenous complainants need legal representation to file and forward their claims.

“In some cases where Indigenous peoples want to bring claims against institutional actors (such as police, health care, and so forth) then it is an unfair fight because those institutional actors have or can hire legal teams that are familiar with human rights law and have experience in fighting those cases. Human rights cases should be understood to be long term projects and support put in place to help them go through the system.”

“Have dedicated staff regionally including in the [Downtown Eastside] to start the process of forwarding full time human rights complaints.”

“Prioritize and support Indigenous service providers.”

Photo by Arthur Dayu Dick.



18.0 RECOMMENDATIONS: NEED FOR LEGAL REPRESENTATION

- 18.1 Advocate, perhaps with the Office of the Human Rights Commissioner, Indigenous political organizations and legal advocacy organizations, for legal representation at the filing stage through to resolution, for Indigenous claimants.
- 18.2 Explore options to support greater access to justice for Indigenous Peoples in this area, including Indigenous human rights legal aid funding, administered by the Legal Services Society or a similar organization, to support Indigenous Peoples in making and advancing claims.
- 18.3 Partner with other organizations (such as the Office of the Human Rights Commissioner, CLEBC, law schools, Indigenous and legal organizations) to provide bootcamps and other training opportunities for lawyers or law students about Indigenous Peoples' human rights. This case-based education should address the different elements in bringing a case: What is discrimination on prohibited grounds? Where are examples of evidence? Does the fact that no one witnessed an event mean that no case for discrimination can be brought? Training should include systemic features and intersectionality of the discrimination that Indigenous Peoples experience based on race and gender, geographic and socio-economic status, etc.
- 18.4 Provide student opportunities, such as articling or summer jobs for Indigenous law students to increase practitioners in this area.
- 18.5 Encourage the creation of regional, or circuit, human rights clinics to both educate and assist Indigenous Peoples in filing and carrying through human rights claims. Explore options for clinics or workshops that operate regionally over time so lawyers can stick with a case, including potentially working with the three BC law schools. Clinics should be led by leading Indigenous counsel and provide representation to Indigenous Peoples, individually and collectively.

SUMMARY

Respondents overwhelmingly identified that they have experienced instances of discrimination which they feel violated their human rights. Some respondents had no idea that the BCHRT existed, or how to access it. Many respondents said that their experiences of racism based on their Indigenous identity were so pervasive that they did not believe it would make any difference to report individual instances. Many respondents simply observed that their experiences with racism were “too many to count” or had occurred “too many times over my [years] on this earth.” One respondent observed, racism “is so common that it seemed pointless” to file a complaint.

While removing barriers to access the BCHRT is an issue, removing barriers is not enough. Structural change is needed to incorporate Indigenous definitions of human rights according to Indigenous laws. Until space is made for Indigenous difference, Indigenous Peoples will see the BCHRT as a two-tiered process which does not value or protect their human rights, as Indigenous Peoples.

The BCHRT must answer the TRC's call for reconciliation and work directly with Indigenous communities (both nations and in urban settings) to transform the BCHRT process into one that is inclusive and makes a real difference in the lives of Indigenous Peoples. Efforts must include representatives of Indigenous women, LGBTQ2S+ and youth, as well as Indigenous organizations and cultural communities (such as the Downtown Eastside).

Success for the BCHRT Indigenous Justice Initiative should be measured by (1) the fact that Indigenous Peoples are actively engaged with the BCHRT process and see it as an important mechanism for protecting their human rights, including in their systemic and collective aspects; (2) greater numbers of Indigenous Peoples accessing the BCHRT system to bring complaints and have those complaints resolved in a way that they see as satisfactory; (3) systemic shifts in the BCHRT so that concepts of human rights and fair resolution rooted in Indigenous laws are reflected in the process; and, (4) greater numbers of Indigenous staff, tribunal members, and lawyers working with the BCHRT process.

Photo by Arthur Dayu Dick.



Appendix A

Indigenous Peoples and Human Rights Survey

This is a survey that is being done on behalf of the BC Human Rights Tribunal (BCHRT) to improve services to Indigenous Peoples.

Background

- The BCHRT is responsible for receiving and reviewing complaints under the BC Human Rights Code.
- Indigenous Peoples do not file as many Human Rights complaints as others. The BCHRT wants to understand why.

Why this Survey?

The BCHRT wants to identify steps that can be taken right away to help make the process safer and more user-friendly for Indigenous Peoples.

More work, including perhaps a more in-depth study and discussions with Indigenous Peoples, will be done in the future. This is a first step.

The survey should take 10 minutes or less to complete. Results of this survey will be kept confidential.

1. Indigenous Identity: (check all that apply)

- First Nations
- Métis
- Inuit
- Other:

2. Have you experienced discrimination that you felt violated your human rights?

(Can you share some details about what happened – you can talk about more than one incident)

3. Did you feel discriminated against based on: (check all that apply)

- Indigenous identity
- Woman
- Man
- Two-Spirited or LGBTQ
- Age
- Disability
- Family Status
- Poverty
- Other:

4. If you DID NOT file a complaint with the BC Human Rights Tribunal – Why not? (check all that apply)

- Not sure how
- Did not think it would make a difference
- Did not think I would be believed
- Was not sure if it was discrimination under the BC Human Rights Code
- Scared of retaliation
- Experience so much discrimination that this was just another example
- Process was confusing
- Ran out of time (did not file in one year limit)
- Other:

5. If you did try to file a complaint with the BCHRT – Why did it not go through? (check all that apply)

- Process too confusing so I stopped
- Complaint was dismissed by the BCHRT because they said it was not discrimination
- Lack of evidence or supporting witnesses
- Outside the time limit
- Other:

6. What else should we know about why you did not file a complaint or why your complaint did not go through?

7. If you did use the BC Human Rights Tribunal Website, what did you think of it?

8. What would make it easier for Indigenous Peoples to bring discrimination complaints to the BCHRT?

9. Do you think that your understanding of what human rights are is different as an Indigenous Person? How?

10. Is there anything you would like to add?

Thank you.

Appendix B

Question #3 Grounds of Discrimination

99 Respondents:

87	Indigenous identity
49	Women
25	Age
23	Poverty
20	Family Status
7	Disability
5	LGBTQ2S
3	Man

Question #4 -If you DID NOT file a complaint with the BCHRT – why not? What else should we know about why you did not file a complaint or why your complaint did not go ahead?

98 Respondents

62	Not sure how / Didn't know that I could
61	Did not think it would make a difference
39	Did not think I would be believed
38	Experience so much discrimination that this was just another example
37	Was not sure if it was discrimination under the BC Human Rights Code
32	Scared of retaliation
15	Process was confusing
12	Process was too overwhelming
8	Ran out of time

If you did try to file a complaint with the BCHRT why did it not go through?

Of the 25 respondents who did submit a complaint:

9	Process too confusing, tried but did not complete the complaint
7	Lack of evidence or supporting witnesses
5	Complaint was dismissed by the BCHRT because they said it was not discrimination
5	Blocked by procedural issues, such as filing outside of time limit

Question #5 If you used the BCHRT website, what did you think of it?

32 Respondents

26	Did not use the website, including 5 who said they were not aware of the website
1	Used website with assistance
2	said website was "ok"
3	said website with difficult/complicated to use

*EXPANDING
OUR VISION*

*Cultural Equality
& Indigenous Peoples'
Human Rights*