

FEDERAL & BC HUMAN RIGHTS CLAIMS

**Advising complainants of sexual
harassment and sexual assaults**

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Sexual Harassment = Sex Discrimination

- Sexual harassment is discrimination on the basis of sex: *Janzen v. Platy Enterprises Ltd.*, 1989 CanLII 97 (SCC).
- It encompasses any sexually-oriented practice that endangers an individual's continued employment, negatively affects their work performance, or undermines their sense of personal dignity.
- Its effect is to import sexual behaviour into the workplace in a manner that harms the victim's working environment and attacks their dignity.
- It may be blatant, such as with leering, grabbing, or sexual assault, or it may be more subtle, such as with sexual innuendos or propositions.

BC *Human Rights Code*

Discrimination in Employment

13(1) A person must not

- (a) refuse to employ or refuse to continue to employ a person, or
- (b) discriminate against a person regarding employment or any term or condition of employment

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

“Employment”

- **Employment protection can include**
 - Conduct that happens away from the worksite
 - Conduct that happens outside of working hours
 - Conduct by a co-worker
 - Conduct by someone working on the same worksite but employed by another employer
 - Conduct by a customer or client

“Section 13(1)(b) prohibits discrimination against employees whenever that discrimination has a **sufficient nexus** with the employment context”: *Schrenk*, 2017 SCC 62

Intersectionality

- Multiple grounds of discrimination may intersect and overlap
- Grounds cannot necessarily be separated out or parsed on an individual basis
- “The complainant is an integrated person, with a number of characteristics...all of which are alleged to have been factors in how she was treated.”
 - *Radek v. Henderson Development (Canada) Ltd.*, 2005 BCHRT 302
 - *PN v. FR and another (No. 2)*, 2015 BCHRT 60

Protection from Retaliation

- It is a violation of s. 43 of the *Code* to punish someone because they:
 - Made a human rights complaint
 - Might make a human rights complaint
 - Gave evidence in a human rights complaint
 - Might give evidence in a human rights complaint
 - Assisted someone to make a human rights complaint
 - Might assist someone to make a human rights complaint
- Helpful retaliation case: *The Sales Associate v. Aurora Biomed Inc. and others (No. 3)*, 2021 BCHRT 5 paras. 149-67

Canadian Human Rights Act

Employment

7 It is a discriminatory practice, directly or indirectly,
(a) to refuse to employ or continue to employ any individual, or
(b) in the course of employment, to differentiate adversely in relation to an employee,
on a prohibited ground of discrimination.

Harassment

14 (1) It is a discriminatory practice,
(a) in the provision of goods, services, facilities or accommodation customarily available to the general public,
(b) in the provision of commercial premises or residential accommodation, or
(c) in matters related to employment,
to harass an individual on a prohibited ground of discrimination.

Sexual harassment

(2) Without limiting the generality of subsection (1), sexual harassment shall, for the purposes of that subsection, be deemed to be harassment on a prohibited ground of discrimination.

Canadian Human Rights Act

Retaliation

14.1 It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual **who filed the complaint or the alleged victim.**

Acts of employees, etc.

65 (1) Subject to subsection (2), any act or omission committed by an officer, a director, an employee or an agent of any person, association or organization in the course of the employment of the officer, director, employee or agent shall, for the purposes of this Act, be deemed to be an act or omission committed by that person, association or organization.

Exculpation

(2) An act or omission shall not, by virtue of subsection (1), be deemed to be an act or omission committed by a person, association or organization if it is established that the person, association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof.

Process at BCHRT

Screening (lengthy)

- Address any obvious preliminary issues (sniff test)
- Respondent(s) notified
- Response(s) filed

Mediation?

Disclosure (first round)

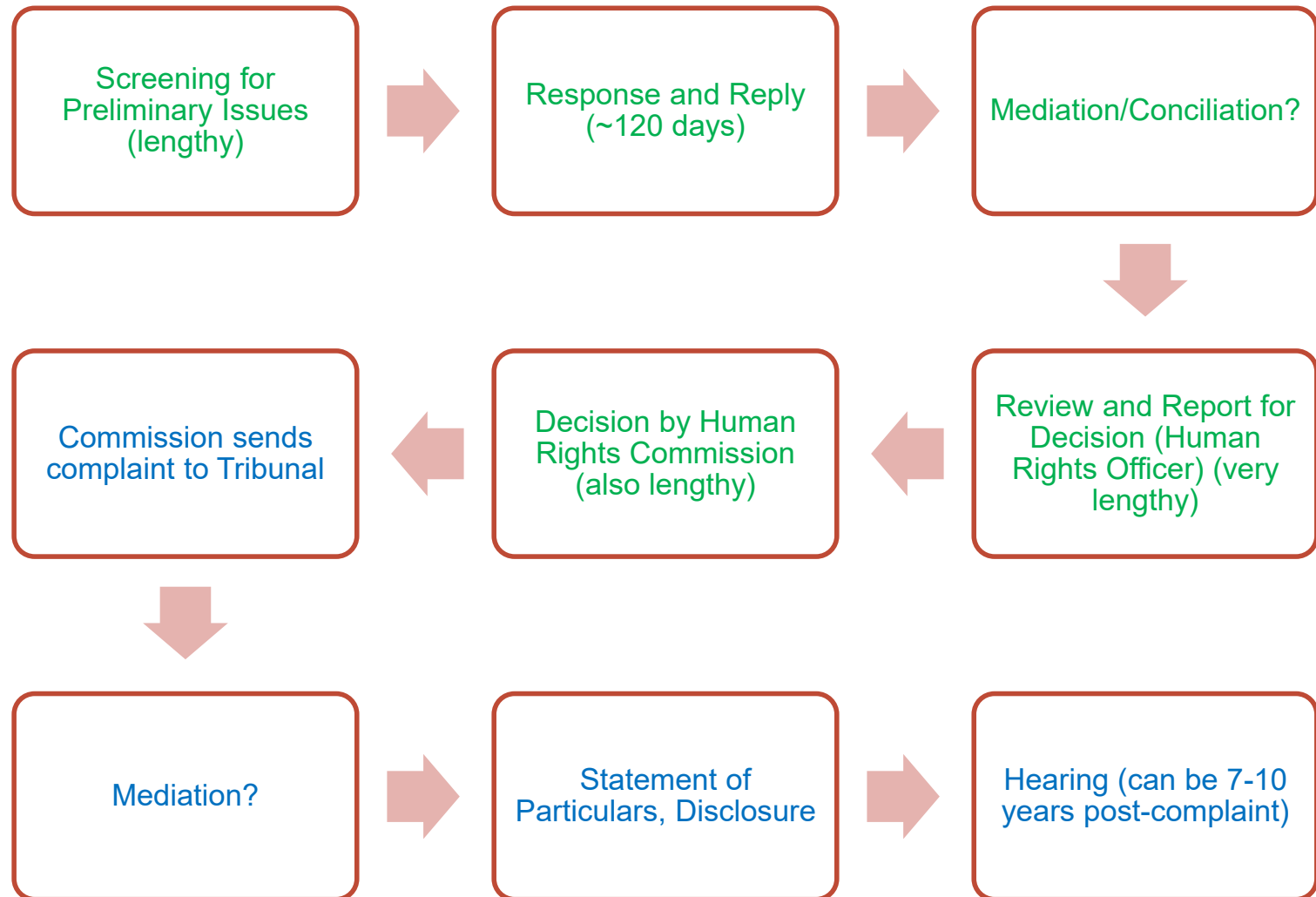
Case Path (lengthy)

- Application to Dismiss, OR
- Application to apply to dismiss

Hearing

- Hearing date set
- Disclosure (second round)
- Mediation?
- Hearing

Process in Federal Complaint



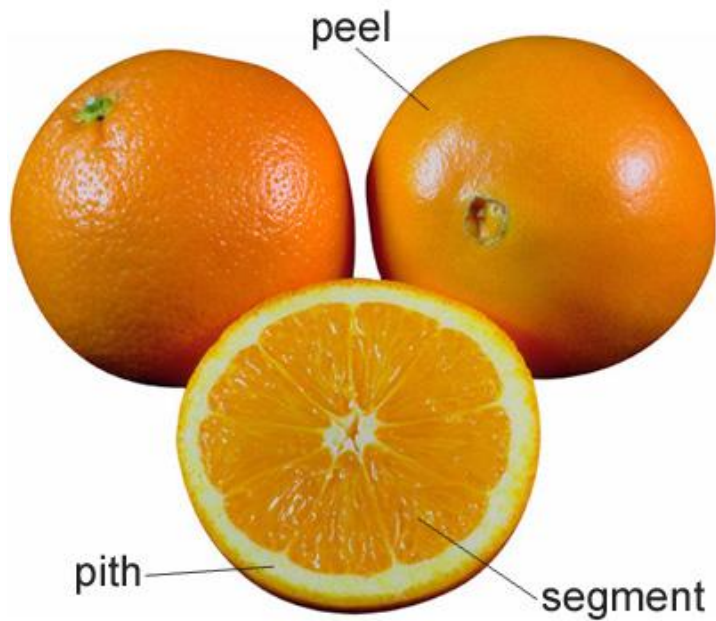
Process at BCHRT

- Direct access
- Screening backlog
- Fast-track?
- Individual, group, or class
- 60 days for judicial review to BCSC

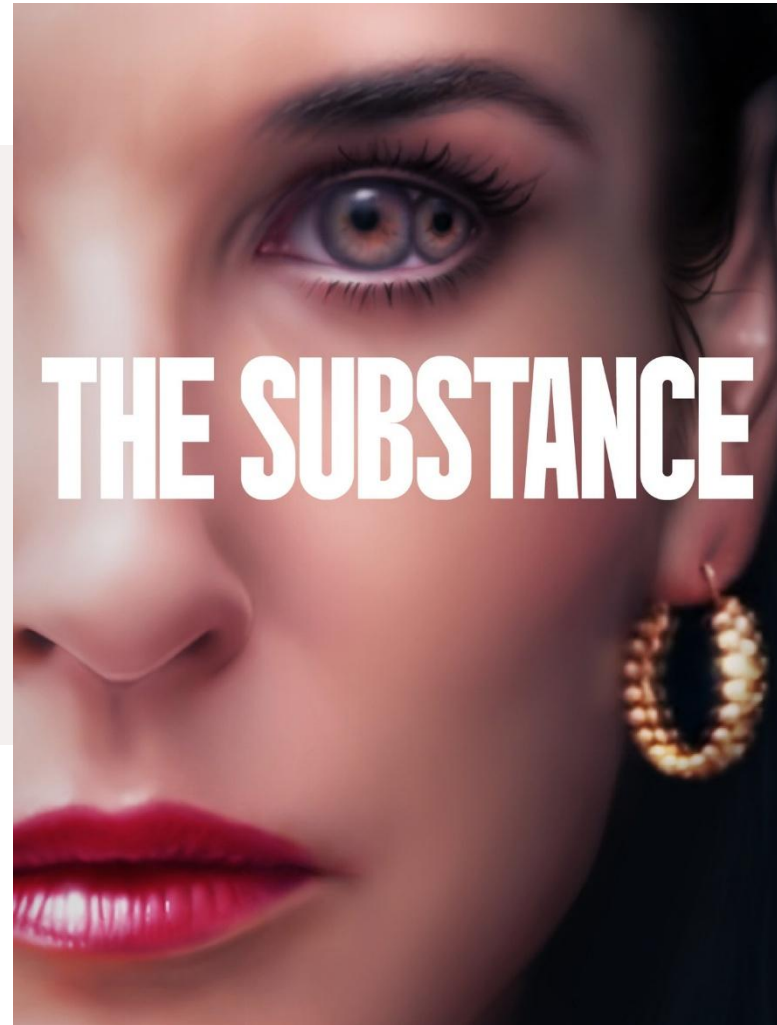
Process in Federal Complaint

- Two-tier system
- Backlogs at various points
- Alternate process-phobic
- Specific process for certain large employers
- Commission will often participate at CHRT hearings
- 30 days for judicial review to federal court

Jurisdiction Issues



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Jurisdiction Issues

CHRC provides a list of organizations subject to *CHRA*

- federal departments, agencies and Crown corporations
- chartered banks
- airlines
- interprovincial communications and telephone companies
- interprovincial transportation companies, like buses and railways that travel between provinces
- First Nations governments and some other First Nations organizations
- other federally regulated industries, like uranium mines

Jurisdiction Issues

- The leading case is *NIL/TU, O Child & Family Services Society v. B.C.G.E.U.*, 2010 SCC 45 which applies a "functional test" that examines the "nature, operations, and habitual activities of the entity to see if it is a federal undertaking".
- Unless it isn't...: *Stefanishion v. Princess Resort and others*, 2024 BCHRT 97 vs *Ram v. Ministry of Health and others*, 2025 BCHRT 202
- Ultimately, this is an extremely complex, fact-specific and difficult to predict area of law

Jurisdiction Issues

- Most important thing is to remember to consider this issue and be alert for any 'red flags', like an interprovincial, telecommunications (web-based) or banking dimension to the business, or a nexus with indigenous governance.
- Being federally regulated is NOT the same thing as being a federal work or undertaking (eg marijuana operations)
- Legislated Employment Equity Program (LEEP) tracks federally regulated companies with 100 or more employees and people periodically FOI their list:
<https://stlawyers.ca/blog-news/list-federally-regulated-companies-canada/>

Jurisdiction Issues: the Practical Solution

[48] As a final comment, I underscore that s. 25 of the *Code* allows the Tribunal to defer a human rights complaint pending the outcome of another proceeding. Therefore, when CHRC first informed Ms. Ferguson that it appeared that Vancouver Skycap Ltd. may fall under provincial jurisdiction, the more prudent course of action would have been for her to file a complaint with this Tribunal and request that the complaint be deferred under s. 25 of the *Code* pending CHRC's decision on the jurisdiction issue.

Ferguson v. Vancouver Skycap, 2016 BCHRT 163 at para 48



Time limit for filing a complaint (BC)

22(1) A complaint must be filed within one year of the alleged contravention.

(2) If a continuing contravention is alleged in a complaint, the complaint must be filed within one year of the last alleged instance of the contravention.

(3) If a complaint is filed after the expiration of the time limit referred to in subsection (1) or (2), a member or panel may accept all or part of the complaint if the member or panel determines that

(a) it is in the public interest to accept the complaint, and

(b) no substantial prejudice will result to any person because of the delay.

Public Interest Factors

- Length of delay
- Reasons for delay (e.g., disability-related factors)
 - Good reasons: disabled, in hospital or jail, extremely traumatized, erroneous legal advice
 - Bad reasons: unaware of BCHRT or right to make a complaint
- Public interest in complaint itself
 - Unique, novel, unusual issues
 - Vulnerable complainant
 - Gaps in jurisprudence
 - Systemic issue, the resolution of which would benefit others
- No prejudice to respondent

Leading Cases on Timeliness

- *School District v. Parent obo the Child*, 2018 BCCA 136 (CanLII), <https://canlii.ca/t/hrffv>
 - Meaning of “continuing contravention”
- *British Columbia (Ministry of Public Safety and Solicitor General) v. Mzite*, 2014 BCCA 220 (CanLII), <https://canlii.ca/t/g7c2b>
 - Public interest factors

Time limit for filing a complaint (Federal)

Commission to deal with complaint

41 (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

...

(e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.

Time limit for filing a complaint (Federal)

- While there is not an explicit adoption of a “continuing contravention” test in the Act, it is implied in the reference to “acts or omissions the last of which occurred more than one year...before receipt of the complaint”.
- Discrimination ≠ consequences of discrimination
- The Commission can also extend the time limit:
 1. If the delay was due to reasons beyond the complainant’s control;
 2. If the complainant only found out about the discrimination later, they have a year from the date of discovery (different from BCHRT);
 3. If the delay was due to the complainant’s disability;
 4. If accepting the complaint is in the public interest (similar test to BCHRT)
- Timeliness issues are in the sole jurisdiction of the Commission, reviewable by the Federal Court

Time limit for filing a complaint (Federal)

Helpful recent case / cautionary tale: *Peron v. Canada (Attorney General)*, 2025 FC 665

- Basis for extension request was 'reasons beyond complainant's control'
- Provided a note from a psychologist diagnosing him with MDD
 - Medical note did not date the diagnosis and provided general information about the complainant's symptoms
- This was insufficient evidence (para 24), particularly because the complainant had been able to engage in significant communication regarding:
 - Submitting an access-to-information request to obtain personnel files and absence records;
 - Reviewing and accepting a job offer with the Ottawa Tax Center in March 2018;
 - Engaging in multiple discussions with CRA management regarding accommodations;
 - Maintaining ongoing communication with the respondent; and
 - Providing documentation to the CRA in support of crediting back his leave.
- Commission found that he was capable of numerous tasks related to the allegations in the Complaint (25) and therefore his reason for the delay was unreasonable
- Reviewing court noted that, despite the Commission's advice that the complainant pursue the complaint through the grievance process, the complainant was still obligated to fully submit the complaint while seeking those remedies (43)
- The reviewing court found that the psychologist's note ought to have addressed the specific medical reason for the complainant's failure to file the complaint on time, and that it was reasonable for the Commission to consider his ability to seek other forms of redress (48)
- While the complainant did provide new medical evidence to the reviewing court, this was too little, too late... (49)

Interesting Recent(ish) Cases

- *The Sales Associate v. Aurora Biomed Inc. and others* (No. 3), 2021 BCHRT 5
- *The Worker v. Translink Security Management Ltd.*, 2025 BCHRT 122
- *Ms. C v. City and others*, 2023 BCHRT 203

The Sales Associate v. Aurora Biomed Inc. and others (No. 3), 2021 BCHRT 5

- During A's job interview with company R, the hiring manager, M, asked her questions about her marital status and plans to have children.
- After she was hired, her supervisor, S, a much older man, called her "beautiful lady" and "beautiful girl" instead of by her name on several occasions, and told her she should "smile more" because it made her "look better".
- When she reported S's conduct to M, M called a meeting with her and S. S was defensive and denied everything.
- The manager terminated A the next day.

The Sales Associate v. Aurora Biomed Inc. and others (No. 3), 2021 BCHRT 5

- S's conduct was not inherently sexual.
- He never made any sexual advances towards A.
- She never felt like he was flirting with her or was trying to pursue a sexual relationship.
- S's comments "were misguided, non-sexual, attempts to be friendly and warm."

- How much does that matter?

The Sales Associate v. Aurora Biomed Inc. and others (No. 3), 2021 BCHRT 5

- Moore test for discrimination:
 1. C has a protected characteristic,
 2. They experienced an adverse impact in their employment, and
 3. Their protected characteristic was a factor in the negative impact.
- Was A negatively impacted in her employment on the basis of her sex? Yes.
- S's conduct reinforced, perpetuated, and exacerbated sexist barriers that continue to disadvantage women in their workplaces.

The Sales Associate v. Aurora Biomed Inc. and others (No. 3), 2021 BCHRT 5

- Emphasizing her appearance undermined her skills and contributions, suggesting her value to the company was connected to her looks, rather than her merit.
- “While telling a woman to smile may feel like harmless banter, it imposes a burden on her to please people in a way that is disconnected from the tasks of the job, and the skills she brings to it.”
- “Calling a grown woman a “girl” in the context of her employment infantilizes and patronizes her. It signals that she is not an adult worthy of being taken seriously in their profession.”

The Worker v. Translink Security Management Ltd., 2025 BCHRT 122

- Worker was survivor of serious domestic violence (gender-based violence) from her ex-spouse;
- Worker was participating in a legal process against her ex-spouse while working for Translink
- This participation was highly fraught and affected her ability to meet certain work requirements
- Translink applied to dismiss the complaint on the basis that this was not discrimination under family status or gender-‘taking a driving test has nothing to do with gender’
- “domestic violence, or intimate partner violence, is a form of gender-based violence that has a disproportionate impact on women”: para 79
- “there is a logical connection between domestic violence and the ground of marital status. By its very nature, this type of violence occurs within the context of an intimate relationship”: para 82
- Nexus with gender/family status was ‘more than mere conjecture’

Ms. C v. City and others, 2023 BCHRT 203

- An employer can be held liable for the sexual harassment perpetrated by one of its employees in the course of employment: *Code*, s. 44(2).
- Employer has a duty to provide, maintain, and restore a discrimination-free work environment.
- Confidentiality clause in Respectful Workplace Policy limited her ability to talk about her experience – could be a breach of the *Code*.

Individual Respondents

- Leading case: *Daley v. BC (Ministry of Health)*, 2006 BCHRT 341
- Sexual harassment has a “measure of individual culpability”
- “No plausible argument can usually be made that the harasser was acting within the scope of his or her authority.”
- Furthers the purposes of the *Code* to hold harassers individually liable

Response and Investigation

- Employers must educate themselves on their obligations under the *Code*
- Employers must respond reasonably and appropriately to complaints of sexual harassment
- Must treat allegations seriously and sensitively, and resolve the complaint in a way that ensures a healthy and discrimination-free work environment
- Where an employer fails to respond reasonably, that failure itself can amount to discrimination “regardless of whether the underlying conduct ... is found to be discriminatory”: *The Employee v. The University and another (No. 2)*, 2020 BCHRT 12

Remedies

Injury to Dignity (BCHRT)

- Compensatory
- Not punitive
- Reflect harm, impact, “pain and suffering”
- Factors: seriousness/severity; social context; impact
- Greater impact → higher award
- “Trend is upward” – *Araniva v. RSY Contracting and another* (No. 3), 2019 BCHRT 97

Other losses

- Wages
- Commissions
- Compensation for benefits
- Tax gross-up
- Expenses
- Attending hearing
- Loss of opportunity
- Education or retraining

Remedies

Systemic

- Policy change
- Accommodations
- Education and training

Remedies - Federal

- Very similar to BCHRT except that ‘pain and suffering’ (equivalent to injury to dignity), is capped at \$20,000 per respondent.
- Tribunal can award up to an additional \$20,000 per respondent as ‘special compensation’ when the discrimination was willful or reckless
- Complainants who have experienced sexual assault have received the maximum under both categories, eg *Starr et al. v. Stevens*, 2024 CHRT 127

Mediation

- What does your client want? What are the interests behind their position?
- Consult the CLAS awards chart and manage expectations
- Prepare an opening statement
- Consider having C speak to the impact of the discrimination
- Be careful about cross-examination of your client by OP
- Opening offer generally shared in “shuttle mediation”
- Consider sharing relevant documents with OP in advance. Evidence of wage loss, mitigation, expenses all helpful.
- Direct negotiations?

Mediation

- Fact sheet on Mediations and Settlement Discussions:
<https://bchrc.net/legal-information/resources/>
- Confidential and without prejudice
- Offer + Agreement = Contract, even if not in writing
- Release of liability – ensure you're aware of any other actions C has or may be contemplating
- Confidentiality, “NDAs”, and non-disparagement clauses

Advantages of Human Rights Complaints

- Puts complainant in the driver's seat
 - Settlement options
 - Injury and impact-focused
 - Expert involvement
- Lower burden of proof than criminal cases
 - Balance of probabilities vs proof beyond a reasonable doubt
- Influence on systemic change and policies
- Privacy and/or media strategy options
- Compensation
- Free to access
- Mediation services
- More flexible rules and processes
- Indigenous Members, processes
- Works to be trauma-informed

Challenges of Human Rights Complaints

- Very, very slow
- Compensation awards are not terribly high (\$15,000-\$50,000, but see Ontario and *Ms. L v. Clear Pacific Holdings Ltd. and others*, 2024 BCHRT 14)
- Potential for litigation abuse
- Privacy is not guaranteed (see *Hilger v. Dr. Terry Abel Dentistry and another*, 2023 BCHRT 32)
- Challenges posed by parallel criminal proceedings