Tribunal Case No. CS-001372

IN THE MATTER OF THE HUMAN RIGHTS CODE, RSBC 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before the British Columbia Human Rights Tribunal

BETWEEN:

British Columbia Teachers' Federation obo Chilliwack Teachers' Association

COMPLAINANT

AND:

Barry Neufeld

RESPONDENT

AND:

BC's Human Rights Commissioner

INTERVENOR

WRITTEN ARGUMENT OF THE INTERVENOR BC'S HUMAN RIGHTS COMMISSIONER

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1. BC's Human Rights Commissioner, an independent officer of the Legislature, intervenes in this complaint to make submissions about the interpretation of s. 7(1)(a) and the effect of an allegation of "child abuse" against transgender people or their allies in complaints under s. 7 of the *Human Rights Code*. There is little case law interpreting s. 7, and this case presents the opportunity for some clarification of the legal test for discriminatory and hate publications. Pursuant to her role as intervenor, the Commissioner does not take a position on whether the Respondent's publications violate section 7.

A. The test for discriminatory publications under s. 7(1)(a) needs modification to reflect *Charter* values

2. First, the Commissioner submits that the Tribunal's approach to s. 7(1)(a) of the *Code* needs modification to reflect a proportionate balance of *Charter* values. In particular, in past cases the Tribunal has created a defense to s. 7(1)(a), where expression is a "mere opinion", especially where it relates to political speech or matters of 'legitimate public interest". The Commissioner says there should not be a blanket defense for "political" or "public interest" speech. Rather, the outcome of any one case depends on a proportionate balancing of *Charter* values of substantive equality and religion or expression, as the case may be.

3. Section 7(1)(a) makes it a *Code* violation to issue any publication that "indicates discrimination or an intention to discriminate against a person or a group or class of persons". There are two distinct ways in which the violation can occur – either through a publication that indicates an intent to discriminate or one that does discriminate, whether or not intention to discriminate is shown.

4. To establish a violation of s. 7(1)(a), a complainant must show that the publication "had a discriminatory effect, or likely effect, or was intended to do so" (*Stacey v. Kenneth Campbell et al.*, 2002 BCHRT 35 at para. 48). Section 7(1)(a) is violated where there is an intent to discriminate, even if that real world effect is only intended but not actually achieved. It is also violated where there is no

intent, but the actual impact is discriminatory. Due to the manner in which precedent has developed, the scope of s. 7(1)(a) is limited to communications that go beyond merely being offensive, or an expression of opinion (*Stacey* at paras. 47, 50-51).

5. Section 7(1)(a) contemplates some level of restriction of freedom of expression, and possibly freedom of religion. In defense to past complaints, respondents have argued that findings of discrimination would violate their rights under s. 2(a) and 2(b) of the *Charter*. While the Tribunal does not have *Charter* jurisdiction, when faced with these arguments from respondents, the Tribunal considered the purposes of the *Code* and interpreted s. 7(1)(a) as not applying to "public comment" on matters of "legitimate public interest" (*Palmer and Palmer v. BCTF and others*, 2008 BCHRT 322 at para. 55).

6. For example, *Stacey* was the first case to consider s. 7(1)(a) of the *Code* as currently phrased. In *Stacey,* the respondent Mr. Campbell had taken out an advertisement in various publications including the Globe and Mail newspaper, stating that queer sexuality is "destructive", "a sin", and "wrong and harmful" (advertisement in appendix to *Stacey*). He pleaded to the Alberta premier to reject the Supreme Court of Canada decision in *Vriend v. Alberta,* [1998] 1 SCR 493, which recognized that sexual orientation should be a protected ground in Alberta's human rights legislation. Mr. Stacey, a subscriber to the Globe and Mail and a gay man, was deeply offended when he saw the advertisement in his newspaper. He brought a human rights complaint.

7. Although neither party made submissions on the consistency of any interpretation of s. 7(1)(a) with *Charter* values, the Tribunal chose to consider them. While recognizing that s. 7(1)(a) protected the value of equality, the Tribunal chose to depart from the generally broad and liberal interpretation to be given to human rights legislation and narrow the situations to which s. 7(1)(a) applies because a broader interpretation would have "a more severe impact of the Respondents' freedom of expression and religion" (at para 37).

8. The Tribunal then found that the respondent's mere expression of political opinion was not within the scope of s. 7(1)(a). The Tribunal did not give reasons for its finding that the statements did not show an intention to discriminate, or explain how it balanced *Charter* values in reaching that conclusion.

9. In *Palmer*, the Palmers, members of the Fundamentalist Latter Day Saints Members Associated with the 'Mormon Hills School Society' filed a complaint against the British Columbia Teachers' Federation. They alleged the latter violated s. 7(1)(a) of the *Code* by writing to the Premier of British Columbia and encouraging the provincial government to take steps to address allegations of sexual exploitation within the Bountiful community and allegedly discriminatory teaching within its independent schools (at para. 1).

10. The Tribunal dismissed the Palmers' complaint at a preliminary stage. It found that the complaint had no reasonable chance of success because the respondent's letter to the Premier merely expressed an opinion about what the government ought to do about matters of legitimate public interest (at paras. 52, 55). The Tribunal found that it was not the purpose of the *Code* to stifle public comment and democratic political action on matters of legitimate public interest (para 55). Although the Tribunal acknowledged that the respondent's *Charter* rights were engaged, it did not explain whether it undertook any balancing of *Charter* values in reaching its decision (at para 9).

11. The defense of "mere opinion" arose again in *Watt v. The Abbotsford Times and others*, 2009 BCHRT 141. In *Watt*, the impugned publication was an opinion piece in a local newspaper in which the writer argued that feminists do not comport with the "Biblical view of femininity" and have other qualities the writer considered objectionable (para. 3). The Tribunal dismissed the complaint of sex discrimination by Ms. Watt on the basis that the column was a "mere statement of opinion" without intent to create discriminatory effects, though the writer "attempted to persuade

others to adopt his view of the proper relationship between men and women" (at para. 24).

12. By contrast, in *Dahlquist-Gray v. Hedley (No. 2)*, 2012 BCHRT 50, the Tribunal found a violation of s. 7(1)(a) where, in response to Ms. Dahlquist-Gray's bid to erect sculptures in the park to diversify local art and provide a place for thinkers, the respondent distributed posters that degraded the complainant based on sexual orientation, religion and place of origin (at paras. 31-35). The Tribunal referred to *Watt* in identifying the contextual factors which should be considered in determining whether a publication is discriminatory:

> [55] In *Watt* at para. 10, the Tribunal addressed some of the factors to be considered in assessing complaints of discriminatory publication:
>
> > Whether under s. 7(1)(a) or (b), the assessment of whether a publication violates s. 7 of the *Code* is a contextual one. As stated in *Elmasry* [and *Habib v. Roger's Publishing and MacQueen (No. 4)*, 2008 BCHRT 378]:
> >
> > We conclude that assessing the publication's meaning in its context includes consideration of:
> >
> > - the vulnerability of the target group;
> > - the degree to which the publication on its face contains hateful words or reinforces existing stereotypes;
> > - the content and tone of the message;
> > - the social and historical background for the publication;
> > - the credibility likely to be accorded the publication; and
> > - how the publication is presented.
> >
> > In any given case, one or more of the considerations might predominate the assessment, and other considerations might be appropriate. (paras. 84 – 85)

13. The Tribunal found that the publications in the *Dahlquist-Gray* case were not hateful within the meaning of s. 7(1)(b), but that they intended to discriminate against Ms. Dahlquist-Gray because they "clearly intended to injure, and,

regardless of… intent, did injure the complainants' privacy, dignity, artistic, and economic interests by calling attention to their religion, marital status, and sexual orientation, and to [Ms. Dahlquist-Gray's] place of origin, and by urging others to act on what [the respondent] took to be shared prejudices about those characteristics" (at para 59). Although the Tribunal referred to *Stacey* and *Palmer*, it did not comment on why they were distinguishable.

14. The above noted cases reveal the inconsistent approach taken to s. 7(1)(a), including exemptions for an expression of opinion or political commentary. In particular, the Commissioner submits that the Tribunal's case law on the distinction between publications that violate s. 7(1)(a) of the *Code* and publications that, while offensive, do not breach the section because they are "opinions" about "matters of legitimate public interest" (*Palmer v. BCTF*, 2008 BCHRT 322 at para. 55, quoted in *Oger*, para. 102) is unclear, difficult to apply, does not reflect either the purposes of the *Code* or an appropriate balancing of *Charter* values. It must be revisited.

15. In *Oger v. Whatcott (No. 7)*, 2019 BCHRT 58, the Tribunal attempted to reconcile some of the above cases, although it did not go as far as stating a generally applicable framework for applying s. 7(1)(a).

16. *Oger* was a case where the respondent published flyers alleging that a candidate for BC's Legislative Assembly was not suited to hold public office solely on the basis that she was a transgender woman. Ms. Oger brought a complaint alleging that the flyers violated ss. 7(1)(a) and 7(1)(b) of the *Code*.

17. The Tribunal in *Oger* reviewed the history, legislative purpose and its prior caselaw on s. 7(1)(a). It found that:

    - The legislative history of s. 7 indicates that it deliberately targets speech, and as such contemplates some level of restriction of freedom of expression in order to further the purposes of the *Code* (at para. 103).

- The type of speech targeted by s. 7(1)(a) is distinct from that targeted by s. 7(1)(b), although there is some overlap (at para. 103).
- Where the application of s. 7 affects *Charter* rights and values, the Tribunal must interpret and apply the *Code* in a manner that proportionately balances the context of the complaint and the purposes of the *Code* and s. 7(1)(a) with those protections (at para. 86). To do so the Tribunal must identify the *Charter* rights and values affected and then "assess the relevant *Charter* protections, the nature of its decision, and the statutory and factual context to render a decision that "gives effect, as fully as possible, to the *Charter* protections at stake given the particular statutory mandate" (at para. 56).
- Section 7(1)(a), which protects from discrimination, engages the *Charter* value of substantive equality under s. 15(1) (at paras. 86-87). The same conclusion was previously reached in *Stacey* (at para 36). However, the value of substantive equality is embedded in the provisions of the *Code*, so need not be considered separately (at paras. 84-87).
- In so far as an adverse finding under the *Code* affects *Charter* rights to freedom of expression or religion as the case may be, those rights need to be weighed in the proportionality analysis (at para. 58).

18. The Tribunal in *Oger* at para. 57 also found that a full proportionality analysis is not required with respect to s. 7(1)(b) as the equivalent section in Saskatchewan's legislation has already been upheld by the Supreme Court of Canada in *Saskatchewan (Human Rights Comm.) v. Whatcott*, 2013 SCC 11.

19. The Commissioner suggests that in order to provide greater guidance to future decision-makers, the Tribunal consider elaborating on what is required in a 'proportionality' analysis. Admittedly, this is a difficult question on which there is no settled guidance from the Supreme Court of Canada. However, reviewing other cases and contexts where conflicting rights are balanced, it can be discerned that most cases of balancing conflicting rights require a decision maker to balance the salutary effects of an action or interpretation against its

deleterious effects (see for example *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835 at 879; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 SCR 442 at para. 32; *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 at paras 8-9; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293, at para. 82 and at para. 203, Rowe J., concurring).

20. The steps in the balancing exercise can be summarized as follows:
    a) Determine the nature and scope of both rights at issue
    b) If there are conflicting rights, determine whether there is a way to accommodate both sets of rights
    c) If there is no way to accommodate both sets of rights, weigh the salutary effects of letting one right prevail over another against the deleterious effects.

21. The Tribunal in *Oger* found that the respondent's speech violated ss. 7(1)(a) and 7(1)(b). The respondent argued in defense of his speech that the expression was merely a political opinion. The Tribunal's decision on the defense turned on the factual findings that the respondent's speech was not "political speech" (at para 116) and was in fact speech that detracted from the core values protected by s. 2(b), as the speech "arbitrarily" attributed characteristics to the complainant without evidence and with no connection to issues of morality and integrity that would be relevant in a political campaign (at para 123).

22. In this case, the Commissioner submits that the Tribunal should go further and affirm that as a matter of law there is no general defense to a s. 7(1)(a) claim for speech that is "an expression of political opinion". Rather, the Tribunal may, on a case-by-case basis, find that s. 7(1)(a) does not apply to expression which is legitimately in the public interest following an appropriate balancing of *Charter* rights and values.

23. Such an interpretation of s. 7(1)(a) is consistent with the text, context and purposes of the *Code*. It is consistent with the text, which contains other express exemptions but no blanket exemption for political speech. Notably *Stacey* was

the first case to read in exemptions for mere "opinions about what the government ought to do" (at para. 52). *Stacey* also read in other exemptions which were subsequently overturned in *Carson v. Knucwentwecw Society*, 2006 BCSC 1779 on the basis that these limitations were not supported by the plain language of the *Code* or its purposive interpretation (at para. 32). This analysis can also be applied to the defense of "political opinion".

24. An interpretation that does not categorically exempt political speech is also consistent with the context and purposes of the *Code*. As noted in *Oger* the purpose of the *Code* is to "identify and eliminate discrimination" (at para 91). It reflects the *Charter* value of promoting substantive equality (at para. 87). In making the exemption that it does for private communications, the section already endeavours to strike an appropriate balance between unlimited free speech in private and minimizing the harm discriminatory statements can cause if publicly expressed. Any further exemptions undermine the protections s. 7(1)(a) confers on marginalized groups.

25. Political speech is not inherently valuable (*Oger* at para 112). A political opinion that is based on mis or disinformation and that is expressed publicly may cause harm by seeking to promote laws and policies that entrench barriers for equality-seeking groups. When a political opinion comes from a person in power such as an elected official, it may be perceived by the public as having greater weight than the views of the average person. Today, such statements can reach wide audiences and create confusion, echo chambers and the illusion of debate where there is objectively none. Such statements may be far removed from the core values underlying the right to free expression, like the search for truth, participation in political decision making, and diversity in forms of self-fulfilment and human flourishing (see for example, *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 at para. 77; *Oger* at paras. 77, 115; *British Columbia College of Nurses and Midwives v. Hamm*, Decision dated March 13, 2025 at paras. 237, 252, 254, 261). There is no reason to exempt them from scrutiny under the *Code*.

26. Moreover, the Commissioner submits that a “mere opinion” or an opinion about a political matter can indicate discrimination and create adverse effects for a complainant with a *Code*-protected characteristic, even if it does not name them specifically. It appears from an overview of previous cases that complainants have succeeded where they have been specifically named or targeted by the respondent (*Oger*, *Dahlquist-Gray*, *Li v. Brown,* 2018 BCHRT 228), but not if the statements are considered general or seem to be directed at the world at large, even if they are hateful (*Stacey*, *Watt*).

27. For example, in *Stacey* the Tribunal dismissed the complaint because the respondent’s political opinion did not *intend* to discriminate, without considering whether the statements also indicated discrimination, commenting that there were no submissions on that point (at paras. 51-55). *Watt,* following *Stacey*, found there was no evidence of adverse effect on women from a “mere statement of opinion” alone (at para. 24). Such an analysis ignores the text of s. 7(1)(a) which also applies to publications or statements which “indicate discrimination” and have the effect of discriminating. As recognized in *Watt* itself, the social and historical background for a publication or statement is a relevant consideration in determining whether s. 7(1)(a) is violated. If political speech or publicly expressed opinion taps into historic stereotypes or reinforces systemic discrimination, it creates harm for members of the targeted groups by perpetuating their historic disadvantage, thus indicating discrimination and violating s. 7(1)(a) even if it does not specifically target or name the complainant.

28. Finally, doctrines developed in civil defamation law and criminal law can be informative of the human rights analysis, although should not be imported uncritically. Civil defamation law may not engage the same *Charter* rights and values as human rights legislation. Criminal law has greater consequences for a person’s liberty interests than does an adverse finding under human rights legislation.

29. Nonetheless, even in those contexts, there is no categorical exemption for "political speech" or "public interest speech". For example, in defamation law there is a defense of qualified privilege, which exists if a person making a communication has "an interest or duty, legal, social, moral or personal, to publish the information in issue to the person to whom it is published" *and* the recipient has "a corresponding interest or duty to receive it" (*Neufeld v. Bondar*, 2025 BCCA 51 at para. 72). This defense focuses on the substance of a communication as opposed to the occasion on which the communication is issued (*Grant v. Torstar Corp.*, 2009 SCC 61 at para. 100; *Pointes* at paras. 74-80; *Paramount v. Johnston*, 2018 ONSC 3711 at paras. 45-46, 48). That is, qualified privilege may sometimes attach to political speech, but that does not always entitle a person to present to the public an "unvarnished opinion" about a political matter (*Neufeld v. Bondar*, at para 77).

30. Criminal law similarly recognizes that not all expression is equally valuable. For example in *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 760, the Supreme Court stated: "While we must guard carefully against judging expression according to its popularity, it is equally destructive of free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of s. 2(b)".

B. An allegation that support for gender affirming care for transgender people is "child abuse" may violate both s. 7(1)(a) and s. 7(1)(b)

31. The Commissioner's second point is that in every case concerning discrimination against transgender people, the Tribunal has an opportunity to further develop the law around the unique content of hate directed at them. In the Commissioner's view, one of the unique aspects of discrimination against transgender people is the allegation of child abuse made against transgender people and their allies. While there is no case that has expressly confirmed that accusing allies of child abuse is hateful, the Supreme Court has recognized that associating LGBTQ2S+ persons themselves with child abuse or pedophilia can constitute hate speech (*Whatcott* at para 45).

32. The approach to assessing whether publications meet the threshold of hate speech under s. 7(1)(b) is a contextual one. To understand that context, decision makers must take into account the particularities of how discriminatory publications target different marginalized groups. Where gender identity and expression are at issue, decision makers must take into account the pernicious stereotypes about transgender, non-binary, and otherwise gender non-conforming people that are the basis for much of the discrimination against them.

33. Statements that support for gender-affirming care is child abuse are increasingly made (Dr. Saewyc testimony Nov 29, 2025 at 11:12:36-11:19:34, esp 11:16:28; Dr. Saewyc expert report at 0173). The Supreme Court has found that exposure to hatred can result from expression that equates the targeted group with groups traditionally reviled in society, such as child abusers and pedophiles (*Whatcott* at para 45). They may incite violence against those who support gender-affirming care. For example, in *C.D. v. British Columbia (Provincial Health Services Authority*, 2019 BCSC 603, appeal from ultimate decision allowed in part, 2020 BCCA 11, a child applied to the Court for an order permitting that child to pursue hormone therapy. In the course of a preliminary application to anonymize the healthcare providers involved, the Court described the online reaction to the case, much of which accused the healthcare providers of child abuse and advocated for violence against them:

> [29] Below the articles in the Federalist, the Federalist has published reader comments. A number of these comments encourage or approve of violence against AB's healthcare professionals. Some of the more egregious posts include:
>
> - All the state actors in this incident (these doctors, etc.) need to be executed for high treason as well as child abuse and child abduction. Stealing a child from his parents to perform sex change perversions on the child is demonic behaviour and must be punished by death.
> - When those in positions of power and trust abuse children, parents need to retaliate. And we will start to see that here as the current push continues. I can tell you this though; if I had a

> daughter who was really struggling and someone in the lab coat told me they were gonna inject her with chemical cocktails (with permanent effects) whether I wanted them to or not, well… Parents have both a right and a duty to kill those who would abuse their kids.
> - It would be wise for the dad to take his daughter and flee Canada. This would be unwise because he would not win, but the dad has the moral right to use violence to stop the doctors from administering the testosterone to his daughter. Above all, he has a moral duty to do everything possible to ensure she never gets a(nother) dose.
> - If he chooses violence and the doctor dies, that is not murder and it may very well be better than doing nothing.

[30] Online posts relating to this proceeding also appeared on the online forum 4chan. Many of these posts also encourage violence against members of AB's healthcare team. Some of the more egregious comments include the following:

> *...massive problem and there is only one solution: kill all the enablers - kill the judge and his family - kill all those who convinced the daughter that she can be a man - torture them violently on HD video to make an example of them once this is done the enablers will be scared and they will stop.
>
> *If the dad murdered the judges and doctors that forced this and I was selected for jury duty in this trial I would not convict him
>
> [Emphasis added.]

[31] While these are the more egregious exhortations to violence, and the 4chan comments have since been taken down, the evidence also shows substantial online commentary analogizing AB's medical treatment to child abuse, perversion and even pedophilia. While these other comments may not specifically exhort violence against these health care professionals, they portray the professionals as criminals who hurt children, and therefore give rise to related risks of incitement of violence against them.

[32] Furthermore, while not all of the health care professionals were named in the comments, all of the health care professionals involved in AB's care

> may reasonably be concerned that they are a part of the group of "enablers" or "state actors" to which these threats pertain.…
>
> [33] On February 26, 2019 the two healthcare professionals specifically named as respondents in CD's petition received a direct email from an anonymous address calling them a "child abuser," stating that they should not be permitted near children, and that they belonged in prison. The emails contain a link to the February 26 Federalist article. Both have since felt compelled to make security changes at their practices and clinics, and are concerned about their safety and that of their other patients.

See also *A.M. v Dr. F*, 2020 BCSC 2139 at 25-47; *Hamm* at 101-102.

34. Such rhetoric is also dehumanizing because it questions whether transgender persons are human or exist (*Oger* at paras. 61-62).

35. Statements that gender-affirming support is child abuse are not based on evidence and are designed to produce an emotional reaction and a reflexive, unconsidered response. That type of response is the textbook definition of a moral panic, defined as a "mass movement based on the false or exaggerated perception that some cultural behaviour or group of people is dangerously deviant and poses a threat to society's values and interests." (*Oxford Dictionary of Law Enforcement*, (Oxford University Press, 2014)). This definition has been affirmed and applied in case law (see for example *R. v. Banks*, 2007 ONCA 19 at para 35; *R. v. M.(S.)*, 2013 ONCJ 219 at para 48; *University of Toronto (Governing Council) v. Doe et al.*, 2024 ONSC 3755 at paras 24, 73-74).

36. Moral panics, by definition, vilify or expose certain persons to hatred, particularly by those who have the power to react - voters and politicians dependent on voters for public office. Accusing those who support transgender people's right to identify their own gender and take whatever steps they need to affirm that gender of child abuse is also a means of further discouraging support, isolating and further marginalizing already vulnerable groups.

37. LGBTQ2S+ persons and groups have been a frequent subject of historic moral panics (see for example a description of a history of discrimination against sexual

minorities in *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25, at paras. 81-99). As the rights of transgender people are increasingly recognized and respected in our society, hate and discrimination by some people against them also rises. And while connected to historic moral panics, old stereotypes morph into new hateful expressions. The statement that gender affirming support is child abuse relies on old and well-established strategies of tapping into societal moral panics to produce adverse effects for a vulnerable group. As the Tribunal in *Oger* at para 61 commented:

> [61] However, as this hearing made clear, the journey is far from over. Unlike other groups protected by the *Code,* transgender people often find their very existence the subject of public debate and condemnation. What flows from this existential denial is, naturally, a view that transpeople are less worthy of dignity, respect, and rights. In the hearing room for this complaint, we were witness to repeated, deliberate, and flagrant attacks on Ms. Oger based on nothing more than a belief that her very existence is an affront.

38. Transgender people are a particularly vulnerable group, who have disproportionately experienced the effects of hateful and discriminatory speech. The Tribunal must be mindful of the unique experiences of trans people – including the role of moral panic in generating hate and discrimination – when determining complaints brought by transgender persons or on their behalf. Doing so will give effect to the purposes of the *Code* to identify and eliminate hatred and discrimination.

All of which is respectfully submitted on behalf of BC's Human Rights Commissioner.

Date: April 22, 2025

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Counsel for the Intervenor, B.C.'s Human Rights Commissioner

TABLE OF AUTHORITIES

TAB	LEGISLATION	SECTIONS CITED
26.	*Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, 1982, c 11 (UK).	s. 2, s.15
27.	*Human Rights Code*, R.S.B.C. 1996, c. 210	s. 7