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Jim Emmerton
Executive Director
British Columbia Law Institute
1822 East Mall
University of British Columbia
Vancouver, BC V6T 1Z1
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Re: Research on Workplace Dispute Resolution

Dear Mr. Emmerton,

I understand from your news release dated June 30, 2010 that the Ministry of Labour has asked the British Columbia Law Institute to undertake research and analysis in relation to workplace dispute resolution mechanisms in BC. As per our conversation on July 28, I am writing in order to share the concerns of West Coast LEAF regarding the possibility of a new workplace super-tribunal.

In their paper entitled “Human Rights in the Workplace: The Case for a Specialized Workplace Tribunal”, authors Peter Gall, Kate Bayne and Susan Chapman (hereinafter “the Gall paper”) argue that the jurisdiction of Employment Standards, the Human Rights Tribunal and the Labour Relations Board should be combined into a new workplace super-tribunal. Further, they argue that the Human Rights Tribunal (the Tribunal) should be eliminated; all human rights claims within the employment and labour context would be dealt with by the workplace super-tribunal and all non-employment related claims could be channeled through Provincial Court or BC Supreme Court. I understand that this paper may be foundational for the Government of BC’s consideration of a proposed new tribunal.

West Coast LEAF’s mandate is to achieve equality by changing historic patterns of systemic discrimination against women through BC-based equality rights litigation, law reform and public legal education. West Coast LEAF is concerned about the possibility of the elimination of the Tribunal, particularly if such a decision was considered without extensive consultation beyond the limited mandate given to the

BC Law Institute in these circumstances. West Coast LEAF believes that the elimination of the only specialized human rights administrative body in BC could have a profoundly negative impact upon individuals who experience discrimination and are entitled to a remedy in the law for that experience, individuals vulnerable to discrimination, and equality seeking groups in this province.

The elimination of the Tribunal would have a particularly significant impact on women. Although there are 15 possible grounds on which to claim discrimination, 13% of the claims made in 2008/09 were on the ground of sex (which includes harassment and pregnancy). While it is unclear how many of the other complaints were brought to the tribunal by women, it is a logical inference that many of the claims beyond those brought on the basis of sex will have direct relevance to the lives of women in this province. Women's experiences of racism, homophobia, ableism, poverty and other forms of discrimination and disadvantage are equally important to their citizenship and agency in this Province. West Coast LEAF has a strong interest in ensuring access to justice for those who will be most significantly impacted by the elimination of the Tribunal and the creation of a workplace super-tribunal, including people living in poverty, women and other marginalized people.

While many of those working within the existing human rights system identify concerns with the operations and impact of the current human rights regime, including the authors of the Gall paper, the solution lies in thorough consultation and perhaps a creative re-visioning of the Tribunal processes and procedures, rather than wholesale replacement. For example, one of the areas of dissatisfaction is with the Tribunal's concurrent jurisdiction with other administrative bodies; yet this issue may only be effectively addressed when examined holistically, since much of this concurrent jurisdiction falls outside the workplace tribunals that are subject to this proposal. Another concern is with the lack of legal representation in the framing of complaints, an issue which is not addressed in the new proposed regime. Meaningful consultation with a broad range of stakeholders, particularly groups and individuals historically vulnerable to discrimination, and professionals within the system, is essential to any amendment or re-visioning process.

In our preliminary consideration of the proposed new regime for workplace and human rights complaints, West Coast LEAF is concerned that:

- The purpose of administrative structures is to increase expertise in the subject matter of the dispute – combining tribunals and broadening the mandate of workplace decision makers will lesson specialization and create more scope for judicial review and prolonged litigation.
- Separating workplace and non-workplace complaints will fracture the development of the case law on discrimination in the human rights context, and could lead to a confusing development of the common law. If different streams of case law are developed, this creates the potential for the grounds

of discrimination and the protection they afford to differ between employment and other cases.

- Decision making in the unionized and non-unionized contexts differ, and care needs to be taken in combining the expertise of decision makers in these two very different areas. In particular, the Labour Relations Board (LRB) is concerned with resolving differences between two powerful parties: the employer and the union. Human rights structures, on the other hand, are concerned (in the employment context) with the power imbalances between the individual and the employer, and ensuring employee rights are duly respected despite such power differentials. Further, the LRB is appropriately concerned with preserving “labour peace”; that is, the Board must resolve disputes in a manner that promotes the future productive relationship between the parties. On the other hand, the Tribunal is more concerned with justice for the individual parties, and focused (at least theoretically) on systemic change that aims to challenge the established order rather than maintain it. On a related note, the remedial focus of the different administrative structures differs significantly, with reinstatement being a common remedy before the existing workplace bodies but not the Tribunal.

West Coast LEAF is concerned that severing employment discrimination cases and handing them to a tribunal whose backbone is expertise in labour relations would impair the ability of human rights law to evolve in a way that is responsive to the many other equally important contexts in which human rights disputes arise. Change may be needed to make human rights adjudication in BC more effective in responding to the evolution of human rights issues in the 21st century. However, fracturing human rights adjudication as proposed in the Gall paper and subsuming discrimination in employment to labour relations concerns that apply only to a narrow range of cases is simply not capable of moving us forward.

- According to the Annual Report for 2008/09, 64% of the complaints received by the Tribunal dealt with employment issues, leaving 36% of the volume of the current human rights complaints outside the jurisdiction of any proposed employment super-tribunal. Furthermore, some complaints include both employment related and non-employment related issues in the same complaint, which are not easily severable. The Gall paper does not adequately address what would happen to the non-workplace (or multi-section) complaints that currently fall within Tribunal jurisdiction. While I understand that the BCLI has not been given the mandate to examine this issue, the feasibility of a workplace super-tribunal is indivisible from the feasibility of the elimination of the Tribunal and the subsequent displacement of non-workplace human rights complaints. Since there is no tort of discrimination, and therefore no common law cause of action for

human rights matters¹, any expanded jurisdiction of the Courts to deal with human rights matters would require legislative reform. The BC Government must give this closely related issue significant consideration, which it has failed to demonstrate in the mandate given to BCLI's project.

- The proposed new structure also raises access to justice concerns. If more human rights matters fall within the jurisdiction of the Court rather than an administrative tribunal, there will be an increased demand for representation. Such representation will be more costly before the courts than before the Tribunal, because of more complex and demanding procedural and evidentiary rules. Sending non-workplace related discrimination complaints to the courts will set up additional obstacles for complainants, including but not limited to the need for representation; these obstacles will ultimately disadvantage the development of human rights law by decreasing the number of complaints being processed. If the need for state funded counsel is not satisfied, more people will be self represented, which will result in slower processes, inefficiencies and possibly unfairness. The Gall paper suggests that the Human Rights Commission may need to be reconstituted for this purpose. While West Coast LEAF agrees that the reconstitution of the Commission should be considered, this idea requires significantly greater thought and consultation, and is not merely incidental to the proposed workplace super-tribunal.

The importance of human rights tribunals has been internationally recognized. In 1993, the United Nations General Assembly adopted by way of resolution the Paris Principles relating to the Status of National Institutions². While these Principles do not explicitly apply to provincial institutions such as the BC Human Rights Tribunal, the UN clearly recognized the importance of having an institution “vested with competence to promote and protect human rights” with the broad mandate to examine “any situation of violation of human rights which it decides to take up”; this mandate can reasonably be applied to BC in the context of Canadian federalism, where the federal human rights structure deals with matters outside the jurisdiction of the provincial systems. The provincial systems are vital in order to ensure that the full spectrum of human rights complaints have a forum for resolution, including those within federal and provincial jurisdiction. Dividing adjudication of human rights matters in the proposed fashion, which may ultimately dilute the strength of human rights jurisprudence, does not satisfy this international directive.

While West Coast LEAF appreciates the opportunity to voice these concerns, we want to emphasize that these preliminary observations do not constitute a sufficiently comprehensive consultation. Additional consultation with organizations representing marginalized British Columbians, who rely upon the protection of the human rights system, must be sought. Any changes made by the Government to the

¹ See *Seneca College v. Bhadauria*, [1981] 2 S.C.R. 181.

² Online: <http://www2.ohchr.org/english/law/parisprinciples.htm>.

existing human rights system must be accountable to those whose rights will be impacted by such a shift. While I am aware that the BCLI is conducting consultations with key stakeholders, with respect, all such stakeholders have vested positions in the outcomes of this debate. This consultation is not complete without the voices of both professionals working within the existing system and those who need, or may need, an accessible and just remedy for their experience of discrimination.

Thank you for considering West Coast LEAF's submission. We would be pleased to have the opportunity for further consultation and for further sharing of our expertise in this area. I look forward to hearing from you.

Yours truly,

A handwritten signature in black ink, appearing to read 'K. Govender', with a long horizontal flourish extending to the right.

Kasari Govender,
Legal Director.