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Sent via email to [Piero.Narducci@chrc-ccdp.gc.ca](mailto:Piero.Narducci@chrc-ccdp.gc.ca)

October 18, 2019

Piero Narducci  
Director General  
Complaints Services Branch  
Canadian Human Rights Commission

Dear Mr. Narducci:

**Re: ARCH Submissions on the Canadian Human Rights Commission Draft Complaint Rules**

On September 13, 2019, the Canadian Human Rights Commission (the “Commission”) invited several organizations to participate on a teleconference call to provide feedback on the recently drafted CHRC Complaint Rules (the “Rules”). ARCH participated on the October 7, 2019 teleconference call and provided several suggested amendments to be made to the draft Rules. ARCH provides the following written submissions to summarize and supplement these suggested amendments with the objective of assisting the Commission in making its process more accessible for complainants with disabilities, as well as more accessible for complainants who are unrepresented.

For ease of reference the suggested amendments are organized below by theme and, where applicable, specific rules are expressly identified.

**A. Accessibility and Disability-Related Accommodations**

Rule 6.2 provides that where, in order to participate in the complaint process, a party requests an accommodation based on a prohibited ground described in the *Canadian Human Rights Act*,<sup>1</sup> the

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<sup>1</sup> RSC 1985, c H-6

Commission will provide such accommodation as is reasonably necessary. ARCH has eight suggested amendments to this provision:

- (1) The provision regarding accessibility should not be lumped in under Rule 6 which speaks to “Application” of the Rules. Rather, the Rules should be drafted to provide for a new stand-alone rule specifically contemplating accommodations and accessibility of the process. This new rule should communicate clearly to complainants necessary information including how to request an accommodation, to whom the accommodation request should be made, and when an accommodation request can be made.
- (2) The process by which a complainant requests accommodation should be different and separate from the process by which a complainant files a complaint with the Commission. This process should have a specific contact person dealing with the disability-related request who is separate from the person overseeing the complaint itself.
- (3) Rule 6.2 as it is currently drafted uses the phrase “reasonably necessary” to denote the level to which the Commission must rise to meet an accommodation request. It is respectfully suggested that this language be replaced with stronger, human rights language. Specifically, ARCH suggests that the phrase “reasonably necessary” be replaced with “appropriate accommodations up to the point of undue hardship.”
- (4) The Rules as they are currently drafted are inconsistent as to when 6.2 applies and when it does not. For example, Rules 7.4, 7.5 and 7.6 all explicitly state that they are subject to 6.2, but Rules 7.1 and 7.2 make no mention of the accessibility provision. ARCH suggests that, in order to remedy this, that it is made plain and clear that all of the Rules are subject to 6.2. This would rectify any ambiguity and serves the Commission’s objective in making the process accessible for complainants.
- (5) Rule 6.2 currently conflates two different accommodation requests in one paragraph. The first sentence generally addresses disability-related accommodation requests, while the second sentence specifically addresses disability-related communication accommodation requests.

For greater clarity, ARCH suggests that these should be two different provisions and should not be lumped into one paragraph.

- (6) Likewise, a separate provision should be drafted to provide for disability-related accommodations required by persons with disabilities who are not able to sign electronically or physically. Accordingly, ARCH suggests drafting a provision clearly stating that alternative methods of signing documents are available for complainants with disabilities who require it as a disability-related accommodation.
- (7) The Rules should explicitly state that disability-related accommodation requests made by the complainants in order to be able to fully participate in the proceedings will be dealt with confidentially by the Commission. It is understood that the Commission's process is confidential. However, when referring to confidentiality in this context, ARCH is addressing two particular instances.

First, there are many instances in which a complainant makes a disability-related accommodation request, and the request as well as corresponding information going to the request is provided to the respondent. It is respectfully submitted that not all accommodation requests, especially those that are procedural in nature and that have no bearing on the substantive issues raised in the complaint, should be disclosed to the respondent. This is of special importance when considering that sometimes the Commission requires medical information to support the disability-related request. This medical information should be dealt with confidentially by the Commission by not disclosing it to the respondent.

Second, and relatedly, while the Commission's process may be confidential, any final decision of the Commission's may be subject to judicial review. On a judicial review, the Commission's once confidential file becomes part of an adjudicative record that is no longer confidential due to the presumption of the open court principle. As such, should the Commission include documents that are not part of the substantive issue of the human rights complaint, but only relevant for the purposes of receiving a disability-related accommodation, it unnecessarily becomes part of an adjudicative record that is now available for public consumption, risking violating the privacy of complainants with disabilities.

(8) The Rules should clearly state that disability-related accommodation requests can be made any time throughout the process. Some complainants with disabilities may be aware of the disability-related accommodations they need to fully participate in the Commission's process at the commencement of their complaint and will be able to make that request at the beginning. Other persons with disabilities, however, may not be prepared to make disability-related accommodations requests at the commencement of their complaint for a number of reasons including: they do not know that they require accommodations to participate, or are not familiar with the specific accommodations they need at that time. Further, disabilities are not static; they are acquired throughout a person's lifetime and may be episodic in nature. Accordingly, a complainant may not have a disability at the start of the complaint process (and may be bringing the complaint on a separate ground), but may acquire a disability in the midst of the process, at which time the need for a disability-related accommodation may arise. As such, in order to ensure that all persons with disabilities are able to participate to the fullest extent in the process, the Commission should make it clear that disability-related accommodations should be requested at the time they are needed.

## **B. Forms Acceptable to the Commission and Filing Deadlines**

Rules 7 and 8 of the Rules set out the criteria that must be met in order for a complaint form to be deemed acceptable by the Commission. The criteria set out in Rules 7.1 to 7.4 is specific, at times stringent and places a heavy burden on complainants. This is especially concerning when taking into consideration the corresponding deadlines as set out in Rules 8.1 and 8.5, both of which stipulate that the Commission will consider the filing date of a complaint is the date on which a final updated or revised version is submitted to the Commission and not the date on which the complaint was first filed.

This is problematic for several reasons. First, while it is appreciated that the specificity of the criteria is intended to make the Commission's process transparent and easy to follow for first-time and unrepresented litigants this intention is thwarted when a complaint is returned to the complainant because a specific criteria is not fulfilled, for example, when a complainant does not provide "a statement that the complainant or the individual or individuals on whose behalf the complaint has

been filed have reasonable grounds for believing that they are or have been the victim(s) of discrimination on the basis of one or more enumerated grounds.”<sup>2</sup>

The concern with 7.2 is that a complainant will demonstrate good faith by submitting their complaint within the one-year limitation period,<sup>3</sup> only to have their application returned to them by the Commission because they did not abide by the 7.2 criteria and be advised to revise it, only to find that upon re-submission they are now outside the limitation period. ARCH appreciates the Commission’s position that a delay argument will not be triggered by the Commission in instances such as this. However, it still remains that a respondent can easily trigger a delay argument, and that the manner in which the Rules are drafted will encourage Respondents to do so.<sup>4</sup>

The Rules allow for the amending of any document filed with the Commission,<sup>5</sup> accordingly, ARCH suggests that the Rules should be amended to state that the filing date of an application will be the first date on which a complainant submits their complaint. Where the Commission determines that any criteria is missing, then a complainant should be permitted to amend their application to ensure that the procedural requirements are met without altering the original filing date.

The aforementioned also addresses the concerns raised by filing deadlines set down by the Commission in section 8 of the Rules. In particular, Rule 8.5 states that “the date of filing a complaint form or other document that has been updated or revised is the date on which the Commission receive the final updated or revised version.” This is very problematic for several reasons. First, this Rule contradicts the Commission’s position on permitting the amending of documents. If the Commission allows for the amending of documents, which it rightly should, then it follows that a complainant should also be permitted to amend or revise their complaint without being penalized for it.

Secondly, the occasions on which a complainant will be asked to revise their complaint is because they may have not abided by procedural requirements set down by the Commission. The

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<sup>2</sup> Rules, at Rule 7.2(d).

<sup>3</sup> *Supra* note 1 at section 41(1)(e).

<sup>4</sup> It bears noting that, as lawyers, we appreciate that the Commission cannot bar a respondent from raising a timeliness issue, nor is that what ARCH is suggesting. However, the Commission has opened the door to the respondent to raise such arguments by drafting its Rules in the way in which they are drafted. The filing deadlines, as they are currently drafted, have the potential to cause great prejudice to complainants who avail themselves of its process.

<sup>5</sup> Rules, at Rule 2.4(b).

Commission itself will send a complaint back to the complainant if they are unsatisfied with the form. Specifically, Rule 8.1 states that the Commission does not consider a complaint to be filed unless it is in a form acceptable to the Commission. What constitutes “acceptable form” is the criteria set out in Rule 7.2, which is discussed above. This raises limitation period concerns as mentioned above in the discussion on Rule 7.2.

In summary, the concern is that the acceptable form criteria set out in section 7.2 coupled with the Commission’s position on filing dates burdens a complainant and increases the likelihood that an unrepresented complainant will fall outside of the limitation period. This contradicts the Commission’s purpose which is to be an accessible forum. Accordingly, ARCH strongly suggests that the filing deadlines be revised to indicate that the date on which a complaint is first received is the date of filing. Should a complaint form not fulfill all of the section 7.2 criteria, then the Commission may send it back to the complainant and request that it be amended. This will allow a complainant to preserve their limitation period while simultaneously ensuring that the Commission receives all of the information it requires to process a complaint.

### **C. Support Persons Do Not Have an Independent Responsibility to the Commission**

Rule 11.1 contemplates “support persons” for the first time in the Rules and asserts that they have a responsibility to cooperate with the Commission at all stages of the complaint process. ARCH suggests that Rule 11.1 be amended to remove “support persons.”

Support persons are often an accommodation for persons with disabilities for a variety of disability-related needs. In this context, it is important to recognize that support persons are present, not as individuals with their own agenda or interests in the complaint, but rather as an accommodation that enables the complainant with a disability to access the complaint process. The complainant owes a responsibility to the Commission and by extension so does the support person, but the support person does not hold that responsibility separate and apart from the complainant.

It is often the case that when a complainant has a support person, that support person is perceived as a substitute for the complainant themselves. For example, a support person may be present at a mediation and the other parties in the room will direct their questions or statements at the support

person rather than the complainant themselves. This is not appropriate. Accordingly, the Rules should be drafted in such a way to reflect that the support person is an accommodation and not a separate individual who owes an independent duty or responsibility to the Commission.

#### **D. The Importance of Sign Languages**

Rule 11.5 states that parties are entitled to communicate and receive available services in both official languages from the Commission. ARCH suggests that this Rule be amended to state that services are available in “French, English and Sign Languages.”

ARCH appreciates the Commission’s position that this Rule was drafted to reflect Canada’s official languages as set down by the *Official Languages Act*.<sup>6</sup> It is ARCH’s position, however, that the Rules should treat *OLA* as a floor and not a ceiling. Again, as a Commission whose objective is to protect and promote human rights, and to provide an accessible complaint process, the Commission’s Rules should reflect that the forum is inclusive not just to those speaking Canada’s official languages, but also to persons from the Deaf community whose first language is neither English nor French. This is especially imperative considering that the recently enacted *Accessible Canada Act*,<sup>7</sup> specifically contemplates the recognition of sign languages.<sup>8</sup> ARCH suggests that the Commission’s Rules also reflect this recognition.

#### **Conclusion**

ARCH appreciates the Commission’s recognition for the need to codify their rules and practices in the aim of making its process more transparent and accessible to complainants. However, considering that the majority of the complaints filed with the Commission are based on the ground of disability, it is imperative that the Rules contemplate and communicate its accessibility process to ensure that persons with disabilities are able to fully participate. By the same token, considering that many complainants filing complaints with the Commission are unrepresented, it is important to ensure that

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<sup>6</sup> RSC 1985, c 31 (4th Supp) [“OLA”].

<sup>7</sup> SC 2019, c 10.

<sup>8</sup> In particular, section 5.1(2) speaks to the recognition of American Sign Language, Quebec Sign Language and Indigenous sign languages are recognized as the primary languages for communication by deaf persons in Canada.

the Rules do not place a disproportionate burden on complainants by dictating specific criteria, that if not fulfilled increase the probability that a complaint will fall outside the limitation period.

ARCH appreciates the Commission's invitation to consult on its draft Rules and to provide verbal and written submissions in the hopes that it will be of assistance to the Commission.

Sincerely,

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