Submission of the BC Human Rights Clinic to the BC Office of the Human Rights Commissioner's Inquiry Into Hate in the Pandemic

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Community Legal Assistance Society (CLAS)

Introduction

Good morning. Thank you for the opportunity to provide input to the Office of the Human Rights Commissioner's Inquiry into hate during the pandemic.

My name is Laura Track. I use she/her pronouns. I'm joining you today from the unceded territories of the Musqueam, Squamish, and Tsleil-Waututh Nations. I'm a human rights lawyer and the director of the BC Human Rights Clinic, a program of the Community Legal Assistance Society (CLAS). The Clinic assists people who have experienced discrimination in BC to pursue human rights complaints at the BC Human Rights Tribunal. Our services include providing information, guidance, and referrals by phone, email, and through our website; providing summary legal advice; as well as legal representation in Tribunal proceedings. We also deliver educational workshops, seminars, and trainings to both rights-holders and duty-bearers to help them understand their rights and responsibilities under BC's *Human Rights Code*.

Other CLAS programs assist marginalized and low-income people with legal issues including tenancy, income security, detentions under the *Mental Health Act*, and workplace sexual harassment, among other issues. This submission includes input from frontline staff in several of CLAS's program areas.

I offer our perspective and recommendations in a spirit of humility, recognizing that CLAS has not done the broad outreach and community consultation, research, or analysis necessary to ground comprehensive recommendations for legal reform. I want to acknowledge that the Human Rights Clinic is not a law reform organization. We are a provider of legal services, and our mandate does not extend to research, community consultations, or data analysis. While CLAS as a whole does have law reform work as part of its broader mandate, issues of hate, and the appropriate policy responses to these issues, are not topics we have researched and studied. CLAS's primary law reform focus is in the area of poverty law and the systemic legal and policy issues affecting low-income people marginalized by poverty, disabilities, and other intersecting sources of oppression. We are not experts in criminal law, the regulation of technology and online spaces, or civil legal responses to hate, and while we are aware of some of the good work going on in BC and across the country to provide community-led responses to the rise of hate during the pandemic, we cannot speak knowledgably to the breadth and depth of this essential work.

What we can speak to, I hope helpfully, is our considerable direct experience assisting people who have experienced various forms of discrimination, and who are searching

for options for accountability, healing, and redress. We are grateful for the opportunity to participate in this important conversation.

My submissions will focus on three broad topics:

1. The gaps in BC's human rights laws that prevent the human rights system from being adequate to the task of responding to and addressing hate in our communities.
2. The systemic barriers to accessing the human rights system in cases that do fall within the purview of the *Human Rights Code*. This includes a lack of legal assistance at the drafting and filing stage of a human rights complaint, and the inordinate backlog and delays in the Tribunal's complaint resolution process.
3. The absence of other good options for those targeted by hate to seek legal redress for the harm they have suffered.

1. Gaps in human rights protections

A. Protected Areas

Some months ago, I was invited by Resilience BC's Anti-Racism Network Hub to deliver a workshop to some of the people involved in setting up the Hub. They asked me to speak about the *Human Rights Code* and its application to incidents of racism and hate, and to describe the Clinic's services in these types of cases. I do these sorts of workshops all the time, and was delighted to connect with this important new service and resource.

I went through my usual workshop content, describing the characteristics protected by the *Code*, with a particular focus on the grounds of race, colour, ancestry, and place of origin and examples of the kinds of treatment that might constitute discrimination on these grounds. I also explained the protected areas, emphasizing the application of the *Code* in employment, tenancy, and access to publicly available services.

When I got to the end of my presentation, I received several questions from the participants about scenarios involving racist treatment in a wide variety of settings. "What if another passenger made racist comments to someone on the bus?" people wanted to know. "What about a hateful comment made to someone on the street, or in a parking lot, or while they were walking along the sidewalk?" I clicked back to my slide listing the protected areas, and reminded them of how the *Code* only applies to discrimination in employment, housing, and the provision of facilities and services to the public. "So there's no recourse?" they asked. "Someone couldn't use BC's human rights complaints process to seek accountability and redress for these clear acts of discrimination and violations of human rights?" They were dumbfounded to learn that our human rights laws do not protect people from such egregious acts of discrimination and hate, and that a human rights complaint could almost certainly not succeed in these types of cases.

These were sophisticated service providers. Imagine how confusing it must be to the general public to learn that the human rights system – the body with the express purpose of preventing and responding to incidents of discrimination – is incapable of responding to and addressing such egregious examples of discrimination, racism, and harm?

The need to fit one's experience of discrimination into an area of daily life that is protected by the *Code* is likely the most significant barrier we see for people coming to CLAS seeking legal information and guidance on how to respond to instances of hateful conduct.

CLAS lacks the data collection capabilities to capture and report on how often these types of cases are coming to us, and whether they have increased since the onset of the pandemic. While I cannot provide quantitative data to you in these submissions, I can tell you that since March 2020, CLAS has fielded numerous calls and inquiries from people who have experienced discrimination and hate that can be linked with racist attitudes about people and the pandemic.

A few examples serve to illustrate:

One caller, who identified as Asian, was in a restaurant and was verbally attacked by people sitting at the table next to her. They told her to go back to China, and to take her disease with her. She was embarrassed and left the restaurant. She called CLAS to see what action she could take against these individuals.

Numerous other callers have also reported being told to "go back to China" in other contexts, including while riding the Skytrain.

A second caller, who identified as Asian-Canadian, reported that someone had thrown a can of pop at her and her partner from a moving vehicle, screaming "thanks for Covid!" and using a racist slur. She called to ask what legal rights they had against the offending individuals.

A third caller who identified as half-Japanese said he was waiting in line at a pharmacy when a woman who was also waiting in line and was speaking to another woman about Covid turned and said to him "We need to deport all of you people back." He said he told the store cashier, who informed him there was nothing they could do and he should just ignore the women. He was disappointed by the store's response and wondered whether stores and businesses have any obligation to develop policies on dealing with racist conduct.

With the arguable exception of the third incident and the pharmacy's response to the racist incident, none of these incidents could ground a successful human rights complaint. The experience of racist treatment while walking down the street did not occur in an area of daily life protected by the *Code*. While the first caller experienced the discrimination at a restaurant, which would be covered by s. 8 of the *Code* as a service customarily available to the public, the offending customers were not in any kind

of a service relationship with the caller, and so could not be held individually liable under the *Code*. It does not appear the caller raised the issue with the restaurant staff and asked them to take any action.

There would of course be practical challenges to bringing complaints against individuals in these types of cases as well, including identifying and serving the respondents. I raise these examples as illustrative of a wide gap in legal protections from discrimination in our daily lives. The application of the *Code* and the areas to which it does and does not apply are poorly understood. And, as I will discuss further below, there are few if any legal alternatives for recourse and redress when a hateful incident falls outside of the *Code's* protected areas.

B. Protected Characteristics

Beyond the limitations of the *Code* in terms of the protected areas, there are also limited grounds of discrimination that are prohibited by the *Code*. Discrimination and hate based on someone's income or socio-economic status is not prohibited by the *Code*, leaving instances of poor-bashing and discrimination against people who are homeless, for example, the outside the protections of the law. Such conduct has been all too frequent during the pandemic, as seen in public responses to encampments and other visible manifestations of failed social and economic policy to address poverty, inadequate and unsafe housing, and the deadly drug poisoning crisis.

We see other potential gaps in the characteristics protected from hate and discrimination by the *Code*. Fat-shaming and hateful conduct targeting someone's body size, for example, is outside the *Code's* scope. Discrimination based on the language someone speaks, or their immigration or citizenship status, may not be captured unless it can be linked to a person's race or place of origin, which are protected. Until recently, hate that targeted someone's Indigenous identity was not explicitly protected by the *Code*, though we are happy to see that this gap was addressed with the recent addition of this ground to the protections of the *Code*.

We recommend that the characteristics protected by the *Code* should be expanded to include, at the very least, social condition, which has been studied and advocated for by many groups – including the Commission – for many years. We would encourage the Commission to also lead research into and make recommendations for additional grounds that could be added to the protections of the *Code*, such as body size, citizenship status, and potentially others.

C. Hateful Publications

Section 7 of the *Code* prohibits a person from publishing, issuing or displaying any statement, publication, notice, sign, symbol, emblem or other representation that is likely to expose a person or a group or class of persons to hatred or contempt.

This is something I can provide some quantitative data on. In the Clinic's fiscal year of 2020/21, we received zero applications for legal assistance with a s. 7 complaint. In 2019/20, we had one (based on gender identity and expression). In 2018/19, the number was zero, and in 2017/18, it was again one.

A review of the Tribunal's annual reports and breakdown of their cases reveals that section 7 cases comprise a similarly miniscule proportion of their work.

The bar for what constitutes a publication likely to expose a person or group to hatred or contempt is extremely high. Moreover, the types of communications the section applies to, such as posters, pamphlets, and other types of physical, printed statements, have limited relevance to our modern world in which so many of our communications happen online.

Until 2013, section 13 of the *Canadian Human Rights Act* prohibited communication of hate speech "by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament." In other words, the *Act* prohibited online expressions of hate. When the federal Conservative government repealed that section of the Act in June of 2013, it left a glaring gap in the Canadian legal landscape with respect to providing a mechanism of accountability and redress for hate speech communicated online. While the BC Human Rights Tribunal has recently indicated that it may retain some jurisdiction over hate published on social media and online news sites,[1] this jurisdiction is far from clear and remains to be conclusively determined. I believe the Commission is intervening in the case – the Chilliwack Teachers v. Neufeld complaint; I'm heartened to see this and trust the Commission will continue to look for opportunities to advance the law on this important issue.

Much gender-based discrimination and harassment, in particular, occurs in online spaces. Numerous researchers have concluded that existing legislation does not hold internet companies and online platforms sufficiently accountable for permitting and facilitating the dissemination of hate. Internal procedures for requesting the removal of hateful posts are slow, difficult to navigate, and often ineffective. While CLAS is not well-placed to provide concrete recommendations on these difficult topics, we commend to the Commissioner the good work that has been done on this topic by women's groups, organizations such as the Canadian Anti-Hate Network, and scholars including Dr. Chris Tenove, Dr. Heidi J.S. Tworek, Dr. Fenwick McKelvey here in BC,[2] as well as many others across the country.

[1] *Chilliwack Teachers' Association v. Neufeld*, 2021 BCHRT 6 at paras. 86-92.

[2] Dr. Chris Tenove, Dr. Heidi J.S. Tworek, Dr. Fenwick McKelvey, Poisoning democracy: How Canada can address harmful speech online" (November 8, 2018) online: <https://ppforum.ca/publications/poisoning-democracy-what-can-be-done-about-harmful-speech-online/>.

D. Conclusion on Gaps in the Law

I've spoken about gaps in the law including the ways in which BC's *Human Rights Code* does not protect people from discrimination happening between individuals and in private settings; how it fails to protect people from discrimination and hate on the basis of many of the personal characteristics that we know are often targeted for hate; and the ways the law does not adequately respond to online hate.

Recommendations here are challenging. While we might advocate for a broader application of the *Code* to cover hateful incidents occurring outside the currently protected areas, and a broader remit for the BC Human Rights Tribunal to respond to and adjudicate these cases, and possibly even to have some investigative function to assist complainants to identify and name perpetrators, as will be discussed further below, the Tribunal is hugely under-resourced to meet even its existing mandate. Adding to its scope and work without a massive investment in resources would be completely untenable and would only make matters worse by providing an illusion of responsiveness, without the actual capacity and ability to deliver. It is also not clear that an adjudicative body is the appropriate place to undertake such work. We certainly do not advocate for a reinstatement of any type of gate-keeping body that would investigate complaints before referring them to the Tribunal for adjudication, as BC used to have and which many provinces continue to have. It is also not clear that an adversarial dispute-resolution process is even desired by those impacted by hate in many cases.

My mind goes to the community-based responses to anti-Asian violence that sprung up in Vancouver and across North America in response to the spike in anti-Asian violence that occurred during the pandemic. I am also thinking of the restorative justice practices that are applied in some criminal cases, and have been practiced by communities and cultures Indigenous to this land since time immemorial. I do not have the knowledge or expertise to speak to the effectiveness of these strategies in cases of hateful conduct or to how they ought to be designed to be most effective, educational, and perhaps even healing for all involved. But I do know that many of our clients, in all sorts of cases, are less interested in proving a case of discrimination and winning a monetary remedy before a Tribunal, and much more interested in having the person or institution that harmed them take responsibility for their conduct, acknowledge the harm they have caused, and make meaningful amends. I expect this is also true in many incidents of hate.

The Human Rights Tribunal certainly has an excellent track record of supporting and assisting parties to reach a resolution of human rights complaints outside a formal adjudicative setting, and has also, I understand, been working to incorporate Indigenous approaches to dispute resolution into their work, including healing circles and other restorative practices. Involving the body with the greatest expertise in mediating situations of discriminatory conduct in also responding to hate incidents would seem to make good sense. However, as I've mentioned, the Tribunal would need substantial

additional resources to take on this work. And as I will now describe, even for incidents of hate that do fall within the current parameters of the *Code*, people face inordinate delays and other barriers to accessing justice through the Tribunal's processes. These issues cannot be addressed without also addressing the critical lack of funding and support for the body tasked with preventing discrimination in our province.

2. Systemic Barriers to using the Tribunal complaint process

Even when situations do fall within the limited parameters of the *Code*, there are numerous systemic barriers to accessing that system and using it to effectively hold perpetrators accountable for the harms caused by discrimination and hate.

The first are the massive delays due to the over-taxed and under-resourced human rights complaints system. The Tribunal is experiencing an unprecedented surge in the number of cases filed, and is struggling to keep up with the demand given its limited resources. This is a huge challenge for the human rights system as a whole. It is unfortunate that, when the government finally reinstated the Human Rights Commission and charged it with advocating and educating British Columbians on their human rights, it did not provide commensurate additional resources to the dispute resolution body tasked with responding to and dealing with the increased cases it should have anticipated would follow.

It is somewhat trite to say that justice delayed is justice denied, but we see the truth of this statement every day at the Human Rights Clinic. We feel it's our responsibility to advise people considering making a complaint that the complaints process can take many years to resolve their issue. Once they have this knowledge, we see many people simply walk away from the process, either without ever filing a complaint, or at some point during the process when it becomes simply too much for them to continue to pursue.

The delays exist throughout the Tribunal's process, including at the very front end in terms of screening and service of complaints. It can take up to a year for a complaint to be served on the opposing party, which often results in additional delays when parties have moved, employees have left their employment, and people with knowledge of the events giving rise to the complaint have become more difficult to reach. Many human rights cases are appropriate for mediation and resolution through an early settlement, but when accessing even this process takes over a year after the filing of a complaint, the prospects of settlement can be undermined by the passage of time.

The application to dismiss stage is another source of significant delay and backlog in the Tribunal's system. Preliminary applications to dismiss a complaint essentially give respondents two kicks at the can to have a complaint against them dismissed. If they are not successful in the application, they can still defend the case against them at a hearing. There are no adverse costs consequences for filing an unsuccessful ATD, resulting in no downside to respondents in filing these applications. Complainants, on

the other hand, must go to great lengths to respond to what can be quite technical and legalistic applications, often supported by huge volumes of affidavit evidence. These applications are hugely burdensome for complainants, and for the Tribunal as a whole. They are also contributing to the massive backlogs the Tribunal is currently experiencing. They must be significantly scaled back, and in some cases prohibited altogether when the case requires assessments of witness credibility and findings of fact that cannot be made on the basis of affidavit evidence. This would include most if not all complaints alleging incidents of hate.

Another barrier to using the Human Rights Tribunal complaints process is the limitation period. Though recently extended from 6 months, many clients and callers to our Clinic and the SHARP Workplaces Program, which provides legal advice to people who've experienced workplace sexual harassment, still find the one-year limitation period much too short to allow them to learn and understand their legal rights and to, in some cases, recover enough from the discriminatory events to consider and pursue their legal options, seek legal support, and prepare and file a complaint. A review of the Tribunal's caselaw shows many complaints are being dismissed because they were filed beyond the one-year time limit. Important issues of discrimination and hate may be going unaddressed by the Tribunal because complainants are unable to file their complaints in time.

Feeding this problem is the lack of legal representation and assistance for people at the complaint drafting stage. The Clinic's mandate kicks in after a person has filed a complaint and had that complaint accepted for filing by the Tribunal. It is at that time that the complainant can apply for legal representation from our Clinic. While we provide some limited assistance for complainants prior to filing through our weekly Short Service Clinics, these are half-hour appointments that 1) are rarely sufficient to complete the lengthy complaint form, and 2) are in high demand and almost always booked up very quickly.

We have done what we can to adapt our services to meet this gap, within the terms of our funding and contract, and to be creative in how we can address this unmet need. We also know there are some other options for people at the drafting stage. While they all provide excellent services, mainly through law students and volunteer paralegals, they are not experts in human rights. I realize this may sound self-serving, but I cannot help but think it unfortunate that our Clinic, the most visible and widely known source of legal advice and support for human rights cases, is not resourced to provide this valuable service – which, I should note, has important downstream effects in that poorly drafted complaints add additional burdens to the Tribunal process, clog up the Tribunal's screening processes, and result in further delays.

There is one further barrier to accessing the Tribunal's processes in cases of hate and other forms of discrimination that I want to speak to. Many people who access our legal services, or who attend our workshops, are deeply skeptical of the Tribunal's ability or willingness to understand the nuances of their experience and make findings in their

favour. I cannot count the number of people who have told me they wouldn't bother to make a complaint about an experience of discrimination because there were no witnesses, they had no corroborating documentary evidence, or they otherwise doubted that they could persuade the Tribunal that their experience constituted discrimination. People perceive the system as stacked against them. Moreover, when they see that the Tribunal's decision-makers have historically been largely white and do not reflect the diversity of BC's population, they are even less eager to raise issues of racial discrimination with this body and wonder whether a white decision maker will be able to understand the experiences of everyday racism that impact them.

In addition to advocating for more funding and resources for the Tribunal to meet its current demand, we hope the Commission will also advocate for continued efforts on the part of the Tribunal to diversify its Members – which, I want to acknowledge, it has made some considerable strides on by adding several Indigenous Members to its team. We would also like to see the Commission advocate for ongoing training and support to the Tribunal to help ensure its decision-makers understand and recognize racist conduct and its impacts, including at the screening stage, application to dismiss stage, and in its determination of complaints after hearing.

Finally, it would be helpful for the Commission through its education work to join the Clinic and Tribunal in reminding the public that, while the complainant does bear the burden of proving their case, the lack of witnesses or other forms of corroborating evidence is far from a guarantee that a complaint will fail. As the Tribunal emphasized in a recent case, "The Tribunal is equipped to make findings of fact and can prefer a complainant's version of events even when it is contested and there is no other corroborating evidence. This should not deter complainants from coming forward or discourage them in the course of pursuing their complaints."[3] While certainly not perfect, the Tribunal does have experience identifying and understanding what it has called the "subtle scent" of racism and making an inference in complainants' favour despite the absence of direct evidence of racial discrimination. People targeted by discrimination and hate should not be deterred from filing a complaint, if that is what they wish to do, merely by the absence of direct evidence.

3. No good options

Returning to my experience delivering the human rights workshop to the folks at Resilience BC, as I mentioned, those participants were shocked and surprised to learn that the *Human Rights Code* would not apply to hateful and racist conduct by one shopper to another, from a person to their neighbour, or to the hateful conduct of a stranger targeting someone while they were walking down the street. They were even

[3] *The Patron v. Landmark Cinemas Canada*, 2020 BCHRT 127 at para. 16.

more distressed to learn that there are very few legal options available to people targeted and impacted by these types of events.

Of course, the *Criminal Code* prohibits assault, criminal harassment, and uttering threats, among other offences that may be relevant to this topic. The *Criminal Code* also prohibits public incitement or willful promotion of hate. Hate can also be an aggravating factor in criminal sentencing. However, much of what most people understand as a "hate crime" – the hurling of racial epithets from a moving vehicle, for example – is unlikely to violate the *Criminal Code*. The *Charter's* protection of freedom of expression means that many racist, demeaning, offensive and harmful statements will not be investigated by police nor pursued by prosecutors as a criminal offence. That said, cases the Clinic has worked on make clear that police would benefit from greater training on what may constitute the "willfull promotion of hate" for example, as well as greater training on responding to victims of such behaviour in a sensitive and trauma-informed manner, even when the conduct does not constitute a crime.

In any event, and pretty universally, the workshop participants I was engaging with reported that the people they serve would be unlikely to call the police regarding what had occurred. The same is true for the callers to CLAS I mentioned earlier. Sometimes that's due to a lack of evidence and a sense that there would be nothing the police could do. The couple targeted by the racist taunts by passengers in a passing vehicle, for example, did not get a license plate number for the vehicle, and felt that therefore, there would be little utility in reporting the event to the police.

More often, however, we hear from marginalized individuals that they would not feel comfortable or safe in reporting their experience to the police, and do not trust the police enough to report a hateful incident perpetrated against them, sometimes due to previous negative experiences they have had with police themselves. These more marginalized members of our society, including Indigenous and racialized people, people living in poverty, trans people, and people with precarious immigration status, are both the most likely to experience hate, and the least likely to feel safe to report it to police. The access without fear campaigns led by groups like Sanctuary Health, for example, have demonstrated the barriers people without official immigration status have in accessing police assistance for crimes committed against them due to fears of detention and even deportation if their status is discovered.

There are also some potential civil options victims of hate can consider, including an action in defamation or a suit under the *Civil Rights Protection Act*. I am not well-versed in these types of legal claims, but would note that there are some obvious and significant barriers to advancing a civil claim including the lack of legal aid to support such litigation, difficult and technical processes to navigate in BC Supreme Court, and the potential of an adverse costs award against an unsuccessful plaintiff. I would also note that the *Civil Rights Protection Act*, which creates a tort for conduct or communication promoting hatred or contempt of a person or a class of persons, or promoting the superiority or inferiority of a person or class of persons, only applies in

respect of a person or class's colour, race, religion, ethnic origin or place of origin. Promotion of hatred, contempt or notions of inferiority based on someone's gender, gender identity or expression, sexuality, disability, immigration status, social condition, any many other aspects of identity are not covered by this *Act*. I would also add that the *Act* appears to be poorly understood, infrequently used and, as far as I can tell, has never resulted in a successful action to obtain compensation or other remedies for a breach.

Conclusion

To conclude, I want to acknowledge an inherent challenge in using a colonial legal system to address incidents of hate, resting as it does on a foundation of white supremacy and the dispossession and subjugation of Indigenous Peoples. Moreover, Canada's colonial legal system is concerned with individual rights, while hatred is a collective problem and systemic racism and other forms of discrimination are baked into our very laws, policies, and institutions. One criminal conviction, or one successful human rights complaint or civil suit, does not undo history, it does not grapple with deeply entrenched societal attitudes, and it will not, without more, prevent hate from continuing to rear its ugly head.

The legal system is not adequately equipped to address and prevent hate. On its own, it will <u>never</u> be up to this crucial but exceedingly difficult task. Education aimed at promoting racial understanding and preventing prejudice must start early. Children deserve to learn this country's true history, to confront uncomfortable truths, and to be exposed to diverse perspectives as they learn and grow in our schools. More and better resources are needed so teachers are equipped and supported to facilitate this learning from kindergarten through to graduation.

Instances of hate are the sharp and pointy tip of a huge iceberg of systemic discrimination and structural racism impacting Black, Indigenous, and other racialized communities, as well as other disadvantaged groups. We will not successfully address instance of hate without confronting these larger systems of oppression. CLAS commends the Human Rights Commissioner for taking on this urgent work, and we thank you for listening to our submission.