THE MANITOBA HUMAN RIGHTS COMMISSION | LA COMMISSION DES DROITS DE LA PERSONNE DU MANITOBA

Written Submission
Standing Committee on Justice
Bill 26 – *The Human Rights Code Amendment Act*

The Manitoba Human Rights Commission is an independent agency of the Government of Manitoba. The mandate of the Commission is established by *The Human Rights Code* and is premised on the *United Nations Paris Principles,* which establish the role and function of human rights institutions to promote and protect human rights in the public's interest via an independent complaint mechanism, education, advocacy and research.

A key aspect of the Commission's mandate is the administration of our human rights complaints mechanism. While this system resolves countless human rights concerns each year, we recognize that delays within the current system pose significant access to justice concerns and undermine public confidence in Manitoba's human rights system.

Our system must evolve in response to these challenges, driven by principles of access to justice, efficiency and innovation in the justice system.

The search for greater efficiencies to address delay was at the heart of Allan Fineblit's 2018 Review of the Manitoba Human Rights Commission and Manitoba Human Rights Adjudication Panel. We understand that Mr. Fineblit's recommendations form the basis of many of the legislative reforms proposed in Bill 26. Our Commission is generally supportive of amendments that support the efficient use of our resources, including streamlined decision-making, powers for early dismissal of complaints and the proposed "appeal" mechanism that will serve as a check and balance on the reformed complaints disposition system. To ensure that these changes do not compromise access to justice for parties in this system, we will continue to provide strategic direction to Commission staff through policy and procedural development.

While most of the legislative reforms outlined in Bill 26 build upon Mr. Fineblit's recommendations, the Commission is deeply concerned with the implications of section 43(2.1) of the proposed Bill, which will cap damages for injury, feelings and self-respect at $25,000.00. We note that this recommendation was not included in Mr. Fineblit's report and we are not aware of any public consultation or analysis process examining the implications of this amendment. As such, we offer the following analysis and recommendations to the Standing Committee on Justice, to inform your deliberations on this section of the proposed amendments.

Background on Human Rights Remedies

Human rights legislation in all Canadian jurisdictions reflects broad, public policy objectives namely the recognition and rectification of discrimination in society. To

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achieve this end, human rights legislation takes a remedial rather than punitive approach. This was perhaps best stated by the Supreme Court of Canada in *Ontario (Human Rights Commission) v. Simpsons Sears* [1985] 2 S.C.R. 536:

> The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant (at para 12).

In *Walsh v. Mobil Oil Canada*, 2013 ABCA 238 the Alberta Court of Appeal noted that the remedial authority under human rights legislation not only addresses the impact of discrimination on the complainant, but also protects against future discrimination and serves as a "deterrent and an educational tool" (at para 31).

In every jurisdiction across Canada, human rights tribunals are provided with the remedial authority to make monetary awards (including compensation for financial loss, compensation for the impact of the discriminatory treatment – often referred to as damages for injury to dignity, feelings and self-respect – and compensation in cases of willful misconduct, malice or recklessness) and non-monetary awards (remedies that will end the discriminatory behaviour, secure future compliance with the law and reinstate any opportunities or privileges lost or denied as a result of the discrimination).

Damages for injury to dignity, feelings and self-respect are a remedial award aimed at compensating the complainant for the harm caused by discrimination. In *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880, the Human Rights Tribunal of Ontario noted that "the harm […] of being discriminatorily denied a service, an employment opportunity, or housing is not just the lost service, job or home but the harm of being treated with less dignity, as less worthy of concern and respect because of personal characteristics, and the consequent psychological effects" (at para. 46).

Moreover, as noted by Ranali and Ryder, injury to dignity is not a loss that is ancillary to the range of harms that are caused by discrimination – rather, it lies at the core of what makes discrimination harmful (see Ranalli, Audra and Ryder, Bruce, "Undercompensating for Discrimination: An Empirical Study of General Damages Awards Issued by the Human Rights Tribunal of Ontario, 2000-2015" (2017) Osgoode Legal Studies Research Paper Series).

The Manitoba Human Rights Adjudication Panel has relied upon the following factors in assessing the quantum of damages for injury to dignity, feelings and self-respect:

- Objective seriousness of the conduct
- Effect on the person experiencing the discrimination

(*Arunachalam v. Best Buy Canada*, 2010 HRTO 1880 (CanLII), cited with approval in *Emslie v. Doholoco Holdings Ltd*, 2014 CanLII 71723, and *A.B. v. Andrew Jasnikowski and Jefferey Jasnikowski o/a Jazco Management*, 2019 MBHR 1).

Additional factors include:

- Humiliation experienced by the complainant
- Hurt feelings experienced by the complainant
- A complainant's loss of self-respect
- A complainant's loss of dignity
- A complainant's loss of self-esteem
- A complainant's loss of confidence
- The experience of victimization
- Vulnerability of the complainant
- The seriousness, frequency and duration of the offensive treatment

(*Sanford v. Koop*, 2005 HRTO 53 (CanLII), cited with approval in *A.B. v. Andrew Jasnikowski and Jefferey Jasnikowski o/a Jazco Management*, supra)

In relation to compensation for injury to dignity, feelings and self-respect, the Alberta Court of Appeal went on to state in *Walsh v. Mobil Oil* that remedial awards that do not provide appropriate compensation can "minimize the serious nature of the discrimination, undermine the mandate and principles that are the foundation of human rights legislation, and further marginalize a complainant. Inadequate awards can have the unintended but very real effect of perpetuating aspects of discriminatory conduct" (at para 32).

The Manitoba Human Rights Adjudication Panel (MHRAP) has also recognized that the quantum for damages should not be too low, as it would "trivialize the importance of the Code by effectively creating a "license fee" to discriminate" (*Vetricek v. 642518 Canada*, 2010 HRTO 757 (CanLII), cited with approval in *A.B. v. Andrew Jasnikowski and Jefferey Jasnikowski o/a Jazco Management*, supra). Similar statements have been made by human rights tribunals in Alberta, Ontario, Nova Scotia and Prince Edward Island.

There are currently two jurisdictions in Canada that have caps on damages for injury to dignity, feelings and self-respect: Canada and Saskatchewan. In *The Canadian Human Rights Act*, damages for pain and suffering (akin to the remedial heading of damages for injury to dignity feelings and self-respect) are capped at $20,000.00. In addition, the Canadian Act provides for remedial compensation for malice, wilful misconduct and disrespect, also capped at $20,000.00. In 2000, a review of *The Canadian Human Rights Act* chaired by Justice La Forest, recommended the removal of all monetary caps in the Act, noting "this signals the importance of these kinds of compensation in human rights matters. The Tribunal can be expected to develop its own views on the damages that are appropriate for discrimination in each case." While these recommendations were made in 2000, the LaForest review was ultimately not implemented and the cap remains in place.

In Saskatchewan's *Human Rights Code*, damages for injury to dignity, feelings and self-respect are similarly capped at $20,000.00. Like Canada, in cases of wilful misconduct or malice, the tribunal may order up to an additional $20,000.00 in compensation.

Prior to 2008, Ontario had a similar prescribed limit under its former human rights act, however this limit was removed upon introduction of Ontario's *Human Rights Code*, to uphold the broader policy objectives of Ontario's human rights law and provide restitution to the complainant (see Ranalli and Ryder, 2017).

In Manitoba, the median award for injury to dignity, feelings and self-respect is $9,906. The highest award in this remedial category is $75,000.00 (see *T.M. v. Government of Manitoba (Justice), 2019 MBHR 13).* In arriving at this remedy, the Adjudicator noted that the award reflects the particular egregiousness of the conduct, the vulnerability of the respective complainant, the frequency and duration of the discrimination, and reinforced the importance that employers uphold their human rights obligations.

In *Kvaska v Gateway Motors (Edmonton) Ltd.,* 2020 AHRC 94, quoting with approval *Simpson v. Oil City Hospitality Inc*., 2012 AHRC 8 at para 63, the Alberta Human Rights Tribunal emphasized the importance of this last point in the assessment of general damages. "There is clear authority that an award of damages must be high enough to encourage respect for the legislative decision that certain kinds of discrimination are unacceptable in our society and should not be so low as to amount to a mere 'license fee' for continued discrimination".

Recent decisions have also emphasized other factors relevant to the assessment of general damages. There is clear authority that an award of damages must be high enough to encourage respect for the legislative decision that certain kinds of discrimination are unacceptable in our society and should not be so low as to amount to a mere 'license fee' for continued discrimination.

Analysis

The Commission remains concerned that capping damages for injury to dignity, feelings and self-respect may undermine human rights protections in the following ways:

1) Capping damages for injury to dignity, feelings and self-respect may act as a deterrent to filing human rights complaints. There is a risk that potential applicants may choose to pursue their human rights claims before the courts, where possible, in order to obtain a greater award of damages in the civil context. It is worth noting that there remains some contention as to whether complainants can pursue claims of discrimination or harassment via civil litigation (i.e. whether there exists a common law tort of discrimination or harassment, see *Seneca College v Bhadauria*, [1981] 2 SCR 181). Notwithstanding this, one of the purposes of Manitoba's human rights system is to provide an efficient, inexpensive and expert forum for adjudicating human rights matters. By introducing a statutory cap on damages for injury to dignity, feelings and self-respect, this may discourage complaints through our system and cause complainants to pursue civil remedies before the courts, where such a forum is available to them.

2) A legislated cap may limit the ability of Adjudicators to account for inflation in assessing awards in future years. In the context of civil litigation, the ”rough” upper limit on non-pecuniary damages is adjusted for inflation (see *Lindal v. Lindal*, [1981] 2 S.C.R. 629) and the Ontario Superior Court has held that the rough upper limit does not apply to intentional torts — in this case, assault, sexual assault and other misconduct of a sexual nature. This not only affirms that assessments of damages are context dependent, but also that establishing a “fixed” limit, such as a statutory cap, risks artificially low awards that do not reflect present financial conditions.
3) A legislated cap may limit the ability of Adjudicators to account for particularly egregious, long-lasting or serious circumstances of discrimination, and may not allow for adjudicators to account for complainants in particularly vulnerable circumstances. The case of *A.B. v. Joe Singer Shoes Limited*, 2018 HRTO 107, emphasizes the vulnerable circumstances that some complainants may find themselves in.
4) The legislated cap will further result in inconsistencies and misalignment in remedial awards across Canada. In other words, should the cap be enacted, a complainant in Ontario may receive greater remedy for comparable discriminatory conduct than a complainant in Manitoba, for example.
5) While there are no limits on other remedial headings, such as damages for financial loss, not all complainants incur financial losses in their particular circumstances of discrimination. For example, an individual who experiences racial profiling in a consumer setting may not incur financial loss but would undoubtedly suffer an injury to their dignity, feelings and self-respect. In other words, injury to dignity is not a loss that is ancillary to the range of harms that are caused by discrimination.
6) A legislated cap may have a particular impact on the rights of persons with disabilities, particularly those in need of reasonable accommodation. Capping damages for injury to dignity, feelings and self-respect may encourage employers not to pursue accommodation on the basis that incurring a potential liability under *The Human Rights Code* is less costly and more convenient than pursuing a complex, higher cost accommodation (for example, alterations to a built environment).

While we are not aware of the policy objectives that the cap on damages is attempting to achieve, we are surmising that the goal is to ensure that damages under this remedial heading remain reasonable and proportionate.

While this is an understandable concern, we note that there is no evidence to suggest that damages for injury to dignity, feelings or self-respect are disproportionate or unreasonable under the current statutory regime. To date, the median average of this type of damage award in Manitoba is less than $10,000.00, therefore falling well below the proposed cap. The Commission does not believe there is sufficient evidence to suggest that the effect of the Bill will be to deter adjudicators from awarding “unreasonable” remedies, as their awards generally appear to be reasonable and have been upheld by the Courts.

We also surmise that the basis of the cap may be to encourage alternative dispute resolution approaches to resolving human rights concerns. While there is no evidence to suggest a correlation between a cap on damages for injury to dignity, feelings and self-respect and increased levels of involvement in mediation (i.e. we have not seen increased uptake of mediation or alternative dispute resolution in jurisdictions with a cap), we further note that the Commission's mediation program has been successful in resolving many of our cases each year, resulting in very few matters proceeding to hearing. Our mediators rely upon existing case law and precedent to assist parties in achieving a reasonable resolution. Moreover, *The Human Rights Code* has other safeguards, including the settlement offer assessment process to ensure that proposed remedies are reasonable and proportionate.

Recommendations:

In accordance with the analysis set out above, the Commission respectfully submits the following recommendations to the Standing Committee:

1) That the Committee choose not to recommend the advancement of proposed section 43(2.1) which will limit damages for injury, feelings and self-respect at $25,000.00.
2) In the alternative, the Commission recommends that the cap proposed in section 43(2.1) be increased to account for particularly egregious cases of discrimination. The Commission also recommends that the cap be indexed for inflation and/or that Bill 26 require a regular review of the cap at least every 3 years to ensure it reflects current conditions.
3) The Standing Committee may wish to consider setting the cap by regulation, as opposed to in statute, to allow for more timely and responsive review and amendment.
4) Should the Standing Committee decide not to eliminate the proposed cap, or not increase the cap, the Committee may wish to consider increasing the cap on exemplary damages currently in place under s. 51(1) giving an adjudicator the discretion to order greater exemplary damages under s. 43(3) where the conduct warrants it.