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Honourable David Lametti, P.C., M.P.
Minister of Justice and Attorney-General of Canada
House of Commons
Ottawa, ON K1A 0A6

April 6, 2021

Dear Minister Lametti,

Our organizations represent the interests of Black and racialized individuals, as well as other equality-seeking groups who frequently turn to the federal human rights system for access to justice. We are writing to express our significant concerns with the current state of the federal human rights system and its failure to fully and effectively promote access to justice for our communities. We urge the federal government to finally implement the recommendations of Justice Gérard La Forest, who 20 years ago recommended that the *Canadian Human Rights Act* be amended to eliminate the gate-keeping function of the Canadian Human Rights Commission and implement a direct access model whereby complainants can file their complaints directly to the Canadian Human Rights Tribunal.

As you are aware, under the *Canadian Human Rights Act*, an individual who wishes to file a human rights complaint must first file their complaint with the Canadian Human Rights Commission. The Commission acts as a gatekeeper and reviews the complaint, determining whether to refer it to a hearing at the Canadian Human Rights Tribunal.

Stakeholders have been raising concerns for over 20 years about the Commission's complaint processing function. The concerns that were raised by a broad range of community groups during Justice LaForest's consultations over 20 years ago are essentially the same concerns we continue to have today. These include concerns that the Commission's gatekeeping function serves to hinder access to justice for complainants, that it results in excessive delays, that complaints are mostly investigated by staff who have no legal training and lack the level of expertise to fully understand the nuances of human rights complaints, and the fact that many meritorious complaints are often dismissed without the opportunity to be considered by a Tribunal member with legal expertise. Historically, these concerns have not only been raised by racialized communities, but by many other stakeholder groups, including those representing the interests of women and persons with disabilities.

After considering these concerns and various other shortcomings of the federal human rights system, Justice La Forest made a series of constructive recommendations in his 2000 report entitled "Promoting Equality: A New Vision, Report of the Canadian Human Rights Act Review Panel". One of the principal recommendations of that report was that the Commission's complaint processing function be dismantled in order to enable individuals to file complaints directly with the Canadian Human Rights Tribunal. Since the time that report was concluded,

both Ontario and B.C. have adopted this model, removing the complaint processing function of their commissions and implementing a direct access model to their respective human rights tribunals. However, at the federal level, Justice LaForest's reports has sat on a shelf and his main recommendation in this regard has still not been implemented.

On multiple occasions, the UN has also called on Canada to implement a direct access model at all levels (both federally and provincially). For example, in 1998, the UN Committee on Economic, Social, and Cultural Rights urged Canada to ensure that "all human rights claims not settled through mediation are promptly determined before a competent human rights tribunal, with the provision of legal aid to vulnerable groups."¹ Likewise, in 2006, the UN Human Rights Committee expressed its concern that human rights commissions in Canada "still have the power to refuse referral of a human rights complaint for adjudication." It urged Canada to "ensure that the relevant human rights legislation is amended at federal, provincial and territorial levels and its legal system enhanced, so that all victims of discrimination have full and effective access to a competent tribunal and to an effective remedy."²

We believe it is time to heed the advice of Justice LaForest and the UN. It is time to finally move to a direct access model federally. The current model has not and is not working for racialized Canadians.

According to internal Commission data on the dismissal rates of race-based complaints over the past several years, race-based complaints have been dismissed by the Commission at higher rates than complaints related to other grounds of discrimination. Rather than recognizing the subtle ways in which racism often manifests itself in Canada, the Commission often dismisses far too many of these complaints on the basis that there is no direct and obvious evidence of racism in these complaints, which include complaints of racial profiling by federal entities. On more than one instance, the Federal Court has reviewed these decisions and found that the Commission erred in dismissing these cases.³

Relatively few Commission dismissal decisions are actually reviewed by the Federal Court because judicial review is a costly and complex process for complainants to undertake. It requires obtaining legal counsel, which many complainants cannot afford. For these reasons, the majority of Black complainants do not seek judicial review of Commission dismissal decisions, which means that the Commission's denial of access to justice goes unchecked in most cases.

According to the Commission's 2019 Annual Report, it received 1,203 human rights complaints in 2019 but only referred 85 cases to the Canadian Human Rights Tribunal. This is a significant gap. (Moreover, even when this small number of cases is referred to the tribunal, people often

¹ United Nations Economic and Social Council, Concluding Observations of the Committee on Economic, Social and Cultural Rights, Canada, 10 December 1998, para 51: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1%2fAdd.31&Lang=en

² UN Human Rights Committee: Concluding Observations, Canada, 20 April 2006, CCPR/C/CAN/CO/5, para 11: <https://www.refworld.org/docid/453777a50.html>

³ See for example the following cases involving Black complainants that the Commission dismissed and that the Federal Court then overturned: *Banda v. Canada (Attorney General)*, 2019 FC 791 (CanLII), <<http://canlii.ca/t/j0vwr>>; *Peterkin v. Toronto Dominion Bank TD Canada Trust*, 2019 FC 579 (CanLII), <<http://canlii.ca/t/j05dj>>; *Powell III v. TD Canada Trust*, 2007 FC 1227 (CanLII), <<http://canlii.ca/t/1tvkv>>.

wait months or years for a hearing.) The Report also provides that the highest number of complaints received were on the ground of disability, whereas the 2nd and 3rd highest number of complaints received were on the grounds of 'national or ethnic origin' and 'race' respectively.

Furthermore, we note that in July 2020, a group of Black and racialized Commission employees wrote a letter to the Chief Commissioner expressing a number of concerns about their experiences of racism within the institution, as well as urging the Commission to cease its overly high dismissal of race-based complaints. Importantly, that letter also notes that there are no visibly Black or racialized Commissioners currently appointed to the Commission, and that there are no Black individuals in senior management positions in the organization. The issues raised in this letter are deeply concerning for an organization that has a legislated mandate to promote human rights for racialized and other communities.

We also note that an April 2020 report authored by Mark Hart, a former Vice-Chair of the Human Rights Tribunal of Ontario, outlined a number of problematic issues with the CHRC's handling of race-based complaints, following an extensive review of the Commission's internal processes.

Let us be clear, dismantling the Commission's complaint processing function does not have to mean dismantling the whole Commission. Like in Ontario and B.C., the Commission could still retain its other functions under the *CHRA*, including its public education and employment equity functions. The Commission could also still maintain its recently acquired mandates under federal accessibility and pay equity legislation. We are not saying that the Commission as a whole should be dismantled, but that its complaint processing function should be because it is doing more harm than good for racialized complainants.

It is evident that the federal government has a vested interest in not removing the Commission's gatekeeping role. According to the Commission's 2019 Annual Report, 43% of complaints received by the Commission are against the federal government. This means that the government has a vested interest in maintaining an organization that dismisses complaints at far too high rates, before they even get to the Tribunal. However, the removal of the Commission's complaint processing function and a move towards the direct access model is long overdue and imperative for the promotion of access to justice for Black and racialized complainants.

If the federal government is serious about combatting racism and discrimination in Canada, it needs to change the broken federal human rights system that prevents effective and timely human rights enforcement, starting by following the example of Ontario and B.C. and implementing a direct access model.

Yours Sincerely,



Raphael Tachie
President
CANADIAN ASSOCIATION OF BLACK LAWYERS

[Other signatory organizations are set out below]

ARCH Disability Law Centre
BC Civil Liberties Association
Black Legal Action Centre
Canadian Association of Labour Lawyers
Canadian Muslim Lawyers Association
Community Advocacy & Legal Centre
Community Legal Assistance Sarnia
Downsview Community Legal Services
Durham Community Legal Clinic
Hamilton Community Legal Clinic/Clinique juridique communautaire de Hamilton
HIV & AIDS Legal Clinic Ontario
IAVGO Community Legal Clinic
Jane Finch Community Legal Services
Mississauga Community Legal Services
Niagara Community Legal Clinic
North Peel & Dufferin Community Legal Services
Renfrew County Legal Clinic
Roundtable of Diversity Associations
Scarborough Community Legal Services
South Asian Bar Association – Toronto Chapter
South Asian Women’s Community Centre (Sawcc), Montreal
Sudbury Community Legal Clinic
The Black Female Lawyers Network
The Center for Research-Action on Race Relations
The Federation of Asian Canadian Lawyers (British Columbia) Society
The Indigenous Bar Association
The Legal Clinic of Guelph and Wellington County
The Peterborough Clinic
West Toronto Community Legal Services

cc. Marie-Claude Landry, Chief Commissioner, Canadian Human Rights Commission
cc. David Thomas, Chairperson, Canadian Human Rights Tribunal