

YUKON HUMAN RIGHTS ACT REVIEW
(Revised Oct.14/08)

Thank you for this opportunity to provide input into improving the Yukon Human Rights Act.

My name is John Pereira and I have a human resources consulting business which I run as a sole proprietorship. I have 20 years experience in human resources in B.C., Ontario and Yukon. The last 16 years have been in the Yukon where I have worked with a variety of employers who operate under either the Yukon Human Rights Act or the Canadian Human Rights Act. During my tenure in the Yukon I have represented employers who have had human rights complaints filed against them. I would like to provide a different perspective relative to the Human Rights Commission Working Document entitled "Improving the Yukon Human Rights Act".

My primary thesis is that the Yukon Human Rights Act and the administration of the Act is currently unfair to employers or respondents and needs to be rebalanced to take into account their interests. In addition, the Commission needs to be more accountable for its actions and decisions. Thirdly, there needs to be closer oversight of the Commission by an independent body that evaluates how the Commission is performing and to which Commission decisions may be appealed. Fourthly, the Commission should be excluded from the adjudication process in order to be fair to all the parties involved in the process.

I'm not sure if any of the Panel members have ever had a human rights complaint filed against them individually or as a representative of an organization. I have represented employers where this has happened and it is not a fun experience. When you open that letter from the respective human rights commission and read the allegations and complaint you get this sinking feeling in your stomach. The complaint usually seems to come out of nowhere and you are incredulous.

I have opened a few of those letters and it is not because I have worked for employers that have poor human resource practices. In fact the opposite is true and to date all such complaints have been found to be without merit. In spite of this experience it is still very disconcerting when it does happen. Even though there has not been merit in the complaints, a significant amount of time and resources have been spent replying to the claims. While the amount of time and resources devoted to the investigation part of the process is substantial, it pales quite significantly when you are dealing with an issue that proceeds to a hearing or adjudication. If the matter proceeds to a hearing, the costs are quite significant both in terms of the staff time and the legal costs. It is not unusual to spend tens of thousands of dollars in legal fees once you are in the hearing track.

The adverse impact is not only the inordinate staff time that is taken up to prepare and respond to the complaint and the legal costs, but there are also the personal, emotional and psychological costs on employees specifically named in the complaint. Being named in such a complaint causes personal embarrassment to the individual and adversely affects their reputation (and that of the organization) in the community. Some employees

named in complaints may react with anxiety and depression and to the point where they become disabled. This is not a hypothetical scenario that I am referring to; rather it is, unfortunately, a real-life example in one of the work places that I have been in. Try to think about why this might happen. If you consider yourself to be a person of very high integrity and one who believes in the objectives of the Act and then all of a sudden there is a non-meritorious complaint that alleges you have acted in a discriminatory and inappropriate way. The cognitive dissonance is sometimes very hard for people to reconcile and accordingly they react in this unfortunate way.

Therefore before subjecting anyone to these significant financial and personal costs, the Act and the Commission must be very careful in exercising this significant power to proceed to a hearing.

As I mentioned earlier I have also represented employers who are covered by the Canadian Human Rights Act. Based on my experience I have noticed the following, vis-à-vis the Yukon Human Rights Act:

- The Canadian Human Rights Act appears to conduct a more efficient investigation, i.e. it is quicker and focuses on only the relevant or salient points of the complaint; and
- The Canadian Human Rights Act appears to be more accountable at the investigation stage, in that complaints that are determined to be not meritorious are dismissed rather than being referred to adjudication.

Given these experiences in another jurisdiction and the potential significant adverse impacts of Commission decisions, I believe that the Yukon Human Rights Commission has to become more accountable for its decisions and more specifically, it has to be willing to dismiss complaints at the investigation stage that do not have merit, or given the tools to do so, rather than leaving it up to the Board of Adjudication to make the decision via a hearing process.

Another area where I would like to see changes is to make complainants more accountable for their decision to file a complaint given the adverse impact that it has on respondents.

While a significant number of complaints are bona fide and filed in good faith, a significant number are unfortunately also filed by complaints who are confused about their rights and obligations (e.g. they may be getting advice/counsel from family or friends who do not have expertise in this realm and who have only heard one side of the events) and/or use the process as leverage to extract a financial settlement from the respondent even when there is no merit to the case. A lot of times people making complaints under this process will not acknowledge their personal responsibility for events that transpired (e.g. an employee may have been dismissed as a result of his/her misconduct or for not meeting reasonable performance standards). On a purely financial basis, it may make more sense for respondents to settle non-meritorious complaints rather than go through the expense of proving they did nothing wrong. Employers should not

be subject to this form of leverage from complainants who are using the Act as sword rather than a shield as the Act was intended.

This inappropriate use of the Human Rights Act can be minimized significantly by making changes to the Act and the administration of the Act by the Commission. Accordingly the following proposals are put forward for consideration:

A) PROPOSALS:

CHANGES TO THE HUMAN RIGHTS ACT:

1) Change the tone to indicate only meritorious complaints will be considered:

There should be a significant change in tone in the Act that would make it clear that the Commission has an obligation to dismiss non-meritorious complaints. This not stated in the current Act. This could be done in a few sections of the Act as follows (note that the proposed changes in wording or the insertion of new wording is underlined):

16(1) There shall be a Yukon Human Rights Commission accountable to the Legislature and the commission shall

(insert after current sub-paragraph c)

(d) dismiss complaints which are not meritorious under this Act;

Rationale: The current Act does not explicitly address this issue, i.e. that non-meritorious complaints are to be dismissed, rather it seems to be implicit.

Revise current sub-paragraph (d) as follows:

(e) promote a settlement of meritorious complaints in accordance with the object of this Act by agreement of all parties

Rationale: In other words the Act should only encourage settlement of meritorious complaints and not ones where there is no merit, which should accordingly be dismissed out of hand rather than trying to negotiate a resolution in order to avoid making a decision or to simply to placate the complainant.

21 After investigation, the commission shall

(a) dismiss the complaint, where it is found to be lacking merit; or

Rationale: The current Act does not indicate in what circumstances a complaint is to be dismissed, this proposed wording above indicates that it would be dismissed where it is deemed to be lacking merit.

(b) try to settle the complaint, where it is meritorious, on terms agreed to by the parties; or

Rationale: Once again, only meritorious complaints should be attempted to be settled by the Commission.

(c) ask a board of adjudication to decide the complaint, where it is found to be meritorious

Rationale: Only meritorious complaints should be forwarded to the board of adjudication.

2) Discourage unnecessary adjudication:

Proposal & Rationale: The Act should discourage non-meritorious complaints or unnecessary adjudication by having the losing party pay the costs of the other party. At this time under section 24(1) (e) only the respondent may be ordered to pay costs. Currently this results in unfairness and a lack of symmetry for both parties. If changed as proposed, not only would it restore fairness and symmetry but it would discourage marginal or frivolous complaints if the complainant is aware and understands that there is a possibility that he/she will have to pay the other party's costs. To achieve this I would recommend the insertion of the following language after section 24 as a new section 25 as follows:

(25) If the complaint is not proven on the balance of probabilities, the board of adjudication will order the complainant to pay all costs of the respondent in defending the claim.

Proposal & Rationale: The Commission should also face more accountability for its decisions to refer frivolous or vexatious complaints to adjudication. This can be done in two ways.

One is to amend current section 25 as follows:

25 If the board of adjudication concludes that the complaint was frivolous or vexatious or that the proceedings have been frivolously or vexatiously prolonged the board shall order the commission to pay to the respondent

(a) all of the respondent's costs of defending against the complaints; and

The two changes are to replace the word "may" with "shall" and to remove the words "part or" at the beginning of section (a)

Secondly if the Commission were to act in an arbitrary way or without the appropriate due diligence such that it were to allow a vexatious or frivolous claim to proceed, those individuals responsible for such a decision should be removed from their appointed posts. Accordingly I would recommend adding section (c) as follows:

(c) Commission members shall be removed immediately from their assignments.

While it is not likely that the Commission would allow this to happen, it sets an appropriate tone that reinforces the Commission's obligation to act with due diligence and that it is accountable.

CHANGES TO THE HUMAN RIGHTS ACT REGULATIONS:

With Respect to the Human Rights Regulations, these also need to be clarified or adapted to meet the proposed changes as follows:

Section 5(1) currently reads as follows:

5(1) The Director of Human Rights may decide on behalf of the Commission

(a) to dismiss a complaint pursuant to subsection 19(1) of the Act:

Proposal & Rationale: Unfortunately, if you read Section 19(1) of the Act it is very vague and does not give guidance with respect to the circumstances in which a complaint is to be dismissed. Given some of the earlier noted proposals (including a revised Section 21), these would be assisted by having the additional supporting language in the regulations:

(a) to dismiss a complaint pursuant to subsection 19(1) and Section 21 of the Act, where it is not meritorious:

Proposal & Rationale: Under Sections 19(4) and 19(5) (5) (b) only the complainant is permitted to make submissions to appeal the Director of Human Rights decision to dismiss the complaint. This would appear to be a fundamental breach of natural justice since the respondent should also have the right to be notified of the Director's decision and have the right to make submissions to the Commission. After all how can the Commission make a decision without hearing both sides of the allegation? Accordingly the proposed wording for these two sections is as follows:

5(4) The Commission shall give the complainant and respondent at least 30 days notice of when it will hear the complainant's appeal.

5(5) (b) any written or oral submissions by or on behalf of the complainant and the respondent.

Proposal and Rationale: Under Section 7 there is once again no criteria for submitting a complaint to the Board of Adjudication and therefore the following proposals are made to clarify or remedy this situation:

7(1) The Director of Human Rights, where he/she would have a reasonable basis to believe, that on the balance of probabilities, that there is a meritorious case with respect a

breach of the Act, the complainant, or the respondent may request the Commission to ask a board of adjudication to decide the complaint.

New Section:

7(3) The Commission may only decide to refer a complaint to the board of adjudication if it has a reasonable basis to believe, that on the balance of probabilities, that there is a meritorious case with respect to a breach of the Act.

In addition to providing the Commission with an explicit criterion for referring a complaint to the board of adjudication, it would make the Commission more accountable for its decision in the context of the earlier noted proposals.

3) Make the Commission more Accountable and Provide Oversight:

The Commission exercises great power in its role and therefore it has a responsibility to ensure that this power is used judiciously and only when necessary given the potential adverse impacts of proceeding with a complaint. It should not allow a matter to proceed to adjudication to avoid making a decision or to placate the complainant. Based on feedback provided by the Commission at the Select Committee meeting October 8, 2008, Commission representatives indicated that due to the language in the Act it has limited ability to dismiss non-meritorious complaints if there is a chance that there could have discriminatory action the part of the respondent and that its actions are subject to judicial review. Given that this is the case the Commission should be given the tools or language in the legislation to allow it to dismiss non-meritorious complaints on the balance of probabilities as stated earlier in this submission. However in order to ensure that the Commission is fulfilling its role of watchdog properly, the Commission should itself be subject to very close scrutiny by an independent watchdog. In other words if the Act expects citizens and organizations to be accountable for their actions, the same should apply to the Commission members and staff. The Act could specifically articulate that the an independent body (such as the Office of the Ombudsman) would be required to review and report on the general performance of the Human Rights Commission and to accept complaints on the behaviours and decisions of the Commission members and staff.

Currently under Section 18 of the Act, the Commission is to deliver a report to the Speaker of the Legislature “about the administration of this Act.” In essence the Commission evaluates its own performance under the current Act and it can be quite self serving, e.g. on page three of the April 1, 2006 – March 31, 2007 Annual Report in the third paragraph it reads as follows:

“We believe our staffing and funding levels have not kept pace with the dramatic increases in workload on the complaint side, even though there have been some increases to both staff and our base grant over the past decade.”

Proposal & Rationale: Section 18 should be changed so that an independent body (such as the Office of the Ombudsman) would evaluate the performance of the Commission. To do this, the independent body could interview complainants and respondents who

have been involved in complaints (there were 42 for the period of April 1/06 to March 31/07 in the last report) and or their legal counsels and commission staff and appointed Board members. The independent body could also look at some financial and performance indicators vis-à-vis other jurisdictions (e.g. salaries paid to Commission staff, FTEs per complaint, % of complaints taken to adjudication, % of complaints dismissed at various stages, results of adjudication –i.e. % of findings in favour of the complainant versus respondent, etc.)

Accordingly I would recommend something akin to the following language:

(18) In each financial year the Office of the Ombudsman shall deliver to the Speaker of the Legislature a report about the administration of this Act. The report will include but not be limited to the performance of the Commission Board and staff based on interviews with complainants, respondents, their respective legal counsels and Board appointees and Commission staff, and comparative analysis vis-à-vis other jurisdictions. The Office of the Ombudsman will make recommendations for improvements for consideration by the Legislative Assembly.

Currently the only articulated external recourse for appealing decisions is in Section 28 of the Act where decisions by the Board of Adjudication may be appealed to the Supreme Court. While the Commission representatives indicated at the October 8, 2008 meeting, that Commission decisions (e.g. to dismiss a complaint or to refer it to the Board of Adjudication) are subject to judicial review, this does not appear to be articulated in the Act and this option should be made clear in the Act. Although judicial review may be possible on fairly limited grounds (e.g. I would assume on a question of law similar to Section 28), I would still recommend allowing a broader review mechanism by inserting after the current Section 21, a new Section 22, which would allow an independent body (such as the Office of the Ombudsman) to do this which would read as follows:

(22) Either the claimant or respondent may ask the Office of the Ombudsman to review any decision made by the Director of Human Rights or the Commission including but not limited to the decision to ask a board of adjudication to decide the complaint.

4) Commission should not be involved in adjudication process:

Proposal and Rationale: The Commission is currently a party in the adjudication process (as noted in Section 16(1) (e) of the Act and Section 10 of the Regulations) and this should not be allowed because it means the Respondent may end up facing two accusers each with their own financial resources in the adjudication process. One legal counsel I have spoken with has indicated to me that this is not typical of other jurisdictions. This does not have the appearance of fairness and independence regarding the Commission's role. Once the matter has been referred to the Board of Adjudication, the Commission should no longer have any role in the adjudication process. As an example, I am currently involved in a hearing where evidence being presented by the Complainant's witness did not appear to be supporting the Complainant's case. It is my understanding that the Commission, in an effort to shore up the Complainant's case, is now considering calling another witness to refute the earlier evidence provided by the Complainant's own

witness but which did not support the Complainant's case. In fact the legal counsels for both the Complainant and for the Commission were both conferring on this matter during a break in the hearing. From my point of view this should not be allowed since there should be the appearance that the Commission is acting in a fair and unbiased way and this could be achieved by changing these two parts of the legislation so that it is not involved in the adjudication process.

In conclusion the Human Rights Act is a very important piece of legislation given the protection that it provides to those individuals or groups who have been unjustly discriminated against and it is important to continue with this protection. However, the Act and the Commission will lose credibility and the moral authority to continue with this valuable work if the power structure within the Act is not changed so that it deals fairly and with due consideration for the rights of all the parties, including the respondents, and the impacts it has on them. Given the powers available to the Commission within the Act and regulations and the resulting repercussions (including financial, personal, health and emotional) of its decisions, it is extremely important that the powers are reconfigured in such a way that the rights of both the complainants and respondents are acknowledged, considered and protected, and that oversight is provided to the Commission to ensure this happens.

B) RESPONSE TO “Improving the Yukon Human Rights Act”:

With respect to the Human Rights Commission working document (dated September 19, 2008) entitled “Improving the Yukon Human Rights Act”. I have the following points I would like to make.

1) Objectiveness of Process:

This submission by the Human Rights Commission should have been part of a wider process to compile a single independent discussion document which would be used by the Select Panel on Human Rights and distributed to all interested parties before these hearings started. I believe that a review should have been carried out by an independent party without a vested interest in the outcome. The members and staff of the Commission should have been invited to make comments and recommendations as one of the feedback sources to the independent party conducting the review. In addition former complainants, respondents, employers, lawyers, landlords, interest groups, etc. should have been invited to make comments and provide feedback on recommendations for changes and to provide input on what is working well and what is not working well in compiling such a document. Furthermore, as part of the independent review, there should be an analysis or review on the performance of the Commission, Board of Adjudication, Director of Human Rights and Human Rights Commission staff. This independent report should then have been the basis for the public hearings, and the setting of the agenda, rather than just the “Improving the Yukon Human Rights” document.

2) Specific Comments on the Document:

- Page 1 – Enhancing Protection: Recommendation to increase the time limit for making a complaint (from 6 months to 2 years)

Response: This should not happen for several reasons. One is that it is prejudicial to the respondent. Trying to recall a conversation, that could be part of the evidence, that you had three months ago is difficult enough let alone one that took place two years ago. Secondly the time taken before an issue gets to a hearing can be quite significant, e.g. four years after the complaint is made and this time frame is already too prejudicial to respondents to even considering extending it further. Thirdly, there should be an appropriate amount of accountability on the complainant to act within a reasonable period of time.

- Page 2 – Impact of Changes on the Commission: the document states “For example, if the time limitation period is increased from six months to two years, this will likely increase the number of complaints, which in turn will increase the Commission’s workload and the waiting period for complaints to be handled, if no additional resources are provided.”

Further on, on page 4 it states: “All these changes will have a major impact on the Commission’s budget. The Commission submits that its funding should come from the Member Services Board of the Legislative Assembly and that there should be a formula including an escalator clause for adjusting funding based partly on the number of human rights cases in given year.” (emphasis added)

Response: This proposed change is not about increasing efficiency, or doing what is best for Yukon citizens and taxpayers rather it appears to be about empire building and self-interest for the Commission. The Commission, if it is successful in doing its job, should be looking at reducing rather than increasing the number of human rights cases (e.g. through its educational function). As mentioned earlier, finances and staffing levels should be set based on other jurisdictions (e.g. comparable number of Human Rights Cases per Full Time staffing Equivalents).

- Page 4 – Insert “or social condition” in section 7(1) and definition in Section 37: “Section 37: ‘social condition’ refers to disadvantage arising from low social and economic standing in life and from inter-generational trauma arising from the Indian residential school system and includes people who are poor, homeless, or unemployed and people who have difficulty with reading and writing or are subject to stereotypes based on intersecting or interrelated prohibited grounds such as race, sex, age and disability.”

Response: I have a few concerns with this addition. First the definition is too broad and could include almost everyone since we have all had some adverse consequences at some points in our lives (e.g. most of us have been unemployed at some point or poor in our early adult life). Secondly, by having such a definition it would create unrealistic expectations for accommodation and is in direct contrast to the merit principle (e.g. the best candidate is to get the job or

that schools have appropriate thresholds for passing courses and achieving various grades). People should be judged on the merit of their character, achievement and abilities, and not on the basis of their perceived shorting comings. People should also be encouraged to take individual responsibility to overcome the adverse consequences they may periodically face from time to time rather than use it as stepping stone to surpass an individual who is more meritorious (e.g. when competing, for jobs, apartments, etc.)

- Page 6 – recommendation for option to have the board of adjudication hear the complaint before the Commission has investigated a complaint.

Response: This concept does not seem logical since it would appear to make more sense to have an investigation before going through the expense and emotional turmoil of a hearing so that these adverse consequences can be avoided where there is no merit to the complaint. The Commission should act as a gate keeper and ensure that only meritorious complaints proceed to adjudication.

- Page 11 – Duty to Accommodate – Proposal to broaden the language by making significant changes in language in Sections 8(1) to 8(3).

Response: These changes to these sections are too broad and put the entire onus on the potential respondent for the accommodation to the point of undue hardship. The existing language should be maintained which states that “‘undue hardship’ should be determined by balancing the advantages and disadvantages of the provisions be reference to factors such as

- (a) safety;
- (b) disruption to the public;
- (c) effect on contractual obligations;
- (d) financial cost;
- (e) business efficiency.”

- Page 18 – Who May File a Complaint – Proposed wording allows Commission to initiate a complaint

Response: This proposed change gives the Commission wider ranging powers which would not be subject to an appropriate check and balance. Accordingly it should not be considered.

- Page 21 – Improving Remedies – Not sure which is the new Section 9(2)? Also damages for injury to dignity, feelings and self-respect to be not less than \$5,000.

Response: Damages should follow current jurisprudence and should not establish a minimum amount. This is element is already impossible to quantify compared to economic damages and therefore it should be minimal. If this were to be allowed it would increase the likelihood of people filing complaints simply because it would

give them an economic incentive to file a complaint and the means to exert more leverage to extract a potential financial settlement from a respondent.

On a separate point, there should be consideration for exemplary damages to be paid by the complainant to the respondent if the complaint is found to be frivolous, vexatious and/or if the complainant has used the process primarily as a means to achieve a monetary settlement or some other consideration from the respondent and where it is found that there is no merit to the complaint.

While there are other proposals with which I agree, due to the limited time and resources available I have only focused on those areas which I believe would have a significant adverse impact if accepted and adopted.

Thank you for this opportunity to provide input into the process.

John Pereira
Principal, John Pereira Human Resources Consulting