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October 16, 2008

Select Committee on Human Rights  
Yukon Legislative Assembly (A-9)  
P.O. Box 2703  
Whitehorse, Yukon Y1A 2C6

Dear Committee Members,

Please find attached the submission of the Public Service Commission on legislative options for amending the Yukon *Human Rights Act*. We would like to thank the Committee for the opportunity to provide our views and recommendations.

As the department responsible under the *Public Service Act* for employing public servants, our understanding of the operation of the *Human Rights Act* comes mainly from our role as respondent to complaints alleging discrimination in employment filed by public servants. As the largest employer in the Yukon, with considerable practice in this area, we trust that the Committee will give due consideration to what we have learned from this experience.

In this submission, we review a number of problems identified as a result of this experience and propose legislative solutions, we comment on proposals made by the Human Rights Commission and we provide our views on a legislative model recently adopted in several Canadian jurisdictions and being proposed in others.

We wish you the best in your deliberations and look forward to your conclusions on how to best meet the requirements for human rights legislation in our unique jurisdiction.

Yours truly

A handwritten signature in black ink, reading "Patricia N. Daws". The signature is written in a cursive style.

Patricia N. Daws  
Public Service Commissioner.

PUBLIC SERVICE COMMISSION  
GOVERNMENT OF YUKON



**SUBMISSION TO THE SELECT COMMITTEE ON  
HUMAN RIGHTS**

**ON LEGISLATIVE OPTIONS FOR AMENDING THE  
YUKON HUMAN RIGHTS ACT**

PUBLIC SERVICE COMMISSION OF THE YUKON GOVERNMENT  
SUBMISSION TO THE SELECT COMMITTEE ON HUMAN RIGHTS  
ON LEGISLATIVE OPTIONS FOR AMENDING THE YUKON HUMAN RIGHTS ACT

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PUBLIC SERVICE COMMISSION OF THE YUKON GOVERNMENT

**SUBMISSION TO THE SELECT COMMITTEE ON HUMAN RIGHTS  
ON LEGISLATIVE OPTIONS FOR AMENDING THE YUKON HUMAN RIGHTS ACT**

**INTRODUCTION**

The Select Committee on Human Rights was established by the Yukon Legislature in April of 2008 and mandated to receive the views and opinions of interested groups on legislative options for amending the Yukon *Human Rights Act* ("the Act"). We would like to thank the Committee for the opportunity to provide the Public Service Commission's views and recommendations on amendments to the Act to best fulfill the requirements for human rights legislation in the Yukon.

As the department responsible under the *Public Service Act* for employing public servants, our understanding of the operation of the *Human Rights Act* comes mainly from our role as respondent to complaints alleging discrimination in employment filed by public servants. As the largest employer in the Yukon, with considerable practice in this area, we trust that the Committee will give due consideration to what we have learned from this experience.

In this submission, we review a number of problems identified as a result of this experience and propose legislative solutions, comment on proposals made by the Human Rights Commission and provide our views on a legislative model recently adopted in several Canadian jurisdictions and being proposed in others.

**PROBLEMS WITH THE CURRENT ACT/SYSTEM AND RECOMMENDATIONS FOR CHANGE**

**A. COMPLAINT PROCEDURE**

The pillars of a sound administrative justice system are fairness, efficiency and accessibility. In the view of the Public Service Commission, the human rights protection system currently in place in the Yukon has built-in inefficiencies, is so complex as to discourage accessibility and is at times unfair to both complainants and respondents.

**Dual Role of Human Rights Commission:**

Under section 16 of the Act, the Human Rights Commission ("the Commission") is charged with promoting human rights principles, promoting settlements of complaints and advocating at adjudication for the position which best promotes the objects of the Act.

Under sections 20 and 21 of the Act, the Commission is required to investigate complaints and perform a screening role to determine whether they should be dismissed or referred to a Board of Adjudication for a decision.

The Commission is required to carry out its investigation and screening roles in a neutral, even-handed manner. In practice, however, Commission staff often form an opinion on the merits of the complaint at an early stage which shapes the investigation, the Commission's dealings with the parties, and ultimately the screening decision.

Although the Act directs that the Commission take the position that best advances the purposes of the Act, during the Board of Adjudication hearings the Commission invariably supports the complaint. This would seem to be inevitable since the Commission itself initiates the hearing after deciding that the complaint has sufficient merit to warrant hearing.

The role of advocate interested in the outcome of the hearing conflicts with the role of neutral quasi-judicial decision maker. Respondents, in particular, are left with a reasonable apprehension that investigation and screening decisions were not made in a neutral manner.

The problem is exacerbated by the pivotal role given to the Director [section 19 of the Act] who may: confirm that the complaint meets technical requirements; supervise the investigation; make a recommendation to the Commission with respect to the screening decision; and instruct legal counsel to advocate in favour of the complaint during the Board hearing.

***Recommendation:***

- 1. The dual role of the Commission should end. It should not act both as quasi-judicial decision maker and interested advocate in the same matter.***

**Surplus Advocate**

Since the Commission always advocates in support of the complaint, at each hearing the respondent must contend with two opposing parties.

The Commission and the complainant are treated as parties of equal standing, with equal rights to call evidence, make submissions, and so forth.

The case for the complainant is doubled up; the Commission and complainant have two kicks at the can whereas the respondent has only one.

The Commission and complainant are even permitted to cross-examine each other's witnesses, i.e., to ask suggestive and leading questions even though the witness is friendly to their case.

In addition, the extent of the Commission's caseload may well be driven by the Commission's apparent own agenda of continuing complaints which complainants themselves do not appear to have any desire to pursue. Such championing of abandoned complaints unnecessarily exacerbates the problem of delay.

***Recommendations:***

- 2. The Commission's role as advocate at the Board hearing should end. Alternatively, complainants should be required to elect either to rely on the Commission or to present their cases themselves; but not both.***

3. *The Commission should be required to cease pursuing a complaint when a complainant has not demonstrated any interest in continuing it.*

## **Investigations**

Section 20 of the Act requires that the Commission shall investigate complaints. The Act is currently silent with respect to the nature and scope of the investigation.

The purpose of the investigation is to provide the information necessary for the Commission only to render its screening decision. The investigation needs only to establish the sufficiency of the evidence.

The Commission nevertheless insists upon carrying out comprehensive investigations involving the taking of extensive statements, which may or may not have relevance to the actual complaint, and extensive analyses of law prior to rendering the screening decision. This places unnecessary strain on the Commission's resources, resulting in lengthy delays before the investigation of new complaint begins and additional delays before the investigation is completed. Delays of one or two years are not uncommon; delays of more than six years have occurred.

Delay at the investigation stage is prejudicial to the respondent. The allegation of a human rights violation is left hanging over the head of the respondent for a protracted period. A workplace situation may remain unresolved. Witnesses may be unavailable or uncertain of their memories when the complaint finally reaches adjudication years later.

While the investigation report does provide some utility as a mechanism for discovery of evidence, this is only to a limited extent as the parties have no right to direct the investigation, put questions to witnesses, or require the production of relevant documents.

The investigation report has no utility following the screening as it is not admissible as evidence at the Board hearing. For all the resources and delay associated with it, the investigation serves only the minimal purpose of enabling the Commission to determine if the complaint is supported by evidence.

Moreover, this amounts to a duplication of expenses for respondents. Currently, respondents to a complaint must participate in extensive investigations during which they must defend their actions. The process is then repeated when respondents must attend Board of Adjudication hearings to present evidence in even greater detail than that gathered in the Commission's investigation.

### ***Recommendation:***

4. *The Act should set parameters on the scope of the investigation and firm timelines for completion*

## Criteria for Screening Out or Dismissing Complaints

The Act provides two opportunities for an entity with authority to screen complaints to determine whether a complaint should proceed:

- S. 20 – the Commission is not required to investigate complaints which are beyond the jurisdiction of the Commission or which are frivolous or vexatious or when the complainant asks that the investigation be stopped.
- S. 21 – the Commission must dismiss a complaint or try to facilitate a settlement or refer the complaint to a board of adjudication.

The Act is currently silent with respect to the criteria to be used for deciding under section 21 whether a complaint should be dismissed, settled, or referred to a board of adjudication.

The Commission employs the test of whether there is a reasonable basis in the evidence to support the complaint. The decision making process employed by the Commission when applying this standard is obscure and unpredictable to complainants and respondents.

The legislation must set out in clear terms the basis on which complaints can be dismissed. There should be articulated and easily ascertainable criteria for referring complaints to the Board of Adjudication. The Commission's role in screening decisions should be limited to determining whether the criteria are met and the investigation of the complaint at this stage should be limited accordingly.

Alternatively, the Commission should be required to provide reasons for its decision. An avenue for reviewing the screening decision, short of judicial review, should be made available.

Given that significant public resources are expended when the Commission advocates in support of a complaint before the Board of Adjudication, the screening decision should include consideration of whether the nature of the complaint warrants such expenditures in the public interest.

The authority to dismiss should also be granted to the Board of Adjudication. The Act doesn't presently clearly grant this power to the Board – a hearing is required [section 23]. At a minimum, the Board should have the power to strike out a complaint, part of a complaint, or a defence to a complaint when it doesn't meet the criteria.

Two additional bases for screening out complaints – Limitation Period and Multiple Venues – are addressed separately below.

### ***Recommendations:***

5. ***Criteria for proceeding with complaints or rejecting or dismissing complaints or parts of complaints should be clearly articulated in a revised Act.***

6. *Such criteria should be applied by whichever level or entity has authority over a complaint.*
  
7. *A complaint, or part of a complaint, should be screened out or dismissed whenever:*
  - a. *the complaint is beyond the jurisdiction of the commission;*
  - b. *there is no reasonable prospect that the complaint will succeed, i.e.*
    - i. *there is no reasonable basis in the evidence to support the complaint*
    - ii. *it discloses no reasonable complaint;*
    - iii. *no prima facie case of discrimination is established;*
    - iv. *there is no evidence of discrimination on a prohibited ground;*
    - v. *where undisputed facts clearly provide a defence;*
  - c. *proceeding with a complaint (or part of a complaint) would neither benefit the complainant or his/her protected group nor further the purposes of the Act;*
  - d. *the complaint does not warrant expenditures in the public interest;*
  - e. *it is unnecessary, trivial, scandalous, frivolous or vexatious or made in bad faith;*
  - f. *maintaining part of a complaint may prejudice or delay the fair hearing of the rest of the complaint;*
  - g. *the complainant requests that the complaint not be pursued or demonstrates no interest in continuing to pursue the complaint;*
  - h. *the complainant fails to accept a reasonable settlement offer;*
  - i. *it is otherwise an abuse of the process of the Commission or Board of Adjudication.*
  
8. *An avenue for a review of the screening or dismissal decision, short of judicial review, should be made available.*

### **Limitation Period**

Delay is particularly undesirable in human rights matters because the damages alleged in many complaints are intangible and the complaints often relate to incidents occurring in day-to-day life. For both reasons, incidents which are the subject of the complaint may not be well remembered by independent witnesses.

Because a complainant can easily initiate a complaint and bears no risks and no costs for doing so, a potential respondent is vulnerable to manipulation by the potential complainant until the complaint is actually filed or until the expiry of the limitation period.

The remedial objectives of the Act are served far better by encouraging early reporting of complaints rather than extending the deadline. Complainants should not be encouraged to delay. A higher emphasis on education should solve any problem of potential complainants not knowing that they can file a complaint.



The limitation period should not be changed or extended. The limitation period should be enforced.

Alternatively, discretion could be provided to the Commission to relieve against the time limit for filing complaints in certain limited circumstances:

- the exercise of this discretion should be time-limited – for example, where the Commission determines that circumstances beyond the control of the complainant delayed the filing of the complaint, it could exercise discretion for no longer than a two year period prior to the alleged discrimination.
- the exercise of this discretion should also be limited to circumstances demonstrably beyond the control of the complainant and in which there would be no prejudice to the respondent.

There should be an opportunity for the respondent to be heard before the Commission renders such a decision.

The Commission has adopted a practice of allowing late allegations of discrimination to proceed, no matter how late they were filed, if they are alleged to pertain to a more recent incident of alleged discrimination that occurred within the limitation period.

The Act should specify criteria for or define so-called ongoing or continuing complaints and whether and in what circumstances prior incidents can be included in a complaint of this nature. The Commission staff have referred to, and we agree with a definition of “continuing contravention” in *Re the Queen in Right of Manitoba and Manitoba Human Rights Commission et al (1983)*, 2 D.L.R. 4<sup>th</sup> 759 at 764 as follows:

To be a continuing contravention, there must be a succession or repetition of separate acts of discrimination of the same character. There must be present acts of discrimination which could be considered separate contraventions of the Act, and not merely one act of discrimination which may have continuing consequences. [Emphasis added]

***Recommendations:***

- 9. The limitation period should not be changed or extended. The limitation period should be enforced.***
- 10. Alternatively, discretion could be provided to the Commission to relieve against the time limit for filing complaints in certain limited circumstances:***
  - the exercise of this discretion should be time-limited – for example, where the Commission determines that circumstances beyond the control of the complainant delayed the filing of the complaint, it could exercise discretion for no longer than a two year period prior to the filing of the complaint.***
  - the exercise of this discretion should also be limited to circumstances demonstrably beyond the control of the***

*complainant and in which there would be no prejudice to the respondent.*

*11. There should be an opportunity for the respondent to be heard before the Commission renders such a decision.*

*12. The Act should specify criteria for or define so-called ongoing or continuing contraventions and whether and in what circumstances prior incidents can be included in a complaint of this nature. Incidents to be considered continuing contraventions must be of the same character as the prior incident.*

### **Multiple Venues**

There are currently no provisions that limit complainants from pursuing a complaint under the Act while also pursuing a remedy in respect of the same conduct in another proceeding such as a Supreme Court civil claim, a grievance under a collective agreement, a workers' compensation claim or a complaint to the Ombudsman and/or Privacy Commissioner.

Respondents should not have to incur the costs and delays of pursuing a stay of proceedings either before the Commission or in other venues. The Act should not permit complaints to go forward if another proceeding is commenced or could be commenced in a forum where a remedy is available for the substance of the misconduct alleged under the Act.

### ***Recommendation:***

*13. A complaint should be screened out or dismissed if the complaint is one that could more appropriately be dealt with, or has appropriately been dealt with, according to a procedure provided for under another Act.*

### **Mediation and Settlements**

The Act provides the Commission with the authority to try to settle a complaint following investigation [section 21].

The Director is also authorized by the Regulations to try to settle complaints on terms agreed to by the parties and plays a mediation role in doing so.

However, there is no provision authorizing settlement at the hearing stage.

There is also no express authority granted to the Board of Adjudication to establish rules respecting mediation.

As a result, mediation of complaints is ad hoc and the manner in which mediation assistance is provided by the Commission is inconsistent. In addition, because of the advocacy role assumed by the Commission for complainants, respondents question the Commission is even capable to providing mediation assistance in a neutral, even handed manner.

Settlement opportunities should be considered whenever they arise. Considerations such as access to a trained, independent mediator and timelines should be articulated in the Act or Regulations. Alternatively, the Board of Adjudication should have the authority to make rules regarding mediation.

***Recommendation:***

***14. Mediation rules of practice should be set out in the Act or Regulations or the Board of Adjudication should be expressly authorized to make rules. Rules should address access to trained, independent mediators and appropriate timelines.***

**B. ADJUDICATION PROCEDURE**

**Name**

The current name of the Board of Adjudication is somewhat confusing to people who have not previously dealt with the human rights process.

As recommended by the Commission, the Board of Adjudication should be given a more descriptive name such as the Yukon Human Rights Tribunal.

Identifying the Board as a Tribunal is also in keeping with professionalisation of the Board through merit-based appointments.

***Recommendation:***

***15. The Board of Adjudication should be given a more descriptive name such as the Yukon Human Rights Tribunal.***

**Merit-Based Appointments**

There is presently no legislative requirement in the Act that Commissioners and Adjudicators have legal training in administrative law or expertise in human rights.

The substantive and procedural law of human rights has become extremely complex since the advent of the Act. The interaction of human rights law and employment/labour law has grown particularly specialized. Hearings regarding discrimination in employment would be enhanced if the Tribunal had training in employment and labour law as well.

The Board of Adjudication must often assess complex legal and factual issues. A lack of legal training makes it difficult if not impossible for adjudicators to fulfil their mandate under the Act fairly and efficiently.

Potential damages, especially in employment-related complaints, can be very significant. Potential remedies can be wide ranging, and intrusive.

Lay panel members are not sufficiently trained or experienced to render proper decisions on legal issues that arise during hearings, such as objections to questions and evidentiary motions. Hearings are frequently interrupted

while the panel retires to deliberate at length or seek advice from the Board's legal counsel.

Lay panel members have not demonstrated a willingness to grapple with the legal issues raised by the parties, instead choosing to rely on their own interpretations of the Act.

In our experience over several years, many of the decisions rendered by the Board of Adjudication, both interlocutory and final decisions, have been of poor or unpredictable quality.

There is also a perception that protracted hearings result from the Board extending greater latitude to parties with respect to the tendering of evidence than would be the case in other administrative proceedings.

A lack of expertise and training inevitably results in uneven treatment of complaints at all stages of the complaints process and an inconsistency among decisions.

Problems that result from a lack of expertise and training can create a perception of unfairness and can undermine the legitimacy and credibility of the system.

It warrants emphasizing that several other jurisdictions utilize single, qualified Tribunal members instead of panels. This could reduce the delays and expenses inherent in utilizing a lay panel of adjudicators.

***Recommendations:***

***16. Appointments to the Board should be based on merit, including mandatory legal training and training and experience in the fields of human rights, litigation law and administrative law.***

***17. Hearings should be conducted before a single qualified panel member, instead of three lay members.***

***18. Complaints that concern allegations of discrimination in the workplace should be heard by a panel member who also possesses experience in employment law.***

***19. Appointments to the Board should not be limited to Yukon residents; qualified persons outside the Yukon should also be appointed. This practice is already followed at all three levels of Yukon courts as well as in private arbitrations.***

**Rules of Procedure**

There is currently considerable confusion with respect to pre-hearing and hearing procedures before the Board.

There are no prescribed rules of procedure; rather, the Board has crafted interim rules of uneven quality.

Rules of procedures are vitally important to the parties. The lay members of the Board do not possess the necessary legal or drafting expertise to create a workable set of procedures.

Rules of procedure should be enacted by regulation, with provision for modifications and additions by the Board.

These would include guidelines on the procedures themselves, as well as time limits for the performance of these procedures. For example, within a specified time after a referral to a board of adjudication, parties would be required to attend a pre-hearing conference in order to discuss issues relating to the complaint and the possibility of narrowing or disposing of issues. In addition, parties could be required to effect disclosure of their evidence and do so within a set time limit.

***Recommendations:***

***20. Rules of procedure should be enacted by regulation, with provision for modifications and additions by the Board.***

**Costs**

A respondent who successfully defends against a complaint is generally not entitled to receive costs. In contrast, when the Board finds in favour of a complainant it may award costs to both the complainant and the Commission [section 24 of the Act].

There is no reason for this imbalance. Parties that are immune with respect to a costs award have no incentive to act reasonably, and experience shows that parties with immunity act with impunity.

***Recommendation:***

***21. The Act should treat all parties equally, including with respect to costs.***

**Appeals**

The Act currently provides for appeals to the Supreme Court but following Court of Appeal procedures.

The Supreme Court has enacted new rules which provide for procedures for handling statutory appeals.

The reference to Court of Appeal procedures should be eliminated as it merely complicates the appeal process.

It is the current practice of the Commission to undertake the costs of an appeal on behalf of the complainant when the Commission considers the appeal to be justified. This expenditure of public funds to support the complainant works a considerable unfairness to private party respondents. This is another example of the problematic effect of the Commission's dual roles described on page 3 of this submission.

The role of the Commission in appeals should be clarified.

In conjunction with improving the quality of the Board, the Act should require greater deference to the Board and limit the right of appeal accordingly.

***Recommendations:***

***22. The reference to Court of Appeal procedures should be eliminated as it merely complicates the appeal process.***

***23. The role of the Commission in appeals should be clarified.***

***24. In conjunction with improving the quality of the Board, the Act should require greater deference to the Board and limit the right of appeal accordingly.***

## **COMMENT ON PROPOSALS MADE BY THE HUMAN RIGHTS COMMISSION**

In this section, we comment on the Human Rights Commission proposals with respect to which we have experience and which could have an impact on the Government's ability to properly defend complaints in connection with employment in which the Government and/or employees of the government are respondents.

We wish to point out that the Human Rights Commission's proposals are not "housekeeping" proposals, as reported by the Whitehorse Star on October 8, 2008, but substantive proposals which, if adopted, could have a significant impact on the abilities of employers throughout the territory, and on the resources needed, to respond to complaints.

We have not commented on the Commission's proposals if we have already addressed the issue above. If we have not commented on a proposal of the Commission, it should not be assumed that we agree with the proposal.

### **Issue – Expansion of Prohibited Grounds**

The Commission proposes to expand section 7 of the current act by adding additional prohibited grounds of discrimination. In our view, the current list of prohibited grounds is comprehensive and sufficient. Judicial decision makers have interpreted and applied similar lists of prohibited grounds expansively and inclusively. For example, "gender identity" has been included in the prohibited grounds "sex" and "disability"<sup>1</sup>; persons who are homeless would likely be included in the prohibited grounds "source of income" or "disability" or perhaps even "ancestry, including colour and race", depending on the reasons they became homeless<sup>2</sup>.

Human rights legislation is not designed to protect every characteristic in society, but is generally aimed at protecting characteristics which are "immutable". The proposal to include victims of violence as a prohibited ground is not consistent with this aim. Concerns about violence are more properly addressed under criminal law or through social services.

Care must be taken to ensure that, in attempting to ameliorate discrimination in one sector, we don't institutionalize discrimination in another sector. The Commission's proposal to add the ground "social condition" is a case in point. While we acknowledge the historic and ongoing disadvantage arising from the effects of the Indian residential school system, persons disadvantaged by these effects are already covered by the current prohibited grounds in subsections 7 (a) and 7 (c). Meanwhile, there are other societal groups who are vulnerable or disadvantaged because of the effects of generations of poverty in their families who are not of aboriginal origin or who have not suffered the adverse effects of the Indian residential school system. The proposed definition, if adopted, would eliminate these groups from the "social condition" ground.

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<sup>1</sup> Sheridan v. Sanctuary Investments Ltd. (c.o.b. B.J.'s Lounge), [1999] B.C.H.R.T.D. No. 43 at paras 94 and 97

<sup>2</sup> Radek v. Henderson Development (Canada) Ltd., [2005] B.C.H.R.T.D. No. 302

We oppose expansion of the prohibited grounds generally, unless a case can be made that a group of persons with an immutable characteristic has suffered unfavourable treatment and has not been able to obtain a remedy because the characteristics of the group are not included in human rights legislation as prohibited grounds. No such case has been made with respect to any of the new prohibited grounds that the Commission seeks to include.

We also recommend against the Yukon's attempting to be out front of the law of other, particularly large, and more experienced jurisdictions, particularly in areas, in which the law is still changing.

### **Issue – Definition of Disability**

"... **may limit** ..." – The proposed new definition includes conditions that **may limit** a person's ability to carry out any of life's important functions or activities – this is a huge expansion that would extend protection beyond the mandate of the current Act and we strenuously oppose it. Currently, whether or not a medical condition actually does limit a person's ability is what determines that person's the protection under the Act. Society's obligation is to not limit opportunities, despite the fact that a person's abilities are limited as a result of a medical condition. The legislature should not require respondents to assume responsibility for alleged unfavourable treatment on the ground that a complainant has a medical condition that may limit that person's abilities sometime in the future.

Some jurisdictions have, as part of their prohibited grounds, "perceived disability". Whether someone has a disability that may limit their abilities is quite different from whether someone is perceived as having a disability. The Act should protect against discrimination on the ground that a person is perceived as having a disability, but not because he or she may be limited in the future. In fact, we can't think of an example of a situation of this nature. We note that the Commission has not provided a rationale for this proposal.

### **Issue – Duty to Accommodate**

Re 8(2) – ... "**may have an adverse impact** ..." – Again, including this term in this definition attempts to make respondents responsible now for possible future effects of rules or standards. We agree that, in articulating rules and standards, employers have to try to anticipate whether and how a rule or standard could exclude or have an adverse effect on individuals or groups covered by the prohibited grounds. However, every effect of a rule or standard cannot be anticipated. When it is discovered that a rule or standard does have an adverse effect on a person covered by a prohibited ground, the actual effect of such systemic discrimination has to be corrected, and the rule or standard amended accordingly.

We also fail to see how a claim for possible future systemic discrimination would be articulated or in what manner a respondent could be held responsible for a rule or standard alleged to possibly have a future adverse effect. Would a claimant allege that a rule or standard could adversely affect him or her in the future? Would the respondent be required to set aside some cash for a possible



future remedy? Without some clarity in this regard, and we note that the Commission has not included a rationale, this proposal should be rejected.

Re: 8(3) – the Commission proposes to eliminate three of the five current factors which respondents can currently reference to establish undue hardship. The Act currently lists the following factors:

- (a) Safety
- (b) Disruption to the public
- (c) Effect on contractual obligations
- (d) Financial cost, and
- (e) Business efficiency.

The Commission proposes to retain only “factors such as but not limited to health, safety and cost”. We note that this is not referenced in their rationale. **We strongly oppose this proposal as it would significantly limit the ability of respondents to meet the test for undue hardship.** It is a well understood principle of legislative interpretation that the term “such as but not limited to” requires that additional factors that can be considered included must be similar in character to the factors explicitly listed. Therefore, this proposed amendment would permit respondents to reference only factors that are similar to health, safety and cost.

The test for establishment of undue hardship is already extremely stringent, particularly for employer respondents who are viewed as having ample resources, even when those resources stem from taxpayer revenue. If a government employer is not permitted to argue that “disruption to the public” or “business efficiency” contribute to its hardship in implementing a particular accommodation, it is not meeting its obligations to taxpayers. In addition, jurisprudence across Canada interpreting the various human rights statutes has tended to articulate additional undue hardship factors, rather than eliminating factors.

### **Issue – Systemic Discrimination**

The Commission proposes two slightly different definitions of systemic discrimination.

Under “Issue – Duty to Accommodate”, they propose a new subsection 8(2) as follows:

- (2) For the purposes of section 8(1), discrimination means unfavourable treatment resulting from a rule, standard, policy, decision, practice, law or physical barrier that has or may have an adverse impact on those protected under the Act in section 7 and 9.

Under “Issue – Systemic Discrimination”, they propose a new section 12 as follows:

In this Act, discrimination as set out in section 7, 8, 9 and 15 includes laws, policies, procedures, standards, practices or patterns of behaviour that are part of a system that by design or impact has the effect of limiting a person or group’s access to opportunities generally available to others or which creates or perpetuates disadvantage for people protected under the Act.

While these definitions are similar, they are sufficiently different that that it will surely complicate complaints which include allegations of both systemic discrimination and failure to accommodate. Also, detailed definitions of this nature are more likely to become limiting in application than more inclusive.

#### **Issue – Reasonable Belief Required to File a Complaint**

We agree with this proposal.

#### **Issue – Who may file a complaint?**

We oppose the proposal that the Commission may initiate a complaint. We note that the Commission has not provided examples of when this might be necessary in the public interest.

#### **Issue – Time Limit**

We oppose the proposal in 20(4) (a) that the Commission could accept a complaint after the time limit if the delay was incurred in good faith. As we submit on pages 8 and 9, as a minimum, a complainant seeking relief from the time limit should have to show real reasons beyond his/her control for not filing in time and there must be no prejudice to the respondent.

#### **Issue – Improving Remedies**

Re the proposed new 24 (3) – minimum compensation for injury to dignity – **we strenuously oppose setting a minimum amount for compensation for injury to dignity** and for setting such a high minimum amount. Despite having no legislated maximum on injury to dignity payments, the Board of Adjudication has to date not ordered injury to dignity payments higher than \$3,000.00.

This proposal has the potential of hurting small employers without in-house resources – if it would cost more than that to defend against a complaint, they might feel obliged to just offer to pay the \$5,000, whether or not discriminatory conduct could be established. This establishes unfair precedents.

## CONSIDERATION OF AN ALTERNATE MODEL

In this section, we review the development and use of the “Direct Access” model of human rights legislation and comment on the extent to which this model addresses the faults of the system currently in place in the Yukon.

### **Human Rights Legislative Regimes**

In their 2001 report on human rights entitled *Human Rights Review: A Background Paper*, Deborah Lovett and Angela Westmacott said the following about the ultimate goal of human rights legislation:

There have been major developments in the concepts of discrimination and equality in the last twenty years. Despite the evolving nature of these concepts, and the expanding scope of protection, the overarching goal of human rights legislation has remained unchanged. That goal is to prevent the spread of prejudice and discrimination where it occurs and to foster tolerance and equality in our society. In every Canadian jurisdiction, this goal is achieved by: (a) addressing discrimination at the individual and systemic levels; (b) providing a means of redress to individuals and groups who have suffered individual and/or systemic discrimination; and (c) addressing discrimination through research, information and education.<sup>3</sup>

Historically, all human rights regimes in Canada were structured in the same way, with a Commission and a quasi-judicial Tribunal (the “Commission Model”). Recently, however, this has been changing and a Direct Access Model has been adopted in three jurisdictions.

### **The Commission Model**

In the traditional Commission Model, a human rights commission, independent from government, is statutorily empowered by human rights legislation to fulfill two goals. Firstly, it administers and enforces the claims process, *i.e.* it investigates, dismisses or refers claims to hearing. It may also promote the settlement of claims through mediation or other dispute resolution processes. Secondly, the human rights commission promotes awareness and respect for human rights through public education and preventative initiatives. A central feature in the Commission Model is the existence of an independent, quasi-judicial body that operates on an as-needed or permanent basis to adjudicate claims referred to it by the commission.

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<sup>3</sup> *Human Rights Review: A Background Paper* (Victoria, Administrative Justice Project, Ministry of Attorney General, 2001) at 136.

## Commission-Based Jurisdictions

Human rights legislation in the following provinces and territories is administered through a commission-based structure:

Alberta *	Newfoundland and Labrador	Prince Edward Island
Manitoba	Nova Scotia *	Quebec
New Brunswick	Northwest Territories	Saskatchewan
	Yukon	

\* These regimes are currently examining the direct access model. BC, Nunavut and Ontario have already adopted the direct access model.

The regimes in commission-based jurisdictions all have essentially the same characteristics, with slight variations from one jurisdiction to another. In general, human rights complaints in these jurisdictions are filed with a commission which screens out complaints and thus serves as a “gatekeeper”. Most commissions will conduct investigations into complaints and, where appropriate, refer complaints to an adjudicative body which holds a quasi-judicial hearing to determine whether or not there has been a human rights violation. If a violation is not found, the complaint may be dismissed. If a violation is found, the adjudicative body may order the respondent to do any number of things, including ceasing the contravention and rectifying the harm done. In addition, commissions are by and large responsible for promoting human rights awareness under human rights legislation in a given jurisdiction.

## Proponents of the Commission Model

Proponents of the Commission Model feel that it is a fair and accessible system in that the burden and costs of investigation are borne by a commission rather than being shouldered by individual complainants. Supporters of this model also feel that because a commission screens complaints as a “gatekeeper”, the appointed adjudicative body can dedicate its resources “to doing what it does best: adjudicating the substantive merits of allegations of human rights violations.”<sup>4</sup>

In addition, proponents of this model feel that it is a means of connecting individual complaints to wider social concerns and thus fulfills the goal of human rights legislation to address discrimination at the systemic level.

## Concerns with the Commission Model

Concerns with the Commission Model include excessive costs, unfairness, inefficiency and delay. For instance, in his 2002 letter to the Attorney General of B.C. respecting proposed amendments to the B.C. *Human Rights Code*, the President of the B.C. Civil Liberties Association voiced the following criticisms about the bifurcated Commission and Tribunal structure in place in B.C. at the time:

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<sup>4</sup> Heather Dixon, “You’re On Your Own: The Impact of Eliminating Human Rights Investigations in B.C.” in Route 64 – Another Detour On the Road To Equality, Devyn Cousineau, ed. (Victoria, University of British Columbia, 2006) at 61.

...[T]he Code, as currently structured, mandates time-consuming, expensive (both for the system and for the parties) and often pointless procedures which do nothing to ensure fairer results, greater access to or improved public confidence in our human rights system.<sup>5</sup>

He explained further that:

One of the frequent criticisms of the old Commission structure was that it combined too many, probably inconsistent, functions in a single entity. The potential for a conflict of interest, or at least a perceived bias, in a single Commission charged with public education, mediation and investigation of complaints, and representing the public interest in specific human rights complaints, was simply too great.<sup>6</sup>

The B.C. Civil Liberties Association went on in the letter to state that the systems designed to protect and enforce human rights are far too important to be allowed to be brought into disrepute by unworkable statutory structures and consequently recommended that B.C. adopt the "Direct Access" model.

Similar complaints have been made in other jurisdictions.

### **The Direct Access Model**

Unlike the Commission Model, in the Direct Access Model, all claims are filed directly with a permanent adjudicative body rather than a human rights commission. As a result, the adjudicative body has the responsibility for claims management, including creating rules and mechanisms for governing pre-hearing procedure and making pre-hearing decisions regarding dismissal or referral to hearing. It is also responsible for providing dispute resolution processes.

There are variations of the Direct Access Model. In one variation, for example, a human rights commission is retained for limited purposes. However, the commission's primary role is restricted to the proactive promotion of human rights through education and other initiatives rather than that of "gatekeeper" (screening out of complaints).

In another variation, the commission may continue to be involved in certain cases but its traditional responsibilities such as screening, investigation and mediation are eliminated. In that case, the adjudicative body takes a more active, interventionist role regarding case management and decision-making than is typically associated with traditional adjudicative decision-making.

In yet another variation, the commission is eliminated entirely. Legal representation is provided through a publicly-funded human rights clinic and a publicly-funded body is responsible for the provision of education and the promotion of human rights.

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<sup>5</sup> John Dixon, President, B.C. Civil Liberties Association, *Letter* (September 13, 2002). Accessed on-line at: <http://www.bccla.org/othercontent/02hrcommission.html> (October 1, 2008).

<sup>6</sup> *Ibid.*

## Direct Access Jurisdictions

British Columbia, Nunavut and Ontario have each adopted a variation of the Direct Access Model as a system for protecting human rights. The regimes in all three jurisdictions are similar in that claims are filed directly with a permanent adjudicative body which administers claims from filing right through to adjudication.

The main difference is in how the human rights education and awareness function is carried out in each jurisdiction. The body responsible for promotion in Ontario is the Ontario Human Rights Commission. In B.C., the human rights commission has been eliminated and the promotional mandate is carried out by the B.C. Human Rights Coalition, the Ministry of Attorney General and the B.C. Human Rights Tribunal. Finally, Nunavut never established a human rights commission because it adopted a Direct Access structure immediately upon introducing its *Human Rights Act* in 2004. The promotional mandate in that territory is administered through a separate body under the *Legal Services Act*.

## Proponents of the Direct Access Model

Proponents of the Direct Access Model view this model as efficient, cost-effective, accessible and fair.

In addition, permanent tribunals, such as those under Direct Access structures, are seen to offer "expertise, consistency, economy and efficiency in case flow management, and jurisprudential effectiveness, as well as stature and prestige."<sup>7</sup>

## Concerns with the Direct Access Model

Common concerns with the Direct Access Model include a narrowing of the focus of human rights to individual complaints heard by the Tribunal, which some critics feel falls short of addressing systemic concerns. In addition, critics have raised concerns that adopting a Direct Access Model shifts the "gatekeeping" function to the adjudicative body and consequently the latter spends more time screening out complaints than adjudicating the substantive merits of complaints.

Attached as an Appendix is a review of the Canadian experience with human rights legislative regimes.

### **Recommendation:**

***25. The experience above demonstrates that the Direct Access Model is flexible and can be fashioned to suit a variety of legislative and procedural objectives. As one of our most significant concerns about the present regime is the resources and time spent on comprehensive investigations with limited utility, we favour a model which provides parties with early access to the persons with authority to determine whether or not discrimination occurred and to decide whether and which remedies are appropriate.***

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<sup>7</sup> Brian Howe and David Johnson, *Restraining Equality: Human Rights Commissions in Canada* (Toronto: University of Toronto Press, 2000) at 133.

## SUMMARY OF RECOMMENDATIONS

### A. COMPLAINT PROCEDURE

#### Dual Role of Human Rights Commission:

1. *The dual role of the Commission should end. It should not act both as quasi-judicial decision maker and interested advocate in the same matter.*

#### Surplus Advocate

2. *The Commission's role as advocate at the Board hearing should end. Alternatively, complainants should be required to elect either to rely on the Commission or to present their cases themselves; but not both.*
3. *The Commission should be required to cease pursuing a complaint when a complainant has not demonstrated any interest in continuing it.*

#### Investigations

4. *The Act should set parameters on the scope of the investigation and firm timelines for completion*

#### Criteria for Screening Out or Dismissing Complaints

5. *Criteria for proceeding with complaints or rejecting or dismissing complaints or parts of complaints should be clearly articulated in a revised Act.*
6. *Such criteria should be applied by whichever level or entity has authority over a complaint.*
7. *A complaint, or part of a complaint, should be screened out or dismissed whenever:*
  - a. *the complaint is beyond the jurisdiction of the commission;*
  - b. *there is no reasonable prospect that the complaint will succeed, i.e.*
    - i. *there is no reasonable basis in the evidence to support the complaint*
    - ii. *it discloses no reasonable complaint;*
    - iii. *no prima facie case of discrimination is established;*
    - iv. *there is no evidence of discrimination on a prohibited ground;*
    - v. *where undisputed facts clearly provide a defence;*
  - c. *proceeding with a complaint (or part of a complaint) would neither benefit the complainant or his/her protected group nor further the purposes of the Act;*
  - d. *the complaint does not warrant expenditures in the public interest;*
  - e. *it is unnecessary, trivial, scandalous, frivolous or vexatious or made in bad faith;*

- f. *maintaining part of a complaint may prejudice or delay the fair hearing of the rest of the complaint;*
- g. *the complainant requests that the complaint not be pursued or demonstrates no interest in continuing to pursue the complaint;*
- h. *the complainant fails to accept a reasonable settlement offer;*
- i. *it is otherwise an abuse of the process of the Commission or Board of Adjudication.*

8. *An avenue for a review of the screening or dismissal decision, short of judicial review, should be made available.*

#### Limitation Period

9. *The limitation period should not be changed or extended. The limitation period should be enforced.*
10. *Alternatively, discretion could be provided to the Commission to relieve against the time limit for filing complaints in certain limited circumstances:*
  - *the exercise of this discretion should be time-limited – for example, where the Commission determines that circumstances beyond the control of the complainant delayed the filing of the complaint, it could exercise discretion for no longer than a two year period prior to the filing of the complaint.*
  - *the exercise of this discretion should also be limited to circumstances demonstrably beyond the control of the complainant and in which there would be no prejudice to the respondent.*
11. *There should be an opportunity for the respondent to be heard before the Commission renders such a decision.*
12. *The Act should specify criteria for or define so-called ongoing or continuing contraventions and whether and in what circumstances prior incidents can be included in a complaint of this nature. Incidents to be considered continuing contraventions must be of the same character as the prior incident.*

#### Multiple Venues

13. *A complaint should be screened out or dismissed if the complaint is one that could more appropriately be dealt with, or has appropriately been dealt with, according to a procedure provided for under another Act.*

#### Mediation and Settlements

14. *Mediation rules of practice should be set out in the Act or Regulations or the Board of Adjudication should be expressly authorized to make rules. Rules should address access to trained, independent mediators and appropriate timelines.*



## B. ADJUDICATION PROCEDURE

### Name

- 15. The Board of Adjudication should be given a more descriptive name such as the Yukon Human Rights Tribunal.*

### Merit-Based Appointments

- 16. Appointments to the Board should be based on merit, including mandatory legal training and training and experience in the fields of human rights, litigation law and administrative law.*
- 17. Hearings should be conducted before a single qualified panel member, instead of three lay members.*
- 18. Complaints that concern allegations of discrimination in the workplace should be heard by a panel member who also possesses experience in employment law.*
- 19. Appointments to the Board should not be limited to Yukon residents; qualified persons outside the Yukon should also be appointed. This practice is already followed at all three levels of Yukon courts as well as in private arbitrations.*

### Rules of Procedure

- 20. Rules of procedure should be enacted by regulation, with provision for modifications and additions by the Board.*

### Costs

- 21. The Act should treat all parties equally, including with respect to costs.*

### Appeals

- 22. The reference to Court of Appeal procedures should be eliminated as it merely complicates the appeal process.*
- 23. The role of the Commission in appeals should be clarified.*
- 24. In conjunction with improving the quality of the Board, the Act should require greater deference to the Board and limit the right of appeal accordingly.*

## CONSIDERATION OF AN ALTERNATE MODEL

- 25. The experience above demonstrates that the Direct Access Model is flexible and can be fashioned to suit a variety of legislative and procedural objectives. As one of our most significant concerns about the present regime is the resources and time spent on comprehensive investigations with limited utility, we favour a model which provides parties*

*with early access to the persons with authority to determine whether or not discrimination occurred and to decide whether and which remedies are appropriate.*

## APPENDIX

### The Canadian Experience with Human Rights Legislative Regimes

Human rights in the majority of Canadian jurisdictions are administered through a Commission Model. However, the traditional Commission Model has become a source of concern with respect to its soundness as an administrative system for the protection of human rights. Therefore, a number of Canadian jurisdictions have shown interest in implementing a Direct Access Model and three jurisdictions have in fact implemented the new model. This section details the human rights experience in a handful of Canadian jurisdictions and their motivation behind wanting to change from a Commission Model to a Direct Access structure.

#### The B.C. Experience

##### The Pre-March 2003 Model

Prior to amendments of the British Columbia *Human Rights Code* (the "BC Code") in March 2003, B.C.'s human rights legislation was administered through a commission-based structure. Under that structure, the B.C. Human Rights Commission (the "BC Commission") was mandated with educating the public about human rights in the province, and investigating and mediating complaints. The BC Commission was also empowered under the former system to file complaints in its own right or participate in existing complaints.

Once a complaint was initiated, the BC Commission investigated the facts of the case to determine whether it fell within the scope of the *BC Code*. Where there was sufficient evidence to support an allegation of discrimination, the BC Commission referred the complaint to the B.C. Human Rights Tribunal for hearing.

The Tribunal under the former system operated independently of the BC Commission and functioned as the adjudicative branch.

##### Reform of the Pre-March 2003 Model

The Pre- March 2003 B.C. structure became the subject of an extensive, formal public examination initiated by the B.C. government in 2001. The examination concluded that:

The clear and consistent message from legal experts, from human rights advocates, from members of the public and, most importantly, from the users of the system — both complainants and respondents — was that the status quo wasn't working.<sup>8</sup>

Criticism of the former system in B.C. included concerns about:

- The delays in intake and investigation;
- The unevenness and inconsistency between decisions;
- The duration and complexity and costs of the process;
- The inadequacy of appeal mechanisms;
- The rigidity of the complaint investigation process;

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<sup>8</sup> British Columbia, Legislative Assembly, *Hansard*, (23 October 2002, Afternoon Sitting) Vol. 9 No. 5 (Hon. G. Plant) at 3987. Accessed on-line at: <http://www.leg.bc.ca/HANSARD/37th3rd/h21023p.htm> (September 23, 2008).

- A perceived emphasis on dismissal statistics rather than on the proper disposition of complaints;
- The knowledge and training of investigators, and
- An investigation process that did not generally add value to or assist in the resolution of complaints.<sup>9</sup>

In response to these concerns, the province moved from a human rights approach based on multiple agencies with “confusingly intersecting mandates” to an approach with one statutory agency.<sup>10</sup> In March 2002, the *BC Code* was amended and the BC Commission was eliminated, making way for a Direct Access system to the B.C. Human Rights Tribunal (the “BC Tribunal”), which was statutorily empowered to enforce all human rights claims within the province, at all stages; including intake, case management and adjudication.

#### Discussion of the Current B.C. Model

Since the March 2003 reforms to the B.C. system, parties involved in complaints have noticed a vast improvement in the administration of human rights protection in the province.

In the BC Tribunal’s Annual Report 2006/2007, the Tribunal Chair indicated that the new rules of practice and procedure are effective and understood by parties. She also reported that the new case management system is working well and that Tribunal staff is well-trained and effective.<sup>11</sup>

The Chair also related the success of the Tribunal’s promotion of human rights awareness. Finally, and importantly, she reported that the Tribunal was able to reduce its processing time for new complaints and maintained a current workload for most of 2006/2007. In addition, the Tribunal was able to decrease its caseload in 2006/2007 by 13 per cent.

Finally, the Chair explained that the Tribunal’s mediation services continue to be heavily used and that, as a result, many complaints reach early settlement. In fact, the Annual Report indicates that 44 per cent of complaints in 2006-2007 were settled.<sup>12</sup>

Concerns about the new model in B.C. include accessibility issues for the poor and disenfranchised who used to rely on the BC Commission to advance their cases, and the elimination of a body which played an active role in opposing systemic discrimination.

Overall, however, parties involved in the human rights process in B.C. note a significant improvement. In particular, lawyers for respondents see the new model as being more efficient, accessible, cost effective and fair.

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<sup>9</sup> *Ibid.* at 3988.

<sup>10</sup> *Ibid.*

<sup>11</sup> B.C. Human Rights Tribunal, Annual Report 2006-2007, (Vancouver: B.C. Human Rights Tribunal, 2007). Accessed on-line at: [http://www.bchrt.bc.ca/annual\\_reports/Annual\\_Report\\_2006-2007.pdf](http://www.bchrt.bc.ca/annual_reports/Annual_Report_2006-2007.pdf) (October 1, 2008).

<sup>12</sup> *Ibid.* at 7.

## The Ontario Experience

Prior to the recent reforms of the human rights system in Ontario, the Ontario *Human Rights Code* (the "Ontario Code") was administered through a traditional Commission Model. Under that regime, the former Ontario Human Rights Commission had authority to initiate its own complaints. Where a complaint was referred to hearing, the former Ontario Commission had carriage of the complaint before a Board of Inquiry.

The former structure in Ontario became the object of public scrutiny and, as Kevin Marron writes in his 2008 article for *Canadian Lawyer*, by the time a new system was established, the former system was "notoriously dysfunctional."<sup>13</sup>

In October of 2005, the former Ontario Commission issued a consultation report in response to the Ontario government's plans to develop a blueprint to guide the process for reform of Ontario's human rights system. The objective of the former Ontario Commission's consultation report was to "invite a broad range of individuals and organizations involved in Ontario's human rights system to engage in a critical review of that system and to discuss each others' perspectives as actors in the system."<sup>14</sup> The consultees included "complainants, advocates and other interested individuals; complainant and respondent counsel; human resource professionals; specialty and community legal clinics; community organizations; government agencies; unions; academics and other experts, including international human rights consultants; and staff of the [former Ontario Commission] and [Human Rights Tribunal of Ontario]."<sup>15</sup>

Through the consultation, key areas of concern identified by the former Ontario Commission about the existing system were timeliness, efficiency, accessibility, adequate resources, education and approaches to systemic issues.

### Ontario Amendments – Bill 107

In December 2006, the Ontario legislature passed Bill 107, the *Human Rights Code Amendment Act, 2006*, in order to better prevent discrimination, and resolve complaints more quickly and efficiently.

A new complaints process was implemented in June 2008, with individual claims being filed directly with the Human Rights Tribunal of Ontario.

In a press release issued about the amendments, Ontario's Ministry of Attorney General announced that these changes would modernize and strengthen Ontario's human rights system, and bring Ontario "in line with the United Nations' standards for human rights enforcement." The Ministry commented further that:

These changes will produce one of the most advanced and progressive human rights systems in the world," said John Fraser, executive director of the Centre for Equality Rights in Accommodation. "Direct access to a

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<sup>13</sup> Kevin Marron, "Signs of Change," *Canadian Lawyer*, August 2008 at 53.

<sup>14</sup> Ontario Human Rights Commission, *Strengthening Ontario's Human Rights System: What We Heard*, Consultation Report (OHRC, 2005).

<sup>15</sup> *Ibid.* at 60.

human rights hearing is critical if human rights in Ontario are to be protected and promoted."

"The Ontario government is to be commended for reforming our human rights complaints process. Those victimized by discrimination will now have a fair and timely hearing process," said Raj Anand, former chief commissioner. "This legislation is likely to be one of the enduring legacies of this government, strengthening the protection of equality rights in Ontario."

"The meaningful reform of our human rights system, as set out in the Human Rights Code Amendment Act, 2006 will ensure Ontario remains an international leader in human rights protection," said James Morton, president of the Ontario Bar Association. "By implementing the principle of direct access to the Human Rights Tribunal in Ontario, the government has created a model system that will benefit generations to come."<sup>16</sup>

According to Kevin Marron, "[o]perating under a new set of rules, the [Ontario] tribunal promises to promote speedy resolution of cases through mediation and an expedited hearings process."<sup>17</sup>

#### The Alberta Experience

In 1996, Alberta replaced the *Individual's Rights Protection Act* with the *Human Rights, Citizenship and Multiculturalism Act* (the "Alberta HR Act"), both of which provide for a Commission Model of complaint resolution.

In 2007, a report on the Alberta Human Rights Commission examined the modern state of the human rights regime in the province.<sup>18</sup> A number of concerns were raised. First and foremost, it was noted that the number of cases carried forward from the prior year represented nearly half the total cases in Alberta—a significant backlog. This has been a constant issue, dating back at least as far as 1994, when a review by the Human Rights Review Board noted simply that there were too many cases, too few staff and an inadequate budget allocated to dealing with such complaints.<sup>19</sup>

The 2007 report also noted that the referral rate to alternative dispute resolution services was low, a factor it attributed to a provincial dependence on the traditional Commission Model of complaint resolution.

As a result, the report recommended a number of changes to the existing system. It was suggested that the current structure be reviewed in relation to the two existing Direct Access Models in British Columbia and Nunavut, the recent

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<sup>16</sup> "Ontario Passes Human Rights Code Amendment Act", Ministry of Attorney General of Ontario, News Release, December 5, 2006. Accessed on-line at: <http://www.attorneygeneral.jus.gov.on.ca/english/news/2006/20061205-hr.asp> (September 24, 2008).

<sup>17</sup> Marron, *supra* note 11 at 53.

<sup>18</sup> Sheldon Chumir Foundation, (2007) *The Alberta Human Rights and Citizenship Commission: A Comparison with Human Rights Commissions in Canada*.

<sup>19</sup> Alberta Human Rights Review Board, *Equal in Dignity and Rights: A Review of Human Rights in Alberta*. (Edmonton: Human Rights Commission, 1994).

revisions to the Northwest Territories and Manitoba regimes, and the proposed changes in Ontario. Efforts to reduce the backlog of cases were also recommended, with the suggestion that additional legal and other support for complainants was necessary from the government in order to achieve that goal.

The Commission Model in Alberta is still under review with a view to considering moving to a Direct Access Model.

#### The Nova Scotia Experience

As in other parts of the country, there are concerns that Nova Scotia's commission-based structure is both time-consuming and complex. The procedures for investigating and adjudicating complaints have not been substantially restructured since the Nova Scotia Commission was first established in 1967. However, there have been significant increases in the annual number of complaints since that time. Examples of issues in this area are numerous. For instance, delays are a significant concern. There are currently no limits on the time the Commission has to respond to or investigate a complaint, nor is there a permanent human rights tribunal in place. Rather, tribunals are put together on an *ad hoc* or as-needed basis to deal with hearings as they arise. Another issue cited is that the use of alternative dispute resolution mechanisms such as mediation and conciliation is limited under the current model.<sup>20</sup>

For all these reasons, beginning in 2000, an investigation by the Nova Scotia Commission on possible organizational reform was undertaken. Although many of the suggestions that appear in its subsequent reports do not yet appear to have been implemented, they are intended to address the above issues. Among the considerations are the use of a permanent tribunal as a method of reducing the time to resolve human rights complaints and the implementation of a Direct Access Model of enforcement.<sup>21</sup> In support of the latter are the notions that the Direct Access Model allows everybody a hearing; that the process is less complex; that it seems more timely; that it might lead to better results from race-based cases; and that there might be less pressure on individuals to accept a settlement.<sup>22</sup> Also suggested was a broader use of mediation and other alternative dispute resolution services to further streamline the process.

The Commission Model in Nova Scotia is still under review with a view to considering moving to a Direct Access Model.

#### The Federal Experience

Human rights enforcement within the federal arena is also based on the Commission Model. The Canadian Human Rights Commission, whose enabling legislation is set out in the *Canadian Human Rights Act*, was established in 1977 and began operating a year later. Its mandate is to enforce human rights for all federal departments and agencies, federal Crown corporations and all federally-

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<sup>20</sup> Nova Scotia Human Rights Commission, "Moving Forward with Human Rights in Nova Scotia". Accessed on-line at [http://www.gov.ns.ca/humanrights/publications/Moving\\_Forward\\_2002\\_12\\_12.pdf](http://www.gov.ns.ca/humanrights/publications/Moving_Forward_2002_12_12.pdf) (September 29, 2008).

<sup>21</sup> *Ibid.*

<sup>22</sup> Donalee Moulton, "Human Rights Commission Releases Self-Examining Report," *The Lawyers Weekly*: Vol.21, No. 18.

regulated businesses. The Commission is also responsible for administering claims under the federal *Employment Equity Act*.

Although the current regime follows the Commission Model, in recent years a number of concerns have been raised regarding its efficacy. In 1998, a report by the Auditor General concluded that the system is "cumbersome, time-consuming and expensive".<sup>23</sup> Other concerns reference the inability of many individuals to access the system and the significant percentage of cases that are dismissed without a hearing. In response, a subsequent proposal in 2000 by a Review Panel headed by former Supreme Court of Canada justice Gerard La Forest recommended that a Direct Access Model for federal human rights complaints be implemented.

The Review Panel believed a reform to a Direct Access Model would not only streamline the process, but that it would also provide access to those who could not otherwise afford the legal representation necessary to effectively present their case.<sup>24</sup> As of this date, however, no change to the current Federal regime has been made.

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<sup>23</sup> Department of Justice Canada, *Promoting Equality: Chapter 9, Reform of the Complaint Process* at 2. Accessed online at: [http://www.justice.gc.ca/chra/eng/frp\\_c9.html](http://www.justice.gc.ca/chra/eng/frp_c9.html) (September 6, 2008).

<sup>24</sup> Department of Justice Canada, *Promoting Equality: Chapter 10, the New Direct Access Claim Model*. Accessed online at: [http://www.justice.gc.ca/chra/eng/frp\\_c10.html](http://www.justice.gc.ca/chra/eng/frp_c10.html) (September 6, 2008).