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**Submission to  
the Special Committee  
reviewing the Yukon  
Human Rights Act**

**Respectfully submitted by the Yukon Human Rights Board of  
Adjudication**

**October 17, 2008**

## **Introduction:**

The *Yukon Human Rights Act* is one of the most important legislations in the Yukon. It seeks to protect and ensure the rights of groups and individuals. It offers a path of resolution and in some cases, restitution for any breach of human rights.

The Board of Adjudication will not put forth any submissions as to the areas for protection. Our focus is on the processes that are currently in place, identifying the flaws and hopefully offer some productive suggestions and justifications for change.

Ultimately, it falls to the Legislature to change legislation and regulations. This is your challenge. It is our hope that by sharing some of our challenges in the administration of the Act that you will be assisted in making these most difficult decisions. Further, the Board of Adjudication applauds the Special Committee's commitment to consult with the positions of various groups and people who have come out to speak with you. You have been provided substantial amounts of information which will assist you in moving forward in developing recommendations.

It is the sincere hope of the Board of Adjudication that you follow up at some point in the future with providing your recommendations to the public for further comment. Most especially, the Board of Adjudication offers their time and expertise should you wish to pursue consultation with us at your convenience.

## **The Yukon Board of Adjudication**

The Board of Adjudication is a quasi-judicial board created by Legislature through legislation. It is not a court, but an administrative tribunal administered by appointed members representing a broad spectrum of the Yukon public with training in Administrative Justice and Human Rights, not limited to legal professionals. The justice system is encumbered by judicial processes and procedures. The burden of proof is 'on balance of probabilities' is the standard within most Administrative Justice forums. The reason for implementing administrative tribunals is to offer an expedient alternative to the often cumbersome judiciary process in hopes of providing efficient, fair and reasonable access to resolution of complaints arising out of legislation. The process was intended to be based on the Rules of Fundamental Justice, without technical legal rules and procedure that often burden the expedient resolution of matters. Tribunal members were intended to be fair minded members of the public with expertise in the area of the appropriate legislative jurisdiction, with appropriate access to legal advice as necessary to ensure the proceedings meet the requirements of Fundamental Justice.

Over time, the processes under the *Yukon Human Rights Act* at the tribunal level have become increasingly entrenched in judiciary procedures. While it is recognized that lawyers are more comfortable operating within the judiciary, their demands for following judicial and evidentiary processes in the Administrative Justice forum has evolved to the point where it has negatively burdened the intended process and outcome:

- Delays in proceeding with hearing and longer hearings
- Increased use of testimony of limited relevance and value

The impacts of this include:

- Unfairness by extended timelines for both the Complainant and Respondent
- Burdensome costs, not only to the parties, but to the system
- Attempts to further encumber the Rules of Fundamental Justice with greater evidentiary and judicial procedures which are being used to validate proceeding to, or threatening to proceed to Appeal Decisions of the Board to Supreme Court, or to bring procedural decisions to Judicial Review, further delaying resolution and increasing costs.

Any changes to the *Yukon Human Rights Act* or Regulations related to procedures must address the responsibility of the Board of Adjudication to follow the most effective and efficient procedures, and should specifically exclude the application of legalistic evidentiary and judicial rules.

**Challenges faced: The following are a few examples of some of the challenges faced by the Board of Adjudication in processing complaints referred for decision:**

**Requirement of Commission to “carry” a Complaint:** Even if the Commission has determined the chances of a matter being successful at adjudication, the Commission is bound by reasonable presentation by a party to refer a matter for adjudication. They are likewise bound to carry the complaint, which has the effect of being the Complainant’s representative at hearing. This relief of burden to the Complainant is not extended to the Respondent.

**OUR RECOMMENDATION:**

*The Commission may choose to refer a matter for resolution without being required to participate. Where resolution is not reached, either party may bring the complaint to the Tribunal. In some cases, the Commission may wish to participate from the perspective of public interest only, but should not have the burden of carriage of the Complaint.*

### **An Unrepresented Party:**

The challenge, based on the pressures from counsel appearing before the Tribunal is to conduct the matter applying more judicial processes, which challenges many unrepresented parties, whether a Complainant or Respondent. There is no ability for either the Commission or the Tribunal to order or provide counsel. In some extreme cases, the counsel for the Commission has acted as amicus curiae in providing legal information (versus advice) to an unrepresented party; likewise, it is conceivable that where one Respondent is represented, their counsel may be called upon to serve in the role of amicus to an unrepresented respondent. This inability to provide legal advice may raise a question of fairness or conflict of interest.

### **Consideration of Complaint at the same time as presentation of Remedy:**

Members of a tribunal are human. When they hear the testimony of a person, they must weigh not only the information, but that person's disposition, memory, credibility, etc. In some circumstances, to also hear what remedy is being sought, and why, before determining whether there has been a breach of the Act or not, may colour perception of the person or the matter and possibly impact their decision. Additionally the joining of these two pieces of a Complaint increases the hearing time, costs to the parties.

*OUR RECOMMENDATION: That the process, perhaps in the Regulations, should allow the Board discretion to issue its finding on the complaint bifurcated from the remedy sought. This may relieve some financial burden on the parties, at least until the matter is determined and lessen any possibility of prejudice in determining a matter.*

### **Impacts of time between Complaint and Adjudication:**

When a Complaint is filed, there is often a high level of emotion on the part of the Complainant. When the Respondent is informed of a Complaint, there is also a strong likelihood of a high level of emotion. It is at this point that some form of informal resolution is possible, involving a professional mediator. It is our opinion that such process is absolutely critical for a number of reasons:

- Immediate address of an Issue, with the ability to address the emotional responses;
- Clarity of the problem shared between the Parties, recognizing the perception of each in an informal, non-threatening environment;
- The neutrality of the issue at this stage – it is a Complaint that needs addressing, not a “charge of wrong-doing” that is going to be prosecuted; and
- The likelihood that it would almost certainly reduce the number of Complaints that would proceed to investigation, Commission review and ultimately, Adjudication.

By the time a complaint comes to the Board of Adjudication, there is such a level of distrust of the process, distress over timelines, discord between parties, decline in memory credibility, dismay at having to start a “de novo” hearing that the process has become extremely confrontational. The current legislation dictates that a matter coming before the Tribunal is a “de novo” matter, which means that nothing that the Commission has done, investigated or collected as evidence is passed on to the Tribunal. The parties are deeply disheartened to find that all their efforts up to that point are of little value. In fact, most of them are very angry at what they perceive as being wasted time and resources.

The Commission is also required to make a transition from a neutral party who is attempting resolution to a party charged with carriage of the complaint. This lends itself to the perception that the Respondent is GUILTY – because the Commission is pursuing the complaint. Complainants often rely on the Commission to carry their interest, which creates the perception that the Complainant is REPRESENTED BY (at no cost to them) the Commission, while a financial burden is placed on the Respondent.

**OUR RECOMMENDATION:**

*The Tribunal concurs with the Commission in regard to their need to be able to refer a matter directly to adjudication. It concurs that its expertise is such that it is aware of when this would be appropriate, not only because it will be in the best interest of the Parties, but to meet the objectives of Administrative Justice.*

*Additionally, where a matter is referred after a full investigator's report has been completed, that report should be forwarded to the Tribunal and be the foundation upon which the Commission, the Complainant and the Respondents focus their presentation to the tribunal.*

*Further discussion between the Commission, the Special Committee and the Board of Adjudication may provide a Yukon-based process that would best address these concerns.*

**FURTHER CONSIDERATIONS:**

The Board of Adjudication requests that the Committee consider changing the name to "Yukon Human Rights Tribunal" which is consistent with many other jurisdictions, and easier to understand.

There are many areas where the Board may offer feedback, clarity and suggestions to the Special Committee, should you deem it appropriate at some future point in your process. We would recommend that such consultation be conducted with the Human Rights Commission for a fuller, more productive discussion. Having both perspectives at the table will ultimately assist you in delivering a Yukon solution to the Human Rights processes and procedures.

Enclosed for your review is a copy of the BC Human Rights Coalition information. The Special Committee may find it quite useful in your deliberations. It suggests that the Coalition took on the former Commission's role of education and advocacy. The Tribunal role, accepting a Case Management process, remains neutral throughout the process while facilitating a series of resolution steps, up to and including Adjudication before either one Tribunal Member, or a PanelsP

The Board of Adjudication has intentionally avoided addressing any issues with regard to the scope of Human Rights matters. It is our role to enforce the Act within the framework of Administrative and Fundamental Justice requirements. There is, however, a small point which we believe was an error when drafting the Legislation. That is where the duty to Accommodate expressly indicates "physical disability" and excludes "mental disability".

Respectfully submitted on behalf of the Board of Adjudication

  
Barbara A. Kelly Evans, Chief Adjudicator