Strengthening the Nunavut Human Rights System

A Report for the
Government of Nunavut

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The History of Human Rights Legislation in Nunavut

In 1999 when Nunavut was created, Nunavut temporarily adopted the *Fair Practices Act* from the Northwest Territories, allowing itself time to develop human rights legislation for Nunavut. It was recognized from the outset that the *Fair Practices Act* was outdated in various ways, and that Nunavut should develop a made-in-Nunavut approach suited to its unique realities.

Between 2001 and 2003 there was a comprehensive process of consultation about what a made-in-Nunavut approach would look like.[1] A consultation workshop sponsored by the Government of Nunavut Department of Justice was held in Iqaluit in March 2001, with invited representatives from key organizations.

The Government of Nunavut Department of Justice retained a consulting team to facilitate further consultations and to provide advice about an appropriate model for human rights legislation in Nunavut to reflect the needs and issues identified by Nunavummiut. The GN Department of Justice also organized a steering committee to assist with development of human rights legislation for Nunavut that included representatives from the federal and territorial governments, the Nunavut Law Reform Commission, Qulliit Status of Women Council, the Nunavut Council for People with Disabilities, Nunavut Tunngavik Inc. (NTI) and the former Nunavut Social Development Council.

In 2001, there were also consultations in Cambridge Bay and Rankin Inlet. Expectations of Nunavummiut that consistently emerged from the consultations were that Nunavut's human rights system, in addition to having the capacity to react to individual concerns[2] through dispute resolution processes, such as mediation, and where necessary adjudication, should have the capacity to address *systemic* human rights issues and raise awareness of human rights, *proactively*. Public education and outreach, for example, was identified as a high priority responsibility for Nunavut's human rights system.[3] The

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[1] Human Rights Consultation Workshop March 17-19, 2001; *Creating Human Rights for the Territorial Government of Nunavut*, (Knowles Consultancy Services, Inc., 2002)

[2] In other Canadian jurisdictions a human rights concern would commonly be referred to as a complaint. In other jurisdictions the term 'human rights complaint' can connote the substance of a claim and the form presented for adjudication, and more broadly the underlying concern or issue. The term complaint appears throughout human rights legislation in other jurisdictions in Canada. The authors of this Report acknowledge that this concept of complaint is foreign to Inuit culture, in fact the term "complaint" has prohibitively negative or "childish" connotations for Inuit, therefore, its use in Nunavut law may actively discourage Inuit from seeking recourse for the violation of their human rights. Under Nunavut's human rights legislation, the preferred terminology is "notification." This Report uses the terms complaint, notification, and concern, somewhat interchangeably as the discussion moves back and forth between Nunavut and legislation and commentary that comes out of other jurisdictions in Canada. The Report also uses the terms complainant, applicant, and claimant somewhat interchangeably.

[3] The consultations were facilitated by Knowles Consulting and are documented in: *Creating Human Rights for the Territorial Government of Nunavut*, (Knowles Consultancy Services, Inc., 2002); see also: Human Rights Consultation Workshop March 17-19, 2001, reporting on the initial consultation workshop sponsored by the Department of Justice.

consultants' report following the consultations recommended a human rights system for Nunavut that included both a Commission and a Tribunal, with distinct roles.

In 2002, based on the public consultation process and other advice received, the Government of Nunavut Department of Justice produced draft legislation proposing a human rights system that included a Human Rights Commission that was mandated to proactively promote human rights in Nunavut by:

- reviewing government laws, programs and policies;
- undertaking, sponsoring and encouraging research;
- conducting programs of outreach and education;
- advising the government on matters related to human rights;
- initiating complaints; and
- carrying selected complaints involving significant public interest issues to hearing.

The 2002 draft legislation also contemplated a Human Rights Tribunal whose role would be to adjudicate complaints not settled through other dispute resolution processes such as mediation.

However, the legislation introduced in the legislature in October 2002 (Bill 12) did not provide for a Human Rights Commission. Bill 12 provided only for a Tribunal, whose primary roles were to receive and screen complaints, mediate, and adjudicate where necessary.

Concerns about what was perceived as missing from Bill 12 were raised with Standing Committee *Ajauqtiit* of the Legislative Assembly on Bill 12. For example, the written brief submitted by NTI states:

> Bill 12 does not create a Human Rights Commission that can pro-actively investigate problems and undertake public education, let alone incorporate *Inuit Qaujimajatuqangit* into its actions.
>
> It is normal practice in other jurisdictions to have both a Commission and a Tribunal. The purpose of the Commission is to investigate notifications objectively and independently free of any political influence. A Commission typically has investigative powers and a mandate to provide mediation. If a complaint has merit and there is sufficient evidence, the Commission forwards the complaint to an administrative tribunal or court hearing.
>
> Under Bill12, the stand-alone Tribunal will only act if a notification is filed. It will not be able to initiate investigations of systemic discrimination of its choosing, nor does the Human Rights program include policy development, outreach and public education.

> Without a policy development role, the Tribunal will not be able to develop human rights policies specific to Nunavut, and in particular, to the concepts of *Inuit Qaujimajatuqangit….*
>
> Without the power to initiate investigations - instead waiting for a complaint to be filed - NTI believes that systemic discriminatory practices will continue despite the spirit and intent of Bill 12….[4]

Despite such criticisms and the background consultations calling for a range of proactive roles for Nunavut's human rights system, Bill 12 was passed into law without changes. The Government of Nunavut, believing that a stand-alone, direct access Tribunal would be adequate to meet the needs of Nunavut, opted to proceed with human rights legislation providing for a Human Rights Tribunal and no Human Rights Commission. In November, 2004 when the *Nunavut Human Rights Act* came into force, the Nunavut Human Rights Tribunal was created.

The decision to proceed with a stand-alone direct access Tribunal may have been influenced by the example of British Columbia, which, in 2002 abolished that province's Human Rights Commission. In the background at the time, there were also public reports advocating changes in the federal and Ontario human rights systems, and advocating for direct access tribunals, although not without commissions with pro-active mandates.

This Review

In the fall of 2011 the Government of Nunavut requested us to review the structure for protecting human rights in Nunavut. More particularly, our mandate is to review the effectiveness of the Nunavut Human Rights Tribunal with a specific emphasis on whether the legislative authority of the Tribunal and its staff provides Nunavummiut with an effective human rights system.

We consulted key stakeholders during the review: current and former members of the Nunavut Human Rights Tribunal, staff and legal counsel; members of the Nunavut Legislative Assembly; staff of the Legal Services Board; officials of the Nunavut Department of Justice; other Nunavummiut; and experts on human rights systems in other jurisdictions in Canada.

This review is timely and appropriate. The project of developing a made-in-Nunavut approach to human rights enforcement, in light of experience, can and should continue. The Nunavut *Human Rights Act* (NHRA) has now been in force for a number of years. It is therefore possible to reflect on the current structures for human rights in Nunavut with

[4] Submissions of the Nunavut Tunngavik Inc. on Bill 12 - Human Rights Act to the Standing Committee Ajauqtiit, (7 March 2003), in Written Submissions on Bill 12 - Human Rights Act to the Standing Committee Ajauqtiit, (November 2003), 3, at 8.

the benefit of direct experience, as well as awareness of the evolution of human rights systems in other jurisdictions in Canada, and international human rights standards.

New Directions: Establishing a Nunavut Human Rights Commission

This Report identifies a serious structural problem that must be fixed for the NHRA to function effectively. Specifically, certain essential functions are missing from Nunavut's human rights system.

Stakeholders consulted during this review identified a number of functions not provided for in the current NHRA, but which, given the experience of the last six years, they now consider essential to making the NHRA effective for the people of the Nunavut. Each of these functions is significant, but for the most part they are functions which cannot or should not be carried out by the Nunavut Human Rights Tribunal. The core responsibility of a Tribunal is adjudication, and it is widely understood as necessary to maintain some separation between adjudication and education and advocacy.

As recounted to us, the experience of the Nunavut Human Rights Tribunal, and those interacting with it over the last six years, has made it evident that Nunavut needs the functions that are usually carried out by a Human Rights Commission. These functions, though they would be performed by a separate body, would facilitate and strengthen the work of the Tribunal.

The Nunavut Human Rights Tribunal was designed as a direct access, stand-alone adjudicative body. Those with concerns about discrimination in employment, services or housing in Nunavut can contact the Tribunal and register a notification. The Tribunal decides whether a complaint falls within its jurisdiction, engages the parties in mediation, and adjudicates the merits of the complaint when necessary.

The Tribunal was not given a mandate to:

- provide broad human rights education to the residents of Nunavut;
- provide pro-active education to respondents about compliance with the NHRA;
- provide pro-active education to those who need the *Act*'s protections;
- undertake studies, research, or inquiries;
- develop guidelines or policies;
- proactively address concerns about systemic discrimination;
- provide assistance and advice to applicants regarding framing their notifications, evidence, documents, precedents, or witnesses;
- advocate for applicants before the Tribunal (or in court in the event of judicial review or appeal proceedings).

We will discuss each of these functions, and make recommendations. The Report concludes with a summary of our recommendations.

Nunavut Human Rights Commission

Recommendation #1

That the Government of Nunavut amend the Nunavut *Human Rights Act* to include a Nunavut Human Rights Commission.

Nunavut Human Rights Tribunal

Recommendation #2

That the Nunavut *Human Rights Act* be amended to reserve the role of adjudication for the Tribunal. This would include hearing cases referred to it by the Commission; preliminary applications for dismissal by respondents based on criteria that go to the merits of the notification; requests for reconsideration from claimants whose cases the Commission does not refer to hearing; and pre-hearing case management and disclosure processes.

Commission Roles and Responsibilities

Recommendation #3

That the mandate of the Nunavut Human Rights Commission include the specific roles and functions listed in bold text below.

The first recommendation is that Nunavut establish a Human Rights Commission, reserving the role of adjudication for the Nunavut Human Rights Tribunal as set out in Recommendation #2. The roles we recommend be assigned to the new Nunavut Human Rights Commission are:

a. to promote and advance respect for human rights in Nunavut;

b. to protect human rights in Nunavut and the public interest in the advancement of those rights;

c. to forward the public policy that the dignity and worth of every person be recognized and that equal rights and opportunities be provided without discrimination that is contrary to law;

d. to develop and conduct programs of public information and education to,

- **(i) promote awareness and understanding of, respect for and compliance with the Nunavut *Human Rights Act*, and**
- **(ii) prevent and eliminate discriminatory practices that infringe rights set out in the *Act*;**

e. to undertake, sponsor, direct or encourage research into discriminatory practices and make recommendations designed to prevent and eliminate such discriminatory practices;

f. to develop guidelines and adopt policies that will provide guidance regarding compliance with the *Act*;

g. to examine and review any statute or regulation, and any program or policy made by or under a statute, and make recommendations on any provision, program or policy that is inconsistent with the intent of the *Act*;

h. to examine and review Nunavut's compliance with international human rights treaties which Canada has ratified, and the *United Nations Declaration on the Rights of Indigenous Peoples,* and provide advice to the Government of Nunavut;

i. to initiate reviews and inquiries into incidents, practices or conditions that may contravene the human rights of residents of Nunavut, and make recommendations and encourage or co-ordinate plans or activities to reduce, prevent, or remedy such incidents, practices or conditions;

j. to report to the people of Nunavut on the state of human rights in Nunavut;

k. to make special reports to the Legislature of Nunavut following reviews or inquiries, or on an urgent issue;

l. to receive and refer notifications to the Tribunal;

m. to initiate complaints where the Commission considers it appropriate to do so;

n. subject to an applicant's right to ask the Tribunal for reconsideration, to screen out and dismiss notifications that are:

- **i. out of time,**
- **ii. not within the jurisdiction of the Tribunal, or**
- **iii. third party notifications where the person alleged to have been discriminated against does not wish to proceed;**

o. to provide advice and assistance regarding notifications, including:

- **i. advice about the requirements of the *Act,***
- **ii. procedures for filing and proceeding with notifications,**
- **iii. assessing the strength of the claim, and**
- **iv. assistance in completing forms, identifying and contacting witnesses, and identifying and obtaining relevant documents;**

p. to undertake settlement efforts through mediation and other dispute-resolution processes; and

q. to represent applicants and the Commission in hearings before the Tribunal, and before courts in judicial reviews or appeals.

Developing a human rights system for Nunavut that is capable of addressing discrimination proactively and systemically through education and advocacy is consistent with international standards for human rights institutions. The United Nations 1993 *Paris Principles*[5] affirm that human rights systems[6] are to be vested with competence to promote and protect human rights and be given as broad a legislative mandate as necessary to fulfill this aim.

The *Paris Principles* identify key responsibilities and roles necessary to an effective human rights system, and provide detailed guidelines that have implications for the structural makeup of the component institutions. The *Paris Principles*, which represent the collective wisdom of the international community, outline the following functions for state human rights institutions:

- review legislation and administrative decisions;
- examine alleged violations of human rights;
- prepare reports;
- express opinions on the position or reaction of government to human rights evaluations;
- conduct research, education, and publicity programs;
- promote and ensure the harmonization of legislation, regulations and practices with international human rights instruments; and
- protect and promote the public interest.

Elaborating on the *Paris Principles*, the United Nations Centre for Human Rights has identified seven "effectiveness factors"[7] against which human rights systems should be measured:

1. Is the system capable of acting independently from government and other powerful interests?

2. Does the system have a defined, sufficient mandate to protect and promote human rights? This includes the responsibilities to adjudicate complaints, prepare reports,

[5] *Principles Relating to the Status of National Institutions*, 20 December 1993, G.A. Res 48/134, ("*The Paris Principles*"). Online: <http://www2.ohchr.org/english/law/parisprinciples.htm>

[6] Human rights commissions are referred to in the Paris Principles as "national institutions." Because Canada is a federal state its national human rights institutions are federal, provincial and territorial.

[7] Centre for Human Rights, United Nations, *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion of Human Rights*, Professional Training Series No. 4, (New York and Geneva: UN, 1995), Ch. II (A), at 66. Online: <http://www.hrea.org/erc/Library/display_doc.php?url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FPublications%2Ftraining4en.pdf&external=N>

recommendations and opinions, review laws and administrative practices, highlight human rights violations and conduct public human rights education. [emphasis added]

3. Is the system structured to establish and strengthen collaborative relationships with the full range of human rights stakeholders? This includes those with equality obligations, claimants, as well as community advocacy groups and other human rights organizations.

4. Is the system vested with sufficient power to accomplish its objectives while also structured to prevent abuse of respondents' rights?

5. Is the system readily accessible and fairly administered so that rights and responsibilities can be enforced effectively? Do claimants have sufficient supports (legal and otherwise) to make their claims? [emphasis added]

6. Is the system structured and funded so that it operates efficiently and effectively?

7. Is the system structured to be fully accountable to the government, to the public, and to its users?

In proposing a new Nunavut Human Rights Commission with a variety of tools at its disposal to fulfill responsibilities other than adjudication of individual complaints, we have considered the structure of the Nunavut Office of the Official Languages Commissioner. The roles that we propose be assigned to the Human Rights Commission are parallel to the roles of the Languages Commissioner in giving effect to language rights.

The powers of the Languages Commissioner are similar to the powers that a Human Rights Commission would need to be effective. Language rights and statutory human rights are akin in that they are rights of fundamental importance. The Supreme Court of Canada has declared that human rights legislation is "quasi-constitutional" and accorded it primacy over other legislation. As in the case of protection of minority languages, the realization of the promise of substantive equality, which underlies human rights legislation, is dependent on pro-active initiatives by government as a whole, along with the work of specialized enforcement institutions that have their own pro-active capacities.

The Official Languages Commissioner has been effective in discharging legislatively assigned responsibilities which include: investigating claims that language rights have been breached, education and advocacy work, advising public and private sector agencies on how to meet their obligations, and monitoring the Government of Nunavut's progress in meeting its language rights obligations. In 2009, the Languages Commissioner's mandate was expanded, enabling her to:

- mediate complaints,
- start an investigation on her own initiative,
- compel the release of information needed to investigate concerns,
- approve language plans, and

- take legal recourse if necessary over a perceived violation of language rights.[8]

Commission Roles

A. Education

Human rights education matters. A significant role for Human Rights Commissions in other jurisdictions in Canada has been educating the public, and specific sectors of the public – employers, service providers, members of disadvantaged groups – about various aspects of human rights:

- their meaning;
- the interpretation and application of statutory human rights law in Canada;
- the connections between Canada's international human rights commitments and domestic human rights law;
- what human rights mean in daily life;
- how discrimination in employment and services affects the opportunities of individuals and members of groups in our communities;
- what compliance with human rights law requires.

In its June 2000 report, the Canadian Human Rights Act Review Panel, chaired by the Honourable Gerard V. La Forest, said:

> One of the most important aspects of promoting equality is the need to educate those who must provide equality and those who need equality about the meaning and intent of the *Act* with respect to how equality should be achieved.[9]

When human rights schemes were designed in the 1970s, education was seen as a key function of human rights institutions. Governments and community advocates wanted to ensure that institutions were given authority and resources, not only to enforce the law through investigating and adjudicating complaints, but also to educate the public so that discrimination could be prevented. The intention was to foster a culture of respect for human rights by promoting dialogue, discussion and knowledge about discrimination and its causes and consequences.

Human rights education is never finished. The need for it is perpetual, and always urgent. In Nunavut, where human rights law is still new and needs to be integrated with Inuit knowledge, the need for human rights education programs that will foster local knowledge and Nunavut-centric approaches is especially important.

Jim Posynick, who was legal counsel to the NHRT for several years and has been an adjudicator in human rights matters in the Northwest Territories since 1995, wrote to

[8] Languages Commissioner of Nunavut, *Annual Report, 2010-2011*, (2011). The Annual Report provides a more extensive list and account of the Official Languages Commissioner's roles and responsibilities.
[9] Canadian Human Rights Act Review Panel, *Report of the Canadian Human Rights Act Review Panel*, (Ottawa: June 2000), Ch 8, at 4 [CHRA Panel Report].

Marion Love, the Executive Director of the Human Rights Tribunal, on November 4, 2011, to provide his thoughts about changes to the Nunavut human rights system.[10] In his letter he states:

> Since inception, and in particular since the headquarters of the panel has been moved to Coral Harbour, it has become increasingly apparent that public access to information about human rights generally, and the remedial aspects of the NHRA specifically, continues to lag significantly behind other jurisdictions nationally and internationally.
>
> The *Act* is a 'direct access' model which means that the overriding responsibility of Tribunal members is to make decisions based on a filed notification (which is really a complaint by another name). It has no mandate to investigate complaints. It has no mandate to conduct outreach, nor to ensure that cases of importance, e.g. those involving systemic discrimination, are well presented by all parties.
>
> It is trite law that all parties before it are entitled to fair and impartial decision-making. Consequently, the members have an obligation *not* to play a role in public debate about human rights. They must be careful not to display any predisposition towards the conduct of any party or potential party. Their opportunity to speak about human rights is within the 4 corners of the *Act*, namely as decision-makers whose views form the basis for written decisions.
>
> It is not easy remaining neutral in small communities. But it is essential to creating and upholding public confidence and respect for the administration of justice.
>
> The legislators understood this and specifically gave the outreach function to professional people who have an important role to play in increasing the legal knowledge of Nunavummiut, the Legal Services Board ("the LSB"):
>
> Objects of Board
>
> **7.** The objects of the Board are
>
> (a) to ensure the provision of legal services to all eligible persons;
>
> (b) to ensure that the legal services provided and the various systems for providing those services are the best that circumstances permit; and
>
> (c) to develop and co-ordinate territorial or local programs aimed at
>
> (i) reducing and preventing the occurrence of legal problems, and
>
> (ii) increasing knowledge of the law, legal processes and the administration of justice.

[10] The authors of this Report quote from Mr. Posynick's letter with his permission.

> **(iii) providing public education and outreach with respect to human rights.** S.Nu. 2003,c.12, s.49(2). (emphasis added)

Mr. Posynick notes that "[s]ince inception, each and every Chair of the Tribunal has, while acknowledging the danger of taking on a personal role as a human rights proponent, expressed concern about the lack of human rights information available to the public." This outreach function remains unfulfilled.

He concludes by recommending that Nunavut have a Human Rights Commission authorized to fill the crucial public education role, as well as other roles:

> When the *Act* came into force, I was one of those who thought a direct access tribunal was a good idea. It would keep administrative costs down, it would allow Nunavummiut a quicker means of resolving complaints. Looking back at what has actually transpired, the experience of administrative staff and the kinds of scenarios that have arisen because of the relatively low level of understanding of human rights among Nunavummiut, I now believe that there are several reasons that a Human Rights "Commission" is an appropriate and realistic outreach approach for Nunavut:
>
> 1. There has been no discernible increase in knowledge about human rights generally or the content of the NHRA among Complainants or Respondents (with the possible exception of the GN)….
> 2. A "Commission" is a wholly distinct legislative body and there is no danger of bias or tainting allegations.
> 3. A "Commission" can play a hands-on role in helping employers (who comprise the greatest number of respondents in every jurisdiction) develop appropriate employment policies and practices that are *preventative*.…
> 4. A "Commission" can travel and promulgate the legislation as a primary, not secondary mandate.[11]

We agree with Mr. Posynick about the need for a Commission. While employees of the Legal Services Board do provide some information about the NHRA in communities to which they travel, this is not satisfying the need for outreach and information on human rights, or adequately raising the level of understanding.

The need to ensure that information about the NHRA is widely known is basic. However, human rights education must go beyond providing information on the *Act* alone. A Commission with a broad education mandate can provide information about more than the *Act*'s requirements and protections. It can educate employers and service-providers, so that they can identify and eliminate discriminatory practices. It can educate individuals and groups who need human rights protection, so that they understand their rights and can exercise them when they need to.

[11] The numbering of these points is different here than in Mr. Posynick's letter, because some points are not directly related to education and were omitted.

A Commission can also be a voice for human rights values: it can identify and speak publicly about human rights issues that arise, and can promote the realization of human rights in Nunavut. A Commission can, in various ways, foster a larger understanding of equality as a social value, and of conditions required to make equality a reality, both in Canada and in Nunavut.

As Mary Cornish observed in a 2010 paper prepared for the Yukon Department of Justice,

> Eliminating discrimination is not simply a matter of designing a good tribunal complaints process, although that is a key building block. A human rights system must also support and enforce the broader actions required to transform the dynamics that support discrimination.[12]

The 2002 draft Nunavut human rights legislation included a Human Rights Commission. Section 20 of that legislation read:

> It is the function of the Commission,
>
> a) to promote Inuit culture and values that underlie the Inuit way of life in the administration of this *Act*;
> b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
> c) to promote the policy that the dignity and worth of every individual must be recognized and that equal rights and opportunities must be provided without discrimination that is contrary to the law;
> d) to further public policy in Nunavut that every person is free and equal in dignity and rights and to discourage and eliminate discrimination;…
> f) to develop and conduct programs of public information and education designed to eliminate discriminatory practices that are contrary to this *Act*;…
> h) to promote an understanding and acceptance of and compliance with this *Act* and the regulations;…

The *Ontario Human Rights Code* enacted in 2006 sets out education functions for the Ontario Human Rights Commission in this way:

> The functions of the Commission are to promote and advance respect for human rights in Ontario, to protect human rights in Ontario and, recognizing that it is in the public interest to do so and that it is the Commission's duty to protect the public interest, to identify and promote the elimination of discriminatory practices and, more specifically,

[12] Mary Cornish, "Building a Culture of Equality Through Human Rights Enforcement," (Government of Yukon, 2011). Online: <http://www.justice.gov.yk.ca/pdf/Mary_Cornish_Article.pdf>

> (a) to forward the policy that the dignity and worth of every person be recognized and that equal rights and opportunities be provided without discrimination that is contrary to law;
>
> (b) to develop and conduct programs of public information and education to,
>
> > (i) promote awareness and understanding of, respect for and compliance with this *Act*, and
> >
> > (ii) prevent and eliminate discriminatory practices that infringe rights under Part I;…
>
> (j) to report to the people of Ontario on the state of human rights in Ontario and on its affairs;…[13]

Statements of this education function are consistent in statutes in all jurisdictions that have a Commission.[14]

The only other jurisdiction in Canada that does not have a Human Rights Commission is British Columbia. In 2002, the British Columbia Human Rights Commission was abolished. The experience in British Columbia since then does not commend the Tribunal-only approach. Regarding the effectiveness of human rights education under the Tribunal-only model, Heather MacNaughton, former Chair of the BC Human Rights Tribunal,[15] states:

> A tribunal's adjudicative role prevents it from taking or publicizing a position about human rights issues. A tribunal may only speak through its decisions.
>
> B.C. does not have an agency, independent of government, which is responsible for human rights education. Under the B.C. *Code*, the responsibility for education falls on the Attorney General's Ministry which, apart from providing funding to the B.C. Human Rights Coalition for some educational programs, and providing some general information on its website, does little else to fulfill its statutory

[13] *An Act to Amend the Human Rights Code*, S.O. 2006, c. 30, ss. 4, 29.
[14] See for comparison, Alberta *Human Rights Act*, R.S.A. 2000, c. A-25.5, s. 16(1); *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 27; Manitoba *Human Rights Code*, C.C.S.M. 2010, c. H175, s. 4; New Brunswick *Human Rights Act*, R.S.N.B. 2011, c. 171,s. 12; Newfoundland and Labrador *Human Rights Act, 2010*, S.N.L. 2010, c. H-13.1, s. 23; Northwest Territories *Human Rights Act*, S.N.W.T. 2002, c.18, s. 20; Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c. 214, s. 24; Prince Edward Island *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, s. 18; Quebec *Charter of Rights and Freedoms*, R.S.Q., c. C-12, section 71; *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, s. 25; Yukon *Human Rights Act*, R.S.Y. 2002, c. 116, s. 16(1).
[15] Heather McNaughton also served as a member of the Ontario Human Rights Tribunal, and in 2011 was appointed as a master of the British Columbia Supreme Court.

mandate. As a result, *human rights education* in *the Province is falling behind some of the other Provinces.*[16] [emphasis added]

This Report will provide further commentary about the British Columbia experience below.

B. Research, Development of Guidelines or Policies, Inquiry, Initiation of Complaints

There are other functions regularly assigned to Human Rights Commissions that are integrally related to the education function: these are the roles of research, review, development of guidelines or policies, inquiry, and initiation of complaints. In the *Ontario Human Rights Code*, these functions are set out this way:

> The functions of the Commission are… more specifically,…
>
> > c) to undertake, direct and encourage research into discriminatory practices and to make recommendations designed to prevent and eliminate such discriminatory practices;
> >
> > (d) to examine and review any statute or regulation, and any program or policy made by or under a statute, and make recommendations on any provision, program or policy that…is inconsistent with the intent of this *Act*;
> >
> > (e) to initiate reviews and inquiries into incidents of tension or conflict, or conditions that lead or may lead to incidents of tension or conflict, in a community, institution, industry or sector of the economy, and to make recommendations, and encourage and co-ordinate plans, programs and activities, to reduce or prevent such incidents or sources of tension or conflict;
> >
> > (f) to promote, assist and encourage public, municipal or private agencies, organizations, groups or persons to engage in programs to alleviate tensions and conflicts based upon identification by a prohibited ground of discrimination;
> >
> > (g) to designate programs as special programs in accordance with section 14;[17]
> >
> > (h) to approve policies under section 30;[18]

[16] Heather MacNaughton, "Lessons Learned: the BC Direct Access Human Rights Tribunal," (Government of Yukon, 2011). Online:< http://www.justice.gov.yk.ca/pdf/Heather_MacNaughton_Article.pdf >

[17] A special program under section 14 is one that is "designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity…"

(i) to make applications to the Tribunal under section 35;[19]…

(k) to perform the functions assigned to the Commission under this or any other *Act*.

The *Canadian Human Rights Act* has similar wording. Along with its education functions, the Canadian Human Rights Commission:[20]

…

(b) shall undertake or sponsor research programs relating to its duties and functions under this *Act* and respecting the principle described in section 2 [purpose clause];

(c) shall maintain close liaison with similar bodies or authorities in the provinces in order to foster common policies and practices and to avoid conflicts respecting the handling of complaints in cases of overlapping jurisdiction;…

(e) may consider such recommendations, suggestions and requests concerning human rights and freedoms as it receives from any source and, where deemed by the Commission to be appropriate, include in a report referred to in section 61, reference to and comment on any such recommendation, suggestion or request;

(f) shall carry out or cause to be carried out such studies concerning human rights and freedoms as may be referred to it by the Minister of Justice and include in a report referred to in section 61 a report setting out the results of each study together with such recommendations in relation thereto as it considers appropriate;[21]

(g) may review any regulations, rules, orders, by-laws and other instruments made pursuant to an *Act* of Parliament and, where deemed by the Commission to be appropriate, include in a report referred to in section 61 reference to and comment

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[18] Policies under section 30 are policies "prepared and published by the Commission to provide guidance in the application of Parts I and II." An example of such a policy is the Ontario Human Rights Commission's Policy on Human Rights and Policing. This can be found at: <http://www.ohrc.on.ca/en/resources/Guides/policeorgchange.> Racial profiling by police has been a contentious and significant issue for the Ontario Human Rights Commission. The Commission's work on it through research, study, and policy-making has made a significant difference to police practices in Ontario.

[19] Under section 35 "the Commission may apply to the Tribunal for an order under section 45.3 [remedial order] if the Commission is of the opinion that, (a) it is in the public interest to make an application; and (b) an order under section 45.3 could provide an appropriate remedy." Section 35 permits the Commission to make a complaint to the Tribunal on its own initiative.

[20] See section 27 of the *Canadian Human Rights Act*.

[21] Section 61 refers to the Commission's annual reports to Parliament. It should be noted that section 61(2) also permits the Commission to make special reports to Parliament "referring to and commenting on any matter within the scope of its powers, duties and functions if, in its opinion, the matter is of such urgency or importance that a report on it should not be deferred until the time provided for submission of its next annual report…".

on any provision thereof *that* in its opinion is inconsistent with the principle described in section 2; …

For a jurisdiction such as Nunavut, these functions can be extremely important and beneficial.

Research

A Human Rights Commission with power to undertake research could design and support research on issues of specific concern to Nunavut. For example, two recent research papers were prepared for the Canadian Human Rights Commission: *Alternative Dispute Resolution (ADR) in Aboriginal Contexts: A Critical Review*[22] and *Balancing Individual and Collective Rights.*[23] Both of these topics could be highly relevant to the implementation of human rights in Nunavut. A Nunavut Human Rights Commission could take a Nunavut-specific approach to such topics, by taking into account the traditional practices of Inuit in the case of dispute resolution, and the provisions of the Land Claims Agreement in the case of the balancing of individual and collective rights.

Research conducted by or supported by a Human Rights Commission can also foster a deeper understanding of broad human rights issues that affect groups in the community. Research can address local issues and develop jurisdiction-specific approaches to human rights issues, such as housing discrimination, racial profiling, or accessibility to services for persons with disabilities.

Human Rights Commissions have also done research in different ways: through calls for independent researchers to work on contract on specific topics; through Commission-University collaborations; and through community consultations.

Here are some examples:

- The Ontario Human Rights Commission recently published a research and policy consultation paper on human rights and mental health. This is part of an ongoing consultation with community organizations and experts about the human rights of persons with mental health disabilities and addictions. The research project has involved community roundtables and submissions made by many participants.

- The Manitoba Commission undertook a collaborative research project with the University of Winnipeg on racialized communities and police services.[24] This research resulted in, among other things, the Manitoba Human Rights

[22] Wenona Victor (Stó:lo Nation), (Canadian Human Rights Commission, April 2007). Online: <http://www.chrc-ccdp.ca/research_program_recherche/adr_red/toc_tdm-eng.aspx>
[23] Bradford W. Morse, Robert Groves, & D'Arcy Vermette, (Canadian Human Rights Commission, March 2010). Online: <http://www.chrc-ccdp.ca/pdf/ind_col_rights_report-eng.pdf>
[24] Manitoba Human Rights Commission, *The Racialized Communities and Police Services Project, Interim Report*, (November 2007). Online:< http://www.manitobahumanrights.ca/publications/rcaps.html>

Commission making a submission to the Government of Manitoba on proposed amendments to the *Provincial Police Act*.[25]

- The Yukon Human Rights Commission produced a research report on the human rights of women and girls in the Territory of Yukon, which contributed to the consideration of amendments to the *Yukon Human Rights Act*.[26]

- The Quebec Human Rights Commission recently issued a report on racial profiling and systemic discrimination against racialized youth.[27]

Development of Guidelines or Policies

A research capacity can support another key education-related function, the development of guidelines or policies. Human Rights Commissions issue guidelines or policies from time to time on different forms of discrimination, and on measures that will prevent, or address them. These assist employers, service-providers and landlords to understand how to incorporate the requirements of the *Act* into their management practices. They also assist in developing the understanding of workers, tenants, and service recipients of their rights under the *Act*.

Guidelines or policies can provide pro-active, issue-specific education and guidance. For example, the Canadian Human Rights Commission has published the following policies:

- Policy on the Application of Section 13 of the Canadian Human Rights Act (Publications that Promote Hatred)
- Policy on Alcohol and Drug Testing
- Aboriginal Employment Preferences Policy
- Policy and Procedures on the Accommodation of Mental Illness - October 2008
- Policy on HIV/AIDS
- Policy on Environmental Sensitivities
- Policy on Special Programs
- Pregnancy & Human Rights in the Workplace - Policy and Best Practices

[25] Submission from the Manitoba Human Rights Commission and the University of Winnipeg to the Government of Manitoba by the Racialized Communities and Police Services Project (RCAPS Project) Working Committee on Proposed Amendments to The Provincial Police Act before Mr. R. Perozzo. (17 March 2009). Online: <http://www.manitobahumanrights.ca/publications/reportsandsubmissions/rcaps_police.html>
[26] Yukon Human Rights Commission, *Report on the Human Rights of Women and Girls in Yukon*, (April 2, 2008). Online:< http://www.yhrc.yk.ca/pdfs/ReportOnHumanRightsOfWomen-finalApr1508.pdf>
[27] Quebec Human Rights Commission, *Racial Profiling And Systemic Discrimination Of Racialized Youth*, (2011). Online:< http://www2.cdpdj.qc.ca/en/publications/Documents/Profiling_final_EN.pdf>

For Nunavut, issue-specific guidelines and policies developed by a Human Rights Commission could be extremely helpful.

Inquiries, Reviews, Studies, Special Reports[28]

A capacity to conduct an inquiry or review is also a key element of a Human Rights Commission's authority. The goal of an inquiry, review, study or special report is not to find criminal or civil fault, but to air an issue of discrimination, hear those involved and affected, and make recommendations about steps that would prevent or ameliorate the discrimination. Such reviews are a significant part of the work of Human Rights Commissions. They allow a Human Rights Commission to address broader issues, which individual complaints may not adequately illuminate or resolve.

The Canadian Human Rights Commission, for example, undertook a broadly-based review of the treatment by Corrections Services Canada of federal women prisoners in 2003.[29] The CHRC undertook this review after being approached by key non-governmental organizations, knowledgeable and concerned about the treatment of the federal women prisoners, including the Canadian Association of Elizabeth Fry Societies and the Native Women's Association of Canada.

Federal women prisoners are among Canada's most disadvantaged women, and are disproportionately Aboriginal or otherwise "racialized"[30], and poor. Their treatment in the prison system was understood to be a critical issue. Individual complaints could not illuminate the systemic problems in the prison system, nor could individual women feel secure enough to exercise their human rights from the confines of a prison cell. This review permitted the Commission to examine and assess 1) the characteristics of the inmates; 2) the facilities in which they are held; 3) the policies and conditions that determine their treatment; and 4) whether the human rights of federal women prisoners are being respected by Corrections Services Canada.

In its press release issued in January 2004, the Canadian Human Rights Commission summarized the report:

> The report's main finding is that the correctional system needs to be more tailored to the unique needs and generally lower security risks posed by women offenders. Specifically, the correctional system should take a more gender-based approach to custody, programming and reintegration for women offenders.
>
> The Commission found that, while Correctional Service Canada has made some progress in developing a system specifically for women offenders, systemic

[28] These seem to be different terms used to describe the same function.
[29] Canadian Human Rights Commission**,** *Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women*, (December 2003). Online: < http://www.chrc-ccdp.ca/legislation_policies/consultation_report-eng.aspx>
[30] The term "racialized" means a person subject to discrimination because others perceive, experience or categorize them on the basis of race or racial stereotypes.

> human rights problems remain, particularly with regard to Aboriginal women, racialized women and women with disabilities.
>
> The report puts forward 19 recommendations for action and sets out guiding principles to ensure that the treatment of federally sentenced women is consistent with human rights laws.[31]

The Canadian Human Rights Commission also undertook a review of the treatment of the Innu of Labrador by the Government of Canada. The first report was released in 1993, and in 2002, the Commission issued a follow-up report, which found that the recommendations in the 1993 report had still not been implemented. In 2002, the Canadian Human Rights Commission explained the history and the issue this way:

> The Innu Nation first approached the Commission in 1992 to complain that the federal government had failed to meet its constitutional responsibility for the Innu since Newfoundland's 1949 entry into Confederation. The Commission responded by issuing a report in 1993 that identified five recommendations that the federal government should implement to address the concerns of the Innu.
>
> At the time today's report [November 26, 2002] was written, the government had fully implemented only one of the 1993 recommendations: recognizing its responsibility towards the Innu. It had failed the Innu with respect to efforts towards Innu self-government, and had made some progress under the remaining three recommendations. As recently as last week, however, the government officially recognized the members of the Innu of Labrador as status Indians, effectively fulfilling another of the 1993 recommendations.[32]

In both instances, the reviews by the Commission and the resulting recommendations established a base line for government reform, and have assisted federal women prisoners and the Innu of Labrador to assert their rights through a non-adjudicative process.

The Ontario Human Rights Commission has conducted several inquiries, which have enhanced the understanding among public officials and the public at large about racism and racial profiling. For example, in 2002, the Commission initiated an inquiry into the effects of racial profiling on individuals, families, communities and society as a whole. About 400 people came forward to tell their experiences of racial profiling. The Commission issued its inquiry report in 2003, *Paying The Price: The Human Cost of Racial Profiling*, which includes recommendations directed to police agencies, service providers and government.[33]

The Quebec Human Rights Commission has also conducted inquiries into the Oka crisis, into racism in the taxi industry, and into racism in Montreal police forces.

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[31] Canadian Human Rights Commission, News Release, "Protecting Their Rights," (28 January, 2004). Online: < http://www.chrc-ccdp.ca/media_room/news_releases-eng.aspx?id=260>

[32] Canadian Human Rights Commission, *Government Slow to Deliver for the Innu of Labrador*, (26 November 2002). Online: < http://www.chrc-ccdp.ca/media_room/news_releases-eng.aspx?id=246>

[33] Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling*, (21 October 2003). Online: <http://www.ohrc.on.ca/en/resources/discussion_consultation/RacialProfileReportEN/view>

Nunavut has experienced the review of the dog slaughters by the Qikiqtani Truth Commission.[34] The process used by the QTC took a lot of thought and work to imagine, to adapt and to realize. This is an example of how an inquiry function can be useful in Nunavut. Stakeholders identified a number of issues that could be the subject of a review or inquiry by a Nunavut Human Rights Commission, perhaps better than or in addition to individual complaints. Examples include barriers to accessing housing, health care, and employment by Inuit.

Analogously, the Nunavut Languages Commissioner has a mandate to conduct systemic investigations. The 2010-2011 Annual Report describes this as an investigation where the abuse of language rights is perceived as an endemic problem within a Government of Nunavut department or territorial organization.

Assigning an inquiry or review role to a Human Rights Commission gives it authority to address systemic human rights issues through a public process. The Commission can make recommendations to appropriate officials or agencies to prevent discrimination in future, and can monitor progress in implementing those recommendations. A Nunavut Human Rights Commission would be able to establish criteria for conducting inquiries,[35] and design flexible processes that fit the issue and circumstances. For example, some human rights issues may affect Nunavut as a whole; other issues may be of particular importance in certain communities.

Initiation of Complaints

Another significant function of Human Rights Commissions is the capacity to initiate complaints before the Human Rights Tribunal. This permits them to address issues of systemic discrimination that cannot be addressed adequately either through individual complaints or inquiries, because they require a finding to be made about whether discrimination has occurred, and an order regarding remedy.

This has been a little-used power by Human Rights Commissions in Canada, which appear uncertain about exercising it. If they initiate a complaint against government, governments are inclined to treat pressure from human rights institutions for systemic and structural change as intrusions on the authority of government or the legislature, and therefore as "undemocratic," though these are their own institutions, carrying out their assigned tasks. On the other hand, if Human Rights Commissions initiate complaints against very large corporations, they may be concerned about “inequality of arms” that is, an imbalance between the resources available to the Human Rights Commission and the greater resources available to the corporation.

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[34] Qikiqtani Truth Commission, *Final Report: Achieving Saimaqtigiiniq*, (Qikiqtani Truth Commission, Qikiqtani Inuit Association, 2010). Online: <http://www.qtcommission.com/documents/main/QTC_Final_Report_Oct_FINAL.pdf>

[35] Comparison with Nunavut Official Languages Commissioner is illuminating. The 2010-2011 Annual Report of the Nunavut Official Languages Commissioner, *supra*, note 8, sets out criteria for deciding whether to initiate a systemic inquiry on a language issue.

Notwithstanding this history, it remains our view that this is an important authority for a Human Rights Commission to have, and that it is an appropriate companion to the power of inquiry or review.

We also note that the Nunavut Languages Commissioner has the power to initiate legal proceedings in the event of non-compliance. This is analogous to the power that Human Rights Commissions have to initiate a human rights complaint.

C. Assistance and Advice to Applicants

Providing assistance and advice to Nunavummiut who believe they have been discriminated against and wish to file a notification is now recognized as essential for the effective operation of the Tribunal. But to maintain its impartiality, and to be seen to be an impartial adjudicative body, the Tribunal's role as an advisor to applicants is constrained.

This limitation on the front-end support available to applicants has limited the accessibility and effectiveness of the Tribunal, and the *Human Rights Act*. Particularly while rights are relatively new to Nunavummiut, the front end of the process needs to be active, supportive, informative and accessible.

Historically, and still in most jurisdictions, this providing of advice and assistance to claimants is assigned to a Human Rights Commission. Human rights issues are inherently complex. A Nunavut Human Rights Commission could provide essential early assistance and advice to applicants including:

a. Materials describing the complaint process, in co-operation with the Tribunal, that are accessible and easy to understand

b. Direct advice and assistance to individuals who believe that they have been discriminated against regarding:
    - whether the allegation falls within the parameters of the *Act,*
    - whether the complaint falls within the time limits set out in the *Act,*
    - whether they have a factual foundation for a complaint,
    - how the complaint should be framed,
    - assistance with filling out forms for the Tribunal,
    - identifying and contacting witnesses, and
    - identifying and obtaining relevant documents.

<u>Commission Legal Counsel</u>

Recommendation #4

That the Nunavut Human Rights Commission staff include in-house legal counsel.

A Nunavut Human Rights Commission could discharge the function of providing advice and assistance most effectively with its own in-house legal counsel. In addition to providing early assistance and advice to applicants, Commission counsel could have other roles, including advising the Commission on the screening of notifications, mediation, and representing the Commission and applicants before the Tribunal. We discuss these roles further below.

D. Screening of Notifications

Recommendation #5

That the Nunavut Human Rights Commission's screening role be confined to criteria that are essentially procedural or jurisdictional and non-discretionary: whether the events occurred within the last 2 years; whether the complaint falls under one of the prohibited grounds and is otherwise within the jurisdiction of the Tribunal; whether, if the complaint is brought by a third party, the person alleged to have been discriminated against consents.[36]

Recommendation #6

That a decision by the Commission to dismiss a notification be subject to reconsideration by the Tribunal, and that the onus for requesting reconsideration rest with the applicant.

Recommendation #7

That any criteria for dismissal that engage with the merits of a notification, be left for adjudication by the Tribunal, and that a referral of a notification to the Tribunal be deemed sufficient to trigger a hearing by the Tribunal.

In any model for the adjudication of human rights complaints, there is screening of complaints, also referred to as "gate-keeping". The question is, who does the screening, and based on what criteria. Under a direct access model, the Tribunal is given broad powers to dismiss complaints that do not warrant a full hearing.

A direct access model is not necessarily a cost saving model. Regarding the direct access model in British Columbia, Heather MacNaughton, former Chair of the B.C. Human Rights Tribunal, has explained:

> B.C. reformed its human rights system for ideological reasons….Cost saving was not the motivator. In fact, the [direct access] system has not generated cost savings, in part because the work of a direct access tribunal is much more legally

[36] We suggest that s. 22(2)(a) of the NHRA be amended to require consent, for clarity. The *Act* as currently worded allows for a third party complaint where the person alleged to have suffered discrimination does not object.

intensive than the [screening and related investigative] work of commissions and legally intensive processes are more expensive."

In the direct access model currently in place in Nunavut, notifications are screened by the Tribunal. To initiate the process a claimant must file a notification with Tribunal staff in Coral Harbour. The respondent is sent a copy of the notification, and given an opportunity to submit a written reply. Notifications and replies are reviewed by the Tribunal using the criteria set out in ss. 23 and 24 of the *Act*:

- whether the complaint could or should be dealt with under other legislation;
- whether the complaint is trivial, frivolous, vexatious, or made in bad faith;
- whether the complaint is under one of the prohibited grounds and otherwise within the jurisdiction of the Tribunal;
- whether there is enough evidence of discrimination and no irrefutable defense; and;
- and whether the applicant was offered a reasonable settlement.

There are additional criteria if the notification has been filed on behalf of some other person(s).

The Tribunal provides a written decision of the ss. 23 and 24 review to both the Applicant and Respondent. The decision is either to continue with proceedings or to dismiss the Notification. If the Tribunal's decision is not to proceed with a hearing, reasons are provided.

How is complaint screening dealt with in other jurisdictions? From the earliest days of human rights commissions in Canada, preliminary screening has been assigned to them, not to Tribunals, or adjudicators. However, concerns have been raised about screening by human rights commissions, which point to the need for fine-tuning. The major concerns identified by the 2000 Canadian Human Rights Act Review Panel were: delay in the screening process; perceived conflict between commissions' promotional and investigation/decision-making roles; the perception that, because commissions also had the responsibility for representing complainants before adjudicators, meritorious complaints were being dismissed by commissions for resource reasons; the inability of commissions to focus their resources on the most serious human rights issues because of the workload of screening;[37] and the importance of adjudicative interpretation of human rights legislation to the development of the law. Delay was identified as a "very serious problem".

Concerns about the Canadian Human Rights Commission's processes led the Canadian Human Rights Act Review Panel to recommend a new scheme in which claimants had "direct access" to a Human Rights Tribunal, removing the responsibility for complaint screening from the Commission, leaving it to respondents to raise preliminary challenges to such things as jurisdiction before the Tribunal.

[37]CHRA Panel Report, Ch. 9, at 4-5.

The Report of the Canadian Human Rights Act Review Panel did not call for the elimination of the Commission, but rather for direct access to the Tribunal, combined with a strong Commission focused on systemic discrimination, education and monitoring, and a separate agency for legal representation. Ontario's Human Rights Code Review Task Force 1992 Report[38] made similar recommendations, which in turn were implemented in Ontario in 2008. The model recommended for the CHRC and implemented in Ontario is sometimes referred to as hybrid direct access:[39] it allows claimants to access the Tribunal without screening by the Commission, but retains the Commission, and provides for legal representation through a specialized human rights legal support centre that works in partnership with community legal clinics, other community organizations, and the Commission.[40]

As mentioned earlier, the only jurisdiction that has eliminated its Human Rights Commission is British Columbia, and the BC experience since does not commend this Tribunal-only model. In British Columbia, we see similar problems to those identified in Nunavut because there is no Commission. A lively culture of human rights that used to exist in British Columbia is gone because there is no promotional or educational institution to give it life, reality and support. In addition, in British Columbia, there is no guarantee of assistance, advice and legal representation for claimants. Although there is a non-governmental organization and a legal clinic that provide some assistance to claimants, there are genuine issues about their ability to fulfill these roles adequately. Although the system is labeled "direct access," in reality lack of resources and capacity in the non-governmental organizations to provide the necessary assistance, advice and legal representation present barriers to access.

One option for a revised human rights scheme for Nunavut is to leave all screening with the Tribunal. However, that is not recommended. Although direct access (no screening by a Commission) exists in Ontario and British Columbia, two large jurisdictions with a high volume of complaints and a history of backlogs in managing complaints, it is not the model used in most Canadian jurisdictions, or in smaller jurisdictions in Canada. In most jurisdictions and in all smaller jurisdictions, complaint screening is the responsibility of the Human Rights Commission, not the Tribunal.

A benefit of assigning initial complaint screening to the Commission, particularly in a jurisdiction like Nunavut where the population and the volume of complaints are small, is that the Commission can move quickly to either dismiss or to engage other processes, such as mediation, evidence collection, or witness interviews to move a complaint on for hearing. Preliminary screening by the Commission would clear away matters that are not

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[38] Ontario Human Rights Code Review Task Force, *Achieving Equality: A Report on Human Rights Reform*, (1992). Online: <http://www.cavalluzzo.com/publications/Reference%20documents/Human%20Rights%20Reform/Achieving%20Equality%20Report.pdf>

[39] Mary Cornish uses the term "hybrid direct access" and describes the British Columbia, Ontario, and federal situation in "Building a Culture of Equality Through Human Rights Enforcement," *supra*, note 12.

[40] For online information about Ontario's Legal Support Centre, see: <http://www.hrlsc.on.ca/en/aboutus.aspx>

essential for the Tribunal to address. It would allow the possibility of prompt mediation where it appears that a matter can be settled in an immediate and straightforward way. The Commission could likely settle some cases at a very early stage, if it had early intervention authority. The Commission can easily monitor patterns and see if an issue recurs, and so be able to determine if a systemic approach to an issue would be appropriate.

We recommend that the Nunavut Human Rights Commission's screening role be confined to criteria that are essentially procedural or jurisdictional and not discretionary:

- whether the events occurred within the last 2 years;
- whether the complaint is under one of the prohibited grounds and otherwise within the jurisdiction of the Tribunal;
- if the complaint is brought on behalf of a third party, is there consent to the notification proceeding by the person alleged to have been discriminated against.

Determinations about these criteria can be made with a minimum of investigation. If the complaint satisfies these criteria, the Commission should refer it to the Tribunal. If a notification does not satisfy the three criteria mentioned, the Commission should dismiss the claimant's case. The relative superficiality of this form of screening that does not go to the merits of a complaint should address potential concerns about Commission delay, conflict of promotional and investigation/decision-making roles, and the perception that complaints could be dismissed by the Commission for resource reasons.

If the Tribunal is authorized to reconsider a notification that is dismissed by the Commission, when the applicant disagrees with that dismissal, this would provide an additional protection for applicants. It would also protect the Commission from potential criticism that they are a final "gate-keeper" and are dismissing meritorious notifications without hearing.[41]

Under the proposed model, criteria for dismissal that go to the merits of a notification would be left for adjudication by the Tribunal. Under the existing NHRA, there are various criteria that go to the merits or which entail an element of discretion in ss. 21, 23,

[41] As criteria for a Tribunal reconsideration of a dismissal by the Commission, we propose the following:

- the Commission erred in determining that the facts on which notification is based occurred more than two years before the notification was filed;
- although the facts on which notification is based occurred more than two years before the notification was filed the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay;
- the Commission erred in determining that the notification is not within the jurisdiction of the Tribunal;
- the Commission erred in determining that the person alleged to have been discriminated against does not consent.

and 24. In designing a scheme that divides responsibility for screening between the Tribunal and the Commission, the substance of all those criteria should be reviewed.[42]

However, the primary responsibility for initiating dismissal of a complaint after the Commission refers it to the Tribunal, should lie principally with the respondent. The practice of the current Nunavut Human Rights Tribunal has been to review every complaint on a preliminary basis, on its own initiative. This has caused delay in getting cases to hearing. The practice developed because of the ambiguous wording of ss. 44(2) and 27 of the NHRA, which can be construed as mandating a pre-hearing review of the notification in every case. It would be helpful if the *Act* signaled more clearly that the Tribunal is not required to conduct a pre-hearing review of a notification unless it considers that there is a good reason to do so.

Under the proposed model, the amended NHRA should be clear that a referral from the Commission gives the Tribunal a mandate to proceed with a hearing, subject to a successful preliminary motion to dismiss being brought by the respondent. The Tribunal could still dismiss a complaint at any point based on criteria set out the legislation, but a pre-hearing review would not be mandatory in every case. This would reduce the potential for delays.

[42] See recommendation below regarding section 24(1)—could or should be dealt with under another *Act*. We have highlighted our recommendation regarding s. 24(1) because concern about it was raised in our consultations. However, we emphasize that the entire list of grounds for dismissal on a preliminary basis by the Tribunal will need to be redrafted, to take into account the transfer of some screening criteria to the Commission that we have proposed. Also, in our opinion some of the substantive criteria for dismissal contained in the current NHRA are excessively broad or insufficiently grounded in a legal standard. The standard for the kind of case that should not go to a full hearing by the Tribunal should be "claims without merit or foundation and where there is no reasonable likelihood that further proceedings would establish that the claim has merit."

As criteria for dismissal we propose the following:

- the complaint or that part of the complaint is not within the jurisdiction of the Tribunal;
- the acts or omissions alleged in the complaint or that part of the complaint do not contravene the *Act*;
- there is no reasonable prospect that the complaint will succeed;
- the complaint or that part of the complaint was filed for improper motives or made in bad faith;
- the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;
- the contravention alleged in the complaint or that part of the complaint occurred more than 2 years before the complaint was filed unless the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay;
- the complaint has been made by a third party, and the person alleged to have been discriminated against does not consent.

E. Mediation and Settlement

Recommendation #8:

That the primary responsibility for mediation and other dispute resolution processes be assigned to the Nunavut Human Rights Commission, and that the Tribunal have the authority to mediate once a notification has been referred for hearing.

Under the current Nunavut model, the power to mediate complaints rests with the Tribunal. We do not propose that the authority of the Tribunal to engage in mediation be removed. However, stakeholders in this consultation and in earlier consultations emphasized the importance of early intervention to attempt to achieve a settlement. Because we have proposed that the Commission be responsible for initial intake, we propose that the Commission also be able to attempt mediation. Practically speaking, it will be difficult for the Commission to mediate if it has become involved in representing the complainant before the Tribunal. In that event, the Tribunal would assume responsibility for settlement efforts.

F. The Right to Legal Representation

Recommendation #9:

That the NHRA be amended to recognize the right of applicants and impecunious respondents to publicly funded legal representation, and to commit the institutional resources necessary to ensure the adequacy of such representation.

In Nunavut under the current *Act*, there is no guarantee of legal representation for claimants or respondents. An applicant or a respondent can request assistance from the Legal Services Board (LSB). We note that LSB counsel have provided assistance and advice in numerous human rights matters, particularly at the pre-hearing stage, to very good effect. It is in the interests of both fairness and efficiency that publicly funded legal representation be provided to applicants and to impecunious respondents.

In the model we propose, in most cases publicly funded legal representation for the applicant would be provided by the Commission, through representation by Commission legal counsel. However, it will also be necessary to make separate arrangements for publicly funded legal representation for: (a) applicants whom the Commission does not represent, and (b) for impecunious respondents.

The success of the model we have proposed will depend on the Government of Nunavut committing the necessary resources for the Commission to carry out its mandate, including but not limited to, its mandate to provide legal representation to applicants. As well, the Government of Nunavut must commit the necessary resources for legal representation outside the Commission. We recommend that the right to legal

representation be made express in the NHRA.[43] We discuss legal representation further below.

G. Carriage of the Case by the Commission

Recommendation #10:

That the Commission and its counsel be given the authority to carry notifications before the Tribunal, thereby providing publicly funded representation for the Commission, and in most cases the applicant as well.

Carriage

In many jurisdictions, the Human Rights Commission provides representation for both the Commission and claimants in cases that go to hearing, through what is sometimes referred to as carriage of the complaint. 'Carriage' has several meanings. Carriage means representing the best interests of the party or parties for whom one acts. Carriage also refers to the exercise of procedural leadership at the hearing and to control over substantive matters, including the content of the argument and evidence to be advanced at the hearing.

Under the current scheme in Nunavut, there is no institutional body that has a responsibility for shepherding the development of human rights jurisprudence.

In the revised model of human rights enforcement for Nunavut that we propose, the Commission would be assigned responsibility for carriage of complaints before the Tribunal. Commission counsel would represent both the Commission and the applicant, in most cases.

Legal Representation by Commission Counsel

We introduced the idea of in-house Commission counsel earlier (Recommendation #4). There can be significant benefits in assigning multiple roles to Commission counsel in terms of developing and consolidating expertise in one institution. This approach also makes sense from an operational stand-point in a jurisdiction like Nunavut where the volume of human rights complaints that are referred to hearing is bound to be small,[44] and it would likely be possible for Commission counsel to have a broad portfolio of responsibilities.[45]

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[43] See the sixth effectiveness principle referred to above at page 8: Is the system structured and funded so that it operates effectively?

[44] In all jurisdictions the number of complaints that go through a full hearing is small. In Nunavut the number will be smaller still, simply owing to population size.

[45] Under the current *Act*, the LSB has often provided representation for individuals. However, under the model we propose the LSB could not be responsible for all legal representation. For example, it would not fall within LSB's mandate to represent the Commission, and yet, in most cases, the Commission and the applicant can be represented by the same counsel.

When Outside Legal Representation Is Required

Recommendation #11:

That the NHRA, or other legislation, be amended to ensure that publicly funded legal representation from outside the Commission, is made available to applicants when the Commission decides not to represent them, and to impecunious respondents.

Although the Commission would be the claimant's representative in most cases, there may be cases in which the Commission will not, or cannot, act for the claimant. For example, the claimant and the Commission might part ways because of differing assessments of the evidence or approaches to legal strategy. In the model we propose the threshold for referral to a Tribunal hearing is low, which means that at the point of referral the Commission may not be familiar with all the details of a case. As a case progresses, it could become apparent to the Commission that the evidence of discrimination is weak. In such a case, the Commission may not wish to continue representing the claimant, and it will be necessary for the system to provide for the possibility of outside legal advice and representation.

Even if the Commission is empowered to represent claimants during mediations and hearings, there will be a need for legal advice and representation to be available to claimants from counsel outside the Commission in some cases.

Examples include cases in which the Commission has referred the complaint to hearing but decided not to carry the complaint; the complaint has been dismissed by the Commission, and the claimant wishes to seek further advice about their legal options, and possibly representation before the Tribunal.

We recommend that the NHRA be amended to ensure publicly funded legal representation from outside the Commission, is available to applicants the Commission decides not to represent, and to impecunious respondents. The Government of Nunavut may wish to discuss with the LSB whether it can provide these services, and what the content of an agreement for services should be. To date, LSB services to parties to human rights complaints has been provided on a discretionary basis, without a defined agreement, and without assurances of adequate funding from the Government of Nunavut.

The Nunavut Human Rights Tribunal

We have been informed that the Nunavut Human Rights Tribunal is in the process of developing rules of procedure that would among other things establish time lines for production of documents. We strongly support that endeavour since clear rules and

procedures for such pre-hearing matters can facilitate settlement efforts, reduce delays in the hearing process, and reduce the length of hearings.

In the revised model of human rights enforcement that we propose for Nunavut, the Tribunal would retain responsibility for all aspects of adjudication. This would include hearing cases referred to it by the Commission, preliminary applications for dismissal by respondents based on criteria that go to the merits of the notification and requests for reconsideration from claimants whose cases the Commission does not refer for to hearing; and dealing with pre-hearing case management and disclosure processes.

Under the revised model, the Tribunal would retain the power to do such things as compel the production of documents by respondents (and applicants). Once it was determined by the Commission that a complaint falls within the parameters of the *Act*, the Commission, complainant, respondent and counsel would look to the Tribunal (and its rules of procedure) for direction on pre-hearing case management and disclosure processes.

However, the Tribunal would not be responsible for initial intake and screening of complaints. Those responsibilities would fall to the Nunavut Human Rights Commission. Although it is the Commission that would be primarily responsible for mediation and settlement processes, the Tribunal would also have the ability to mediate once a case had been referred to it.[46]

We do not recommend that the Nunavut Human Rights Tribunal be eliminated or that its adjudicative powers be transferred to the courts, as was recently done in Saskatchewan.

The NHRA provides for an appeal to the court on a question of law. This is appropriate. However, there would be significant disadvantages to exclusive use of the courts for human rights adjudication in Nunavut. Exclusive use of the courts would mean that the body responsible for findings of fact in human rights matters would not be representative of the population of Nunavut; there would be no Inuit decision-makers, at least for some time to come. The lack of Inuit judges might be regarded as an issue for court-based adjudication in Nunavut, regardless of the subject matter of the dispute. However, there is something particularly important about involving Inuit in the enforcement of human rights legislation, because the very subject matter of the legislation is equality. Furthermore, in many respects Inuit as a group do not have substantive equality, notwithstanding that they constitute the majority of Nunavummiut. An additional consideration is that Nunavut already has a functioning Human Rights Tribunal that does include Inuit members. In this context, dismantling the Tribunal and replacing it with a court might be perceived by Nunavummiut as a step backwards for equality for Inuit. Additionally, the option of going directly to court creates the risk that the process would become unduly complex, and technical.[47]

[46] See recommendation #8 at page 27, and relevant discussion about why both bodies should be empowered to mediate.

[47] Professor Bill Black makes this point in "The Importance of Considering Human Rights Structure and Procedures," (Government of Yukon, 2011).

Other Matters Arising in the Review

Restriction on Selection of Tribunal Members

Recommendation #12:

That the language of s. 19(4) of the *Act* be clarified to ensure that Tribunal members are not automatically precluded from hearing a case on the merits because of their involvement in pre-hearing matters.

The NHRA provides that a Tribunal member who has taken part in pre-determination on the admissibility of a notification or a settlement process shall not be selected for a Tribunal panel (s. 19(4)). This restriction has resulted in difficulties and delays in selecting Tribunal members because it disqualifies Tribunal members from hearing complaints on the merits if they have dealt with a complaint at another stage, and the pool of Tribunal members is small. In the proposed model, instances of Tribunal members being disqualified from being selected for panels will be reduced because preliminary screening and early stage mediation are roles that fall to the Commission. However, s. 19(4) of the Act could still result in the disqualification of a Tribunal member who presides in any pre-hearing matter. In our view, this is unnecessarily restrictive. It is not necessarily inappropriate that, for example, a Tribunal member should hear a respondent's application for dismissal, and, if the application is unsuccessful, hear the case on its merits.

Criminal Record

Recommendation #13:

That the NHRA protection from discrimination against persons with a criminal record (s. 7 prohibited grounds of discrimination) be amended to remove the restriction that limits the protection to persons to whom a pardon has been granted, and clarify that discrimination against a person with a criminal record, to be permissible, must be related to the employment, benefit, or tenancy in issue.

It is outside the scope of our mandate for this review to do a complete substantive review of the NHRA. Our focus is on the structures or machinery for implementation. However, concerns have been raised in this consultation about the narrowness of the NHRA protection from discrimination based on criminal record, and we wish to alert the Department of Justice to this. The NHRA provides protection from discrimination to a person who has a conviction for which a pardon has been granted. The problem is that the

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Online:<http://www.justice.gov.yk.ca/pdf/Bill_Black_Article.pdf>. Extensive changes to the ordinary rules of civil procedure would be required to accommodate human rights adjudication.

requirements for obtaining a pardon are so onerous that the protection from discrimination is rendered meaningless for many Nunavummiut.

An alternative approach would be to define this protection without reference to the granting of a pardon, by saying simply "has been convicted of an offence." That would not preclude a criminal conviction from being taken into account when it is relevant. For example, with regard to employment the *Act* could state: "has been convicted of a criminal or summary conviction offence that is *unrelated* to the nature of the employment or intended employment of that person." That is the language of the British Columbia *Human Rights Code*. It is also the language of the Newfoundland and Labrador *Human Rights Act, 2010*. A similar approach could be taken to services and tenancy. For example the *Act* could be changed to say: "has been convicted of a criminal or summary conviction offence that is *unrelated* to the goods, services, facility, or contract in question, or unrelated to the housing opportunity in question." Such a change in the language of the NHRA would provide increased protection from discrimination for persons with criminal records, in circumstances where that record is not related to the employment, benefit or tenancy in issue.

Tribunal Discretion Not to Deal with a Notification: Could or Should be Dealt with Under Another Act

Recommendation #14:

That s. 24(1) of the NHRA be amended to provide that if an applicant initiates another proceeding that deals with the substance of the notification referred to the Tribunal, the Tribunal may defer further consideration of the notification until the outcome of the other proceeding is known.

Recommendation #15:

That s. 24(3) of the NHRA be amended to authorize the Tribunal to dismiss a notification where the substance of the notification or a part of the notification has been appropriately dealt with in another proceeding.

Under the NHRA as currently written the Tribunal may in its discretion decide not to deal with all or part of a notification, "where it appears to the Tribunal that a notification is one that "could or should" be dealt with under an *Act* other than this *Act*" (s. 24(1)). The question of whether a notification "could or should be" dealt with under another *Act* has caused difficulty and delay in the decision-making of the Tribunal.

Provided that the notification is within the jurisdiction of the Tribunal, the question of whether the notification should be dealt with under another *Act* is more appropriately left to determination by the claimant. If the claimant has actively initiated another process, such as a grievance, and there is a realistic likelihood that the substance of the claimant's human rights concerns will be appropriately addressed in that proceeding, it may be reasonable for the Tribunal to defer its process until the outcome of the other proceeding

is known. However, s. 24(1) is much broader than that. If the point is to avoid a multiplicity of proceedings dealing with the same matter, it would be preferable if the *Act* were to provide that: if at any time after a complaint is filed the Tribunal determines that the claimant has initiated another proceeding that may appropriately deal with the substance of a complaint, the member or panel may defer further consideration of the complaint until the outcome of the other proceeding is known.[48]

In addition, s. 24(3) could be amended to explictly authorize the Tribunal to dismiss a notification where the substance of the notification or that part of the notification has been appropriately dealt with in another proceeding.

Importance of Face-to-Face Contact

Recommendation #16:

That consideration be given by the Government of Nunavut to establishing the Nunavut Human Rights Tribunal and proposed Human Rights Commission in a major centre of Nunavut, with a view to making these institutions more geographically accessible to Nunavummiut.

Stakeholders emphasized the importance of face-to-face contact with Tribunal staff, especially for mediation. Frustration about the difficulty and potential unfairness of mediation by telephone was expressed. Concerns were also expressed about claimants, particularly Inuit claimants, being unwilling to pursue human rights concerns when they have no realistic means of meeting face-to-face with Tribunal staff or Tribunal members. Similar concerns were raised in earlier consultations. We were told about claimants, particularly Inuit, who were unwilling or unable to follow through with seemingly meritorious concerns by telephone, mail or email. Such concerns, unless adequately addressed, would also arise in respect of a new Nunavut Human Rights Commission.

Face-to-face meetings of Tribunal members have also been found essential to speeding up their process, and getting decisions made.

There are various ways in which the impact of geographic distance could be reduced, including increased use of communications technology, such as Skype, that allows people to see one another while speaking. It is to be hoped that all such possibilities would be explored by the Tribunal and the new Human Rights Commission to make contact between the Commission and Inuit, particularly those living in remote communities, more personal. One recommendation we heard is that government liaison officers who are already in the communities could be trained[49] to support access to Nunavut's human

[48] This would be similar to section 25(2) of the *British Columbia Human Rights Code*.

[49] The importance of specialized human rights training for all those involved in Nunavut's human rights system cannot be emphasized enough. Tribunal members and Tribunal staff spoke to us about the importance of the training they have received, and stressed that it must be ongoing. Commission members and staff will require training. Similarly, for GLO's to function as a bridge between people in remote communities and Nunavut's human rights system, they would require specialized training with regard to the NHRA and human rights law.

rights system by providing human rights information and referrals to the Commission. We believe this merits attention.

However, a factor mentioned repeatedly was the difficulty of dealing with a human rights institution in Coral Harbour. Based on our consultations, it is difficult to avoid the conclusion that Nunavut's human rights system would be more accessible and more effective if its primary offices (Tribunal and Nunavut Human Rights Commission) were more centrally located in Nunavut. Some suggested Iqaluit or Rankin Inlet.

Updated Reference to International Human Rights Instruments Required

Recommendation #17:

That in addition to the *Universal Declaration of Human Rights* (1948), to which the preamble already refers, the NHRA be updated to refer to other applicable international human rights instruments.

International human rights instruments are a primary source of inspiration for human rights legislation. The preamble to the current NHRA refers to the *Universal Declaration of Human Rights*. It would be appropriate to update the preamble to refer to international human rights instruments adopted by the United Nations after the *Universal Declaration*, and ratified by Canada, in particular:

- *International Covenant on Civil and Political Rights,* 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976);

- *International Covenant on Economic, Social and Cultural Rights,* 16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 (entered into force 3 January 1976);

- *Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195, G.A. Res 2106 (XX) (entered into force 4 January 1969);

- *Convention on the Elimination of All Forms of Discrimination against Women,* 18 December 1979, Can. T.S.1982 No. 31, G.A. Res. 34/180 (entered into force 9 January 1982);

- *Convention on the Rights of the Child,* 20 November 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 (entered into force 2 September 1990);

- *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 2515 U.N.T.S. 3, G.A. Res 61/106, (entered into force 3 May 2008);

- *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, G.A. Res. 61/295.

Publication of Settlement Information

Recommendation #18:

That the Nunavut Human Rights Tribunal and the Nunavut Human Rights Commission publish the results of their settlement efforts through summaries that respect the privacy interests of individuals.

The current Nunavut Tribunal has been successful in bringing about settlements in a significant number of cases, but the practice of the Tribunal has been not to publish settlement information. While there can be privacy considerations, information about settlements can also be educational for the public, as a means of teaching about human rights. It is possible and desirable to provide information to the public in a way that does not compromise legitimate privacy interests, for example through summaries that do not reveal the identity of individuals. The following is a November 25, 2011 example from Manitoba,[50] which provides important information without identifying any individuals by name:

> **Human Rights settlement confirms the right to choose**
>
> A human rights mediated settlement, which began as a complaint by Community Living – Manitoba (CLM) against the Government of Manitoba, the Executive Director of the Manitoba Development Centre (MDC) and The Public Trustee, has resulted in balancing the rights of people with disabilities.
>
> The human rights complaint dealt with CLM's concerns regarding the slow progress being made in placing individuals living at the Development Centre into the community.
>
> After a year of detailed human rights investigation, the Manitoba Human Rights Board of Commissioners directed that the parties take part in mediation facilitated by the Human Rights Commission. The intense mediation and the final settlement reveal that diligence and hard work by everyone at the table can result in change. "As each party brought its own perspective to the issue of institutionalization, the mediator took a measured and practical approach," Jerry Woods, Chairperson of the Manitoba Human Rights Board of Commissioners adding that, "alleged systemic discrimination complaints are complex and require more time but in the end, the efforts are always worth it."
>
> The Government of Manitoba has agreed to move 49 people on the transition list from the MDC into the community over the next three years. This, and future

[50] The Manitoba Human Rights Commission regularly publishes information about settlements. The above example and other examples can be viewed online: <http://discovery.gov.mb.ca/search?q=settlement&btnG=Search&client=mhrc&output=xml_no_dtd&proxystylesheet=mhrc&sort=date%3AD%3AL%3Ad1&entqr=0&oe=UTF-8&ie=UTF-8&ud=1&site=mhrc>

> placements, will be closely monitored by a committee including interested parties and the Manitoba Human Rights Commission.
>
> Although the Government agreed that community living is a better option, the settlement also recognizes that everyone has the right to an informed choice, including those individuals and families, who at this point, prefer to live at the MDC. For the first time however, the agreement does give CLM the opportunity to present MDC residents and their families other community living options including the opportunity to visit and experience various community living settings.
>
> According to Mr. Woods the principle that guided the settlement is found in the United Nations Convention on the Rights of Persons with Disabilities. It recognizes the "importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices."

The foregoing example happens to be a group complaint, but had there been individual complainants, they could have been referred to as "individuals" or "people" without naming them. Similarly, an individual respondent can be referred to generically as "an employer" or "a landlord." Governments and large business entities do not have privacy interests. Another way to protect privacy interests is to obtain an individual's permission to publish settlement results.

Conclusion

Amending the NHRA to include a Human Rights Commission, and establishing a Nunavut Human Rights Commission, are the essential next steps in advancing knowledge and the realization of human rights in Nunavut.

Our core proposal is that the Government of Nunavut establish a Human Rights Commission, as a partner institution to the Nunavut Human Rights Tribunal, and tailor the mandate for each to reflect Nunavut's needs.

SUMMARY OF RECOMMENDATIONS

As advisors to the Government of Nunavut, we make the following recommendations. The first recommendation is that the Government of Nunavut amend the Nunavut Human Rights Act to include a Human Rights Commission. Recommendations #2 through #11 elaborate on this proposal. Recommendations #12-17 relate to other concerns that were raised in this review, which we believe should be brought to the attention of the Government of Nunavut.

Nunavut Human Rights Commission

Recommendation #1

That the Government of Nunavut amend the Nunavut *Human Rights Act* to include a Nunavut Human Rights Commission.

Nunavut Human Rights Tribunal

Recommendation #2

That the Nunavut *Human Rights Act* be amended to reserve the role of adjudication for the Tribunal. This would include hearing cases referred to it by the Commission; preliminary applications for dismissal by respondents based on criteria that go to the merits of the notification; requests for reconsideration from applicants whose cases the Commission does not refer to hearing; and pre-hearing case management and disclosure processes.

Commission Roles and Responsibilities

Recommendation #3

That the Nunavut Human Rights Commission be assigned the following roles and functions:

a. **to promote and advance respect for human rights in Nunavut;**

b. **to protect human rights in Nunavut and the public interest in the advancement of those rights;**

c. **to forward the public policy that the dignity and worth of every person be recognized and that equal rights and opportunities be provided without discrimination that is contrary to law;**

d. **to develop and conduct programs of public information and education to,**

(i) promote awareness and understanding of, respect for and compliance with the Nunavut *Human Rights Act*, and

(ii) prevent and eliminate discriminatory practices that infringe rights set out in the *Act*;

e. to undertake, sponsor, direct or encourage research into discriminatory practices and make recommendations designed to prevent and eliminate such discriminatory practices;

f. to develop guidelines and adopt policies that will provide guidance regarding compliance with the *Act*;

g. to examine and review any statute or regulation, and any program or policy made by or under a statute, and make recommendations on any provision, program or policy that is inconsistent with the intent of the *Act*;

h. to examine and review Nunavut's compliance with international human rights treaties which Canada has ratified, and the *United Nations Declaration on the Rights of Indigenous Peoples*, and provide advice to the Government of Nunavut;

i. to initiate reviews and inquiries into incidents, practices or conditions that may contravene the human rights of residents of Nunavut, and make recommendations and encourage or co-ordinate plans or activities to reduce, prevent, or remedy such incidents, practices or conditions;

j. to report to the people of Nunavut on the state of human rights in Nunavut;

k. to make special reports to the Legislature of Nunavut following reviews or inquiries, or on an urgent issue;

l. to receive and refer notifications to the Tribunal;

m. to initiate complaints where the Commission considers it appropriate to do so;

n. subject to an applicant's right to ask the Tribunal for reconsideration, to screen out and dismiss notifications that are:

i. out of time,

ii. not within the jurisdiction of the Tribunal, or

iii. third party notifications where the person alleged to have been discriminated against does not wish to proceed;

o. to provide advice and assistance regarding notifications, including:

i. advice about the requirements of the *Act*,

ii. procedures for filing and proceeding with notifications,

iii. assessing the strength of the claim, and
iv. assistance in completing forms, identifying and contacting witnesses, and identifying and obtaining relevant documents;

p. to undertake settlement efforts through mediation and other dispute-resolution processes; and

q. to represent applicants and the Commission in hearings before the Tribunal, and before courts in judicial reviews or appeals.

Commission Legal Counsel

Recommendation #4

That the Nunavut Human Rights Commission staff include in-house legal counsel.

Screening of Notifications

Recommendation #5

That the Nunavut Human Rights Commission's screening role be confined to criteria that are essentially procedural or jurisdictional and non-discretionary: whether the events occurred within the last 2 years; whether the complaint falls under one of the prohibited grounds and is otherwise within the jurisdiction of the Tribunal; whether, if the notification is filed by a third party, the person alleged to have been discriminated against consents.[51]

Recommendation #6

That a decision by the Commission to dismiss a notification be subject to reconsideration by the Tribunal, and that the onus for requesting reconsideration rest with the applicant.

Recommendation #7

That any criteria for dismissal that engage with the merits of a notification, be left for adjudication by the Tribunal, and that a referral of a notification to the Tribunal be deemed sufficient to trigger a hearing by the Tribunal.

[51] As noted in an earlier footnote, we suggest that s. 22(2)(a) of the NHRA be amended to require consent, for clarity. The Act as currently worded allows for a third party complaint where the person alleged to have suffered discrimination does not object.

Mediation and Settlement

Recommendation #8

That the primary responsibility for mediation and other dispute resolution processes be assigned to the Nunavut Human Rights Commission, and that the Tribunal have the authority to mediate once a notification has been referred for hearing.

The Right to Legal Representation

Recommendation #9:

That the NHRA be amended to recognize the right of applicants and impecunious respondents to publicly funded legal representation, and to commit the necessary institutional resources to ensure the adequacy of such representation.

Carriage of the Case and Representation of Applicants by Commission Counsel

Recommendation #10

That the Commission and its counsel be given the authority to carry notifications before the Tribunal, thereby providing publicly funded representation for the Commission, and in most cases the applicant as well.

When Outside Legal Representation Is Required

Recommendation #11

That the NHRA, or other legislation, be amended to ensure that publicly funded legal representation, from outside the Commission, is made available to applicants when the Commission decides not to represent them, and to impecunious respondents.

Other Matters Arising in this Review

Restriction on Selection of Tribunal Members

Recommendation #12

That the language of s. 19(4) of the Act be clarified to ensure that Tribunal members are not automatically precluded from hearing a case on the merits because of their involvement in pre-hearing matters.

Criminal Record

Recommendation #13

That the wording of the NHRA protection from discrimination against persons with a criminal record (s. 7 prohibited grounds of discrimination) be amended to remove the restriction that limits the protection to persons to whom a pardon has been granted, and clarify that the discrimination against a person with a criminal record, to be permissible, must be related to the employment, benefit, or tenancy in issue.

Tribunal Discretion Not to Deal with a Notification: Could or Should be Dealt with Under Another Act

Recommendation #14

That s. 24(1) of the NHRA be amended to provide that if an applicant initiates another proceeding that deals with the substance of the notification referred to the Tribunal, the Tribunal may defer further consideration of the notification until the outcome of the other proceeding is known.

Recommendation #15

That s. 24(3) of the NHRA be amended to authorize the Tribunal to dismiss a notification where the substance of the notification or a part of the notification has been appropriately dealt with in another proceeding.

Importance of Face-to-Face Contact

Recommendation #16

That consideration be given by the Government of Nunavut to establishing the Nunavut Human Rights Tribunal and proposed Human Rights Commission in a major centre of Nunavut, with a view to making these institutions geographically more accessible to Nunavummiut.

Updating the NHRA Preamble

Recommendation #17

That in addition to the *Universal Declaration of Human Rights* (1948), to which the preamble already refers, the NHRA be updated to refer to other applicable international human rights instruments.

Publication of Settlement Information

Recommendation # 18

That the Nunavut Human Rights Tribunal and the Nunavut Human Rights Commission publish the results of their settlement efforts through summaries that respect the privacy interests of individuals.

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