

**SUBMISSION BY THE YUKON HUMAN
RIGHTS COMMISSION ON THE DISCUSSION
PAPER "MODERNIZING THE YUKON HUMAN
RIGHTS SYSTEM IN YUKON"**

October 8, 2010

To the Department of Justice

TABLE OF CONTENTS

Introduction.....	1
Commission’s Concerns Regarding the Consultation Process.....	3
Theme One – Functions & Structures	
Question 1.....	4
a) The Commission is concerned there is a need for more emphasis on and funding for education and prevention.....	4
The Current Situation.....	5
Lack of Understanding of Human Rights and Responsibilities.....	5
Inadequacy of the Commission’s Funding.....	6
Recent Amendments to Process/Threshold Requirements for Filing Complaints.....	7
What Has Happened as a Result of the Amendments?.....	8
b) The Commission is concerned that the current process does not allow it to refuse to take a case to hearing after investigation where a complainant has refused what the Commission considers a reasonable settlement offer.....	9
c) The Commission is concerned that the current complaint and investigation process takes too long.....	9
Question 2.....	9
Which Model Would Work Best for the Yukon?.....	10
Theme Two – Appeal Process for Final Decisions of the Tribunal	
Question 1.....	11
Question 2.....	12
Theme Three – Adjudicator Qualifications	
Best Practices in Tribunal Appointment Processes.....	12

Question 1.....	14
Question 2.....	15
Question 3.....	15
Theme Four – Funding and Financial Accountability	
Question 1.....	16
Financial Accountability.....	16
Lack of Financial Independence.....	16
The Nature of the Problem.....	16
The Select Committee’s Recommendation That the Commission Not Be Funded Through Justice.....	17
The Commission’s Position.....	17
Ocean Port Case and Lorne Sossin’s Article on “Independence, Accountability and Human Rights”	18
Question 2.....	19
Question 3.....	19
Theme Five – Education Mandate	
Question 1.....	19
Question 2.....	21
Question 3.....	22
Summary of Recommendations.....	22
Conclusion.....	23
Bibliography.....	24

Introduction

On behalf of the Yukon Human Rights Commission, I am pleased to provide this submission on modernizing the human rights system in the Yukon. This work represents the collective knowledge and experience of members and staff of the Yukon Human Rights Commission. However, the extent of our research and preparation was limited by a very tight timeline for consultation, as well as the available Commission members' and staff time and the resources within our budget.

In my role as Chair, I welcome improvements to the human rights system. An important aspect of law reform is keeping pace with change. It also is an opportunity to provide leadership to the rest of Canada. The Yukon could have the most comprehensive and progressive human rights system in this country, and even the world, which could not only enable Yukoners to achieve true equality but also inspire others. A good human rights law and system can improve the quality of life of all Yukoners and ensure there are no barriers to their full participation in the economic, social, political and cultural life of the Yukon.

Any law reform process should fully engage the citizens of this territory in an effective, meaningful, informed, and educated manner because the law belongs to the people. Our *Human Rights Act* should also be written in plain language so that people can understand it, especially given the low literacy rate in the Yukon.

The Commission believes there must be better funding for the education component of its mandate and work. In terms of effectiveness, it is also important to ensure that the Commission's funding is

- adequate to carry out its full mandate in a timely and efficient way and
- at arm's length from government.

To achieve this, the Commission has repeatedly stated that its funding should be dealt with by the Member Services Board of the Legislative Assembly and not through the Department of Justice, which is a respondent in some complaints and also the department which provides legal advice and representation to government respondents on various other human rights complaints.

Human rights complaints are important legal cases with serious consequences for both complainants and respondents. Due to the increasing complexity of human rights cases, it is important that members of both the Commission and the Board of Adjudication (the separate body that conducts hearings) have background and expertise in legal process, human rights and administrative law and issues.

The Commission has made its best efforts to meet the Department of Justice deadline, despite a number of other consultations and projects that have concurrent deadlines and the fact that the Commission is currently short-staffed. The Commission appreciates the one-week extension and \$5000 in funding provided by the Department of Justice for the Commission to do this important work.

The five expert papers provided by Department of Justice for this consultation are helpful. They are:

- *Overview, International Context and History of Human Rights Systems in Canada* by Mary Cornish
- *Why Process and Structure Matter in Human Rights Systems* by Bill Black
- *Balancing Accountability and Independence of Human Rights Agencies* by Lorne Sossin
- *Experience with Streamlining the Conventional Human Rights System in Canada* by Geri Sanson
- *Pros and Cons of the Direct Access Model of Human Rights Complaints Resolution* by Heather MacNaughton

The Commission will refer to these papers as needed throughout its submission. The Commission notes that none of these papers was written by people familiar with the unique Yukon human rights context, the territory's capacity issues, demographics, multicultural heritage, or First Nation people's history, self-governance and land claims treaties.

The Commission's recommendations for Phase 2 of law reform are summarized at the end of this submission on page 22, just before the conclusion.

Melissa Atkinson
Chair, Yukon Human Rights Commission

October 8, 2010

Commission's Concerns Regarding the Consultation Process

Before addressing the themes set out in the Department of Justice discussion paper, the Commission will set out its concerns about this consultation process.

1. The timing of the consultation as well as the short two-month deadline for input are inadequate for meaningful public consultation and citizen engagement. A number of lawyers, members of the public and interested groups have told the Commission that they were unaware of the consultation [until they learned about it from the Commission] and did not see the announcements in the newspapers or read about it online. Other concurrent territorial law reform consultations such as the ones on the *Landlord and Tenant Act* and the regulation of all terrain vehicles (ATV's) have much longer time frames (6 months or more), have offered significant extensions on the deadline for public input, and have had far more extensive outreach such as public meetings and publicity such as household flyers.
2. There is no public meeting for those for whom a written submission is a barrier. Public meetings are also usually covered by the media and therefore reach a wider audience, making the law reform process more accessible and transparent to all.
3. The discussion paper was not initially available in French, nor were any of the five expert papers available online translated. Members of the public have told the Commission that the discussion paper was not available at the main desk in the Legislature building and instead people were told to download it from the internet. Only people with computers or access to computers can use the information provided on the government's website.
4. The five expert reports commissioned by the Department of Justice are useful but have not been advertised in the media: most people are unaware of them and again only people with a computer or access to a computer can find them, if indeed they go looking. Notice about these five papers appears to have been sent to stakeholders on September 23, just a week before the deadline for input expired.
5. There is no discussion of the needs and vulnerability of some of the parties to complaints in the Yukon, in particular those with mental disabilities, like FASD, as well as people with low literacy skills.
6. There was no consultation with the Commission prior to or during the preparation of the discussion paper, despite the Commission's two decades of expertise with the *Act* and more importantly the Commission's experience with the recent 2009 amendments, designed to streamline the Commission's process and provide more balance within the system. These recent amendments are not analyzed in the discussion paper at all. The Commission will provide some information about the

results of these recent amendments in Theme 1 because they are relevant to any discussion of the current process, function and structure.

Theme One – Functions & Structures

1. What concerns, if any, do you have about the current model/process of human rights promotion and complaint handling in Yukon?

- a) The Commission is concerned there is a need for more emphasis on and funding for education and prevention.

There is not enough emphasis on and funding for human rights promotion in the Yukon – the work of preventing discrimination.

In its submission to the Select Committee on Human Rights, the Commission recommended changes to strengthen its education and prevention mandate so that it could prevent discrimination through public education and policy development

- *by examining and reviewing any statute or regulation, and any program or policy made by or under a statute,*
- *by making recommendations to the appropriate person or body on any provision, program or policy that in the Commission's opinion is inconsistent with the intent of the Act. and*
- *by advising the Legislative Assembly on matters related to the Act.*

The Commission believes an after-the-fact approach to human rights where the focus is on complaints needs to be complemented by a strong preventative approach which avoids complaints by anticipating and solving problems with effective policies, systems and services.

Such an amendment would allow the Commission to make recommendations for changes to policies or programs or legislation in the Yukon that are inconsistent with the *Act*. The Commission could develop policy papers and guidelines on various human rights matters as the federal and Ontario Commissions do. The wording for an increased prevention mandate as set out above is based on section 29(d) of the Ontario *Human Rights Code*. Such an amendment would help strengthen the Commission's role in preventing and eliminating discrimination and does not require that there be a complaint before the Commission provides its assistance. It is also consistent with section 39 of the *Act*, the "paramountcy" provision, which says: "This Act supersedes every other Act, whether enacted before or after this Act, unless it is expressly declared by the other Act that it shall supersede this Act."

Such an amendment would also allow the Commission to bring to the Legislative Assembly's attention the need for updates or revisions to the *Act* or the Regulations in a timely manner. This recommendation is based on section 20(f) of the NWT *Human Rights Act*.

The Current Situation

Most of the Commission's budget over the past decade has been spent on complaint resolution and investigation and on providing human rights information and advice one-on-one to individuals seeking help (mostly people who believe they have experienced discrimination and employers who contact the Commission for advice). In the past three years, the Commission has focused its human rights promotion and prevention work on (1) policy development workshops and services, primarily for employers and on (2) training potential trainers to provide education in their own organizations and the broader community about human rights and responsibilities, with a focus on the poorly understood area of the "duty to accommodate", particularly as it relates to disability. The Commission has also done some training by videoconference for people in rural communities, with the support of the Yukon Law Foundation and using the videoconferencing equipment of the Council of Yukon First Nations.

In addition, the Commission has partnered with other Commissions such as the Northwest Territories Commission and the Canadian Human Rights Commission, government departments such as Advanced Education and community organizations such as Yukon Learn. It has also obtained Yukon Law Foundation, Women's Directorate and Workers' Compensation Health and Safety Board Prevention Education funding for public service announcements, publications and workshops, because its own budget is so limited. The recently launched bilingual booklet, "Know your Rights" is an example: it was funded by both the Northwest Territories Commission and the Yukon Government's Advanced Education branch of the Department of Education. The Commission contributed staff time to the project, while its two partners paid all the development and printing costs.

Lack of Understanding of Human Rights and Responsibilities

Despite these efforts, as noted in the Theme 5 discussion, many Yukon people do not have much knowledge or understanding of their human rights and responsibilities. Both have been evolving quickly in case law that most people never read. Yukoners should not have to be lawyers to understand their human rights and responsibilities. Although people are presumed to know the law, including human rights law, the Commission speaks daily with people who do not. The Commission does not currently have the resources to carry out effective education and prevention campaigns throughout the Yukon and still meet its enforcement responsibilities on complaints. (The federal Commission does not have an office here

and has provided education in the territory three times in the last 20 years, when the Yukon Commission has initiated a partnership with Canadian Human Rights Commission to provide some local workshops, including this year's train-the-trainer sessions, funded by the Yukon Law Foundation.)

As Mary Cornish has observed, in "Achieving Equality", "one factor in the failure of the [pre-amendment Ontario] Commission to carry out a major educational campaign is its budget. It simply never had the staff or resources to play a major educational role around the province for all the groups and issues covered by the Code."

That observation is equally true for the Yukon Commission. As Mary Cornish concluded in Ontario, the public, equality seeking groups and respondent groups had high expectations that the Ontario Commission would do far more educational and proactive work for a wider range of groups in addition to carrying out enforcement responsibilities. Other government agencies with similar mandates had far more resources than the Commission. She pointed out that the budget at the time for the Ontario Commission was significantly less than for the Ontario Women's Directorate (about a third less). She said: "The Commission must be properly funded to carry out its distinct role in human rights education."

Inadequacy of the Commission's Funding

The same point can be made about the inadequacy of the Yukon Commission's funding. To follow the Ontario example, the Yukon Women's Directorate has a 2010-11 budget of \$1,747,000 to support the Government's commitment to the economic, legal and social equality of women; whereas the Commission has a budget of \$549,000 to promote the human rights and equality of all Yukoners, in addition to enforcing the *Act*, all of which needs to be done with considerably less than a third of the funding of the Women's Directorate.

Comparison of YHRC with similar agencies:

Agency	Open cases	New cases	Fulltime equiv.	2010 Annual budget
YHRC	64 as of Mar. 31/09	38 in 2009	4.45	\$549,000 but only \$478,000= annual grant, rest [\$71,000] is one-time funding
Women's Dir.	Not applicable	Not applicable	9.2	\$1,747,000
YG Workplace	12 as of Mar.	14 in 2009	4.0	\$1,036,000 for

Harassment Office	31/09			2010/11
Northwest Territories Human Rights Commission	33 as of Mar. 31/09	26 in 2009	5.0	\$935,000 including \$250,000 for education

The funding for the Workplace Harassment Office totals \$1,036,000 with “administration” accounting for \$636,000 and Workplace Harassment prevention for \$400,000. The scope of its mandate is not as broad as the Commission’s, as it only deals with harassment and does not take cases to court or hearing.

As the discussion paper states, the Commission’s grant this year is \$549,000. However that amount includes \$71,000 of one-time funding. So the base grant (guaranteed each year) is only \$478,000. This amount must cover salary for a lawyer, an intake officer/office administrator, an investigator, and also the part-time salaries of a public education specialist (.6 FTE) as well as a Director (.8 FTE); honoraria for 5 members of the Commission who gate-keep complaints; as well as fixed costs for rent of \$40,000 per year; and all other administrative costs for phones and computers. It must also cover legal costs for court and adjudication hearings, for example, hiring medical experts, and producing transcripts of proceedings. It is simply not enough money annually to carry out the Commission’s mandate in a timely and effective way.

What has happened as a result is that the Commission has made frequent requests for supplementary funding through the government’s variance process to cover shortfalls in its annual budget/grant. These requests take time to prepare and are often done several times a year. The Commission Chair has commented on the inordinate amount of time spent on trying to obtain increases to the Commission’s funding – time which could otherwise be spent on education and prevention work.

Recent Amendments to Process/Threshold Requirements for Filing Complaints

The current process was streamlined and the threshold for filing complaints was raised as a result of amendments to section 20 of the *Human Rights Act* in December, 2009. These amendments are:

- time limit for making a human rights complaint has been increased from 6 months to 18 months, with discretion for the Commission to extend the limit;
- threshold for filing a complaint is now “reasonable grounds” rather than merely “belief” as it was prior to 2009;

- Commission has the ability to refer some complaints directly to the Board of Adjudication without an investigation in certain cases. Examples where this can be done are:
 - where a speedy resolution is needed because of urgent circumstances; or
 - where there is agreement on the facts but not on how the law applies to the facts; or
 - where there are no witnesses to the alleged discrimination and the complainant and respondent do not agree on what happened.
- Commission may decide to stop or suspend an investigation of a complaint when
 - a complainant declines a settlement offer that the Commission considers fair and reasonable or
 - where a person making a complaint has used or could first use other processes such as internal grievance or review procedures, which are available within an organization or workplace or
 - a complainant abandons the complaint or fails to cooperate in the investigation of the complaint

What Has Happened as a Result of the Amendments?

In the nine months since these amendments, the Commission's caseload has decreased. On December 9, 2009, there were 44 active cases. As of September 21, 2010, there are 31 active cases.

Since December, 2009, the Commission has used its new section 20 powers in 14 cases to either stop investigations [2], refer the person to other proceedings such as grievances [4], solve them quickly on the basis of a reasonable settlement offer [2], or decline to accept a complaint because there were no reasonable grounds [6]. (Other cases have been resolved or dealt with in this time period, but not using the new section 20 powers.) The fourteen cases are ones which would still be in our system, had the amendments not been made. Parties are now able to get decisions more quickly if their case comes within the section 20 criteria than was previously the case. In other words, these new powers have made a positive difference during the past eight months.

The Commission believes that the new provisions in the *Act*, under section 20, will facilitate a quicker process for complainants and respondents alike. However, these changes have not been in force long enough to assess their longer-term effectiveness.

The Commission has identified three cases suitable for direct referral to the tribunal under the section 20 amendments -- but it does not have the resources to take them to hearing, currently. A better-resourced Commission could use the powers

resulting from the new amendments even more effectively. As Bill Black says in his paper: this amendment can speed things up.

b) The Commission is concerned that the current process does not allow it to refuse to take a case to hearing **after investigation** where a complainant has refused what the Commission considers a reasonable settlement offer.

The new amendments allow the Commission to stop or suspend a complaint during investigation but not once an investigation is over and a settlement offer consistent with the objectives of the *Act* and relevant case law is available but rejected by a complainant. Several cases have gone to hearing in the past several years where a respondent was willing to provide significant remedies to a complainant including compensation to fix the issues giving rise to the complaint but the complainant refused – either because he or she wanted far more money than was warranted in the circumstances based on similar cases or because he or she wanted their “day in court”. In the Commission’s view, this is a waste of valuable resources and not in keeping with the remedial focus of human rights law.

c) The Commission is concerned that the current complaint and investigation process takes too long.

The Commission believes this is because it does not have enough resources. Due to resource constraints, the Commission recently decided to decline to participate in a hearing where both parties are represented, there are no systemic/public interest issues, and the Commission has already devoted significant resources to settlement efforts. This approach of selective participation at hearings is similar to what is happening under the new streamlined model at the Canadian Human Rights Commission, described in Geri Sanson’s *“Experience with Streamlining the Conventional Human Rights System in Canada”*.

2. Who should perform the different functions of the human rights system?

The Justice Department discussion paper says that combining roles that must be impartial (like investigation) with roles that are adversarial (taking cases forward to the Board of Adjudication) in the same Commission, can lead to bias or at least a perception of bias. However, the paper does not discuss how these different functions are performed at the Commission. There is a separation of roles in the Commission. Commissioners make gate-keeping decisions and are not involved in settlement or investigation in any way. The staff investigator is not involved in settlement at all, because settlement information is privileged and because the investigator must conduct an investigation in a neutral way. The lawyer who takes complaints forward to hearing and on appeal to the court on the Commission’s

behalf does not investigate complaints. Before investigation, it is the Director alone who helps parties to try and informally resolve or settle complaints.

The Supreme Court of Canada in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 1 S.C.R. 781 had this to say on this issue of multiple roles: "a plurality of functions in a single administrative agency is not necessarily problematic. The overlapping of investigative, prosecutorial and adjudicative functions in a single agency is frequently necessary for a tribunal to effectively perform its intended role [and] if a certain degree of overlapping of functions is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to the doctrine of 'reasonable apprehension of bias, *per se*."

Which Model Would Work Best for the Yukon?

The Commission agrees with Bill Black's view in his paper, "*Why Process and Structure Matter in Human Rights Systems*": different human rights models or structures have different strengths and weaknesses. There are tradeoffs with any model amongst the goals of

- accessibility
- expeditiousness (speed)
- fairness
- prevention, and
- public confidence in the system.

However, the Commission does not believe that the Court-based Model alone would work in the Yukon. Courts are not designed to deal with unrepresented litigants, as many parties to human rights complaints are. Also as Bill Black notes in his paper at page 5, "fairness requires that neither party to a case has a built-in advantage. Experience shows that if one party has a lawyer and the other does not, the party with the lawyer will win most of the time, even if an adjudicator [or a judge] does his or her best." Also, a human rights system should be primarily remedial rather than predominantly adversarial, like courts are.

The Commission believes that a direct access model without any commission or agency dedicated to human rights education would also pose barriers for Yukon people. How can you use rights that you do not know about? There is also no opportunity for prevention in such a model. It is not efficient or feasible to eliminate discrimination on a case-by-case basis. As Bill Black says in his paper: "the lack of a commission in B.C. makes prevention of human rights violations more difficult because no specialized agency is responsible for human rights education or for the promotion of human rights." Heather MacNaughton is a former chair of B.C.'s direct access tribunal. In her paper, she says at page 2 that "human rights education in the Province is falling behind some of the other provinces".

The Commission believes that either an improved conventional system with commission and tribunal or the hybrid model with a commission, tribunal and specialized legal clinic for both complainants and respondents [Ontario's clinic only helps complainants, not respondents] would work best in the Yukon. To be effective, either model would need to be properly funded.

In terms of costs, the hybrid model is the most expensive, because three separate bodies need funding. As Ms. MacNaughton points out, when B.C. went to a direct access model there were no cost savings over the conventional system it replaced, in part because "the work of a direct access tribunal is much more legally intensive than the work of commissions and legally intensive processes are more expensive."

Theme Two – Appeal Process for Final Decisions of the Tribunal

1. Is the current process effective?

The Commission thinks that the current appeal process where decisions from a Panel of the Board of Adjudication can be appealed on questions of law is an important oversight mechanism that should be maintained. A right of appeal on legal questions is particularly important in the Yukon human rights system where there is no requirement that members of the Board of Adjudication have any legal training or expertise on human rights law and administrative law.

As the Law Reform Commission of Saskatchewan has pointed out in its 2009 paper, "Appeals from Exercise of Statutory Powers of Decision Consultation Paper", statutory rights of appeals are expensive, can create delay, and remove the finality and certainty of a tribunal decision. However, these factors need to be balanced against others:

The decision to include a right of appeal and the scope and nature of such a right needs to therefore be balanced against the cost, delay and significance of the matter at issue. Adding cost and delay to the process of obtaining a final authoritative decision will be justified where the importance of the matters under decision warrants this.

Human rights matters are important ones and the impact of a decision can have serious consequences for the affected people. As the Law Reform Commission states at page 18: "When the subject matter of a decision has important consequences for the person it affects, it is difficult to justify denial of a right to appeal in order to avoid delay or even costs." Also, the Law Reform Commission points out at page 19 that when an appeal involves a question of law, the court is the most appropriate decision-maker: "Judges are specialists in the area of errors of

law and jurisdiction. Indeed, this has always been the role of superior courts. No statutory delegate can be said to have greater competence in this area.”

Statutory appeals also have the benefit of clarifying the law and establishing legal precedents, particularly for sections of the Yukon *Human Rights Act* which are different from those in other Canadian human rights statutes.

The Commission has appealed Board of Adjudication decisions only five times since 1998. Of these, the court overturned two Board decisions. The Commission settled a third appeal before it was heard and was unsuccessful in the two other appeals. The reasons for appeals in these five cases were mistakes of law, lack of reasons for a decision, unclear orders outside of the Board’s jurisdiction, and the lack of any compensation award even though the Board had found discrimination and evidence was led before it of financial loss and injury.

2. What role should the commission play in appeals and/or judicial review applications?

The Commission should be able to participate in both appeals and judicial review applications. It is the body best able to represent the public interest in such proceedings including providing necessary context on systemic complaints. It also has deep expertise in human rights.

Appeals are expensive due to the cost of providing transcripts to the court and hiring a lawyer. Such costs are often beyond the financial means of the parties, especially complainants. Judicial reviews are also expensive. As Bill Black pointed out in his paper, experience shows that if a party is unrepresented that person is more likely to lose even if he or she has a good case. This then becomes an access to justice issue. Currently, legal aid in the territory does not cover human rights appeals or judicial review applications. Without the Commission’s participation, most appeals and judicial reviews would not go forward, even where the case for appeal or review is a strong one.

In the past, the Commission has sometimes decided not to appeal, in part because of its limited funding. This is also an access to justice issue.

Theme Three – Adjudicator Qualifications

Best Practices in Tribunal Appointment Processes

With regard to the qualifications of adjudicators, Bill Black states in his paper:

The qualifications of adjudicators can affect not only the fairness of the process but also public confidence in the human rights system. There is a natural tendency for the party who loses to feel that the outcome was wrong, but that tendency is minimized if all the parties respect the qualifications of those who made the decision. The qualifications of adjudicators also affect the response of judges if a case goes on to court. If the court respects those qualifications, it is less likely to second-guess adjudicators and more likely to defer to their expertise. The Canadian *Human Rights Act* lists the required qualifications in the statute itself. (p. 4)

Lorne Sossin emphasizes in his paper the importance of a transparent appointment process based on merit:

Governments should also make the appointment process a transparent one, with the selection criteria and process publicly available and with all appointments made on a merits basis, consistent with the goals of the legislation, and with appropriate input from the Chair or leadership of the tribunal or commission itself. (p. 6)

Heather MacNaughton in her paper supports Sossin's view about a merit-based and transparent process:

By statute, appointments to B.C. administrative tribunals are made after a merit-based appointments process. The nature of the merit-based process will vary by tribunal and is designed by the Tribunal Chair in consultation with the responsible Minister. Appointments to the Human Rights Tribunal are for five years after a rigorous recruitment process. Because of the nature of the adjudication, and the fact that Ministries of government are often a respondent to complaints, longer term appointments are important protections of independence.

In Ontario, the office responsible for Provincial appointments has implemented a merit-based appointments process in which positions are widely advertised and applicants screened on defined skills-based criteria. Unlike B.C., these are practices not yet legal requirements although unproclaimed provisions of the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009* would enshrine the practice. (p. 6)

Section 14 of the Ontario's *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009* passed, not yet in force, proposes the following:

Appointment to Adjudicative Tribunals

Adjudicative tribunal members to be selected by competitive, merit-based process

14. (1) The selection process for the appointment of members to an adjudicative tribunal shall be a competitive, merit-based process and the criteria to be applied in assessing candidates shall include the following:
1. Experience, knowledge or training in the subject matter and legal issues dealt with by the tribunal.
 2. Aptitude for impartial adjudication.
 3. Aptitude for applying alternative adjudicative practices and procedures that may be set out in the tribunal's rules. 2009, c. 33, Sched. 5, s. 14 (1).

Tribunal-specific qualifications

- (2) If a member of an adjudicative tribunal is required by or under any other Act to possess specific qualifications, a person shall not be appointed to the tribunal unless he or she possesses those qualifications. 2009, c. 33, Sched. 5, s. 14 (2).

Publication

- (3) The responsible minister of an adjudicative tribunal shall make public the recruitment process to select one or more persons to be appointed to the tribunal and in doing so shall specify,
- (a) the steps intended to be taken in the recruitment process; and
 - (b) the skills, knowledge, experience, other attributes and specific qualifications required of a person to be appointed. 2009, c. 33, Sched. 5, s. 14 (3).

Chair to recommend appointments, reappointments

- (4) No person shall be appointed or reappointed to an adjudicative tribunal unless the chair of the tribunal, after being consulted as to his or her assessment of the person's qualifications under subsections (1) and (2) and, in the case of a reappointment, of the member's performance of his or her duties on the tribunal, recommends that the person be appointed or reappointed. 2009, c. 33, Sched. 5, s. 14 (4).

This represents a best practice in human rights appointments across Canada which could be adopted here in the Yukon. All candidates for appointment should be screened for bias and conflict as part of a merit-based selection process.

1. What knowledge, awareness, and/or expertise do adjudicators of human rights complaints in the Yukon require as individuals in order to do their jobs?

Expertise: All adjudicators should have a demonstrable working knowledge of human rights law. All panels of the Board of Adjudication should have at least one lawyer as part of the panel. The Chair of a panel needs experience in conducting hearings in an administrative law setting and also decision-writing skills.

Awareness: All adjudicators should have awareness of international human rights covenants, protocols, and declarations to which Canada is signatory and which set the international norms for human rights and obligations as well as appropriate cultural competence and intercultural awareness skills.

Knowledge: All adjudicators should have an up-to-date understanding of human rights case law; leading cases and recent developments, familiarity with administrative law principles, especially procedural fairness, and the areas of conflict of interest and bias.

2. What knowledge and expertise should be required of the Yukon Panel of Adjudicators as a whole (compared to individual adjudicators) in order to ensure a plurality of perspectives as well as legal soundness of tribunal decisions?

The Panel should reflect the diversity and demographics of the population it serves. For instance, there should always be a First Nation person on the Board of Adjudication in a territory where First Nation people make up approximately 25% of the population. There should be someone with legal training on every panel, ideally chairing the panel.

3. What training ought to be available to tribunal members?

Training should be of a high standard, and cannot realistically be accomplished with only a two or three day course of elementary administrative law such as the one offered at Yukon College. Nor is on-the-job training feasible – there are simply not enough cases at such a small tribunal each year to develop skills quickly and in enough depth to perform the adjudicative job well. It would be extremely useful if there were full semester courses in both human rights law and administrative law available locally at Yukon College for people interested in learning more and seeking an appointment to the tribunal. Ideally funding should also be available for people interested in taking the courses who cannot afford the tuition, but wish to apply for appointment to either the Commission or Board of Adjudication.

The Commission believes that for a small territory, it may also make sense to explore the feasibility of one administrative tribunal capable of dealing with a variety of matters and statutes, such as the Tribunal Administratif du Québec does. The B.C. government has commissioned the B.C. Justice Institute (formerly the B.C. Law Commission) to report on use of a workplace tribunal which could deal with a number of legal issues such as employment standards and human rights. Such a comprehensive tribunal could be more cost effective than a many smaller tribunals and could also allow for quicker scheduling of hearings and for the kind of expertise and capacity that comes with a caseload of more than a few hearings a year. In the Commission's view, such a model would only work if people appointed had sufficient expertise or were given adequate training in the areas of law covered by the tribunal's mandate.

Theme Four – Funding and Financial Accountability

1. Do the existing processes by which the Yukon Human Rights Commission and tribunal are funded strike an appropriate balance between independence and accountability?

In the Commission's view the current arrangements for funding the Commission do not strike an appropriate balance between accountability and independence.

The Commission is a statutory body created by the Legislature or the "legislative branch." It is not created by government (often referred to as the "executive branch" in Canadian constitutional law). Although the Justice discussion paper says that human rights commissions are "created by governments for the purpose of implementing government policy", this is not true in the Yukon. It is also worth noting that typically, the Commission's legislative mandate does not change as governments come and go.

Financial Accountability

Under the requirements of the *Human Rights Act*, the Commission reports to the Legislature every year by tabling its annual report which becomes part of the public record. The Commission's financial statements are always included: they are the result of a review of the Commission's books by an accountant each year which is produced in its entirety in the annual report. The report is also available on our website and in accessible formats through the Commission office. In this way, the Commission is financially accountable to both the Legislature and the Yukon public about the public money it has spent, as it should be.

Lack of Financial Independence

The Commission is not required under the *Human Rights Act* to report to any part of the Government, including the Department of Justice. However, currently, the Commission is required to obtain its funding from a contribution agreement with the Department of Justice. The Commission has explained throughout this past decade to the Justice Department that (1) there is no requirement for this in the *Human Rights Act*, which is paramount over all other Yukon acts, including the *Financial Administration Act* and that (2) in the Commission's view the current arrangements impair the independence of the Commission in terms of public perception.

The Nature of the Problem

The Commission investigates and deals with complaints against the Government, including those against the Department of Justice. In addition, the Department of Justice typically provides lawyers to represent the various government departments in responding to complaints against them, either as an employer or service provider. The Department of Justice frequently informs the Commission that it is unlikely it will be funded to the extent requested and that there should be "stability" in its funding, rather than frequent Commission requests for increases. In addition, sometimes the Department of Justice does not recommend particular items of funding the Commission has requested in the Department's submission to Management Board, such as the Commission's recent request for a small amount of supplementary funding to participate in the policing review.

The Select Committee's Recommendation That the Commission Not Be Funded Through Justice

The Select Committee on Human Rights, a body set up by the Legislature, not the government, and made up of members of Legislature, recommended unanimously that the Commission's funding be removed from the Department of Justice. The discussion paper does not say why, nor does the Committee's report. However, two members of the Select Committee both spoke on this issue in the Legislature on March 30, 2009, when the Minister of Justice tabled amendments to the *Human Rights Act*. MLA Don Inverarity said, "The issue is one of transparency and. . . it's important that . . . we move toward trying to move the funding arrangement for the Yukon Human Rights Commission out of the Department of Justice and perhaps into the Yukon Legislative Assembly, much like some of the other boards we have."

Another member, MLA Steve Cardiff had this to say in the House on the same day: "I would like to see the issue of arms' length funding for the Commission addressed. It is about transparency; it is about the appearance of conflict . . . about the perception of conflict, in that when complainants file a complaint with the Human Rights Commission against the government, against their employer . . . it's the Department of Justice that represents the Government as a respondent. So it would remove that conflict - - or it would remove the appearance of that conflict, if nothing

else – if the funding was removed from the Department of Justice. One of the areas that was suggested was to put it with the Legislative Assembly through the Member Services Board. . . . That is the way other offices like the Ombudsman are [funded].”

The Commission's Position

The Commission recommended in its submission to the Select Committee that it should be funded through the Member Services Board of the Legislature, just as the Ombudsman is – another statutory decision-maker which must be independent and must be seen to be independent of government and with a mandate to investigate government. There is no explanation in the Justice discussion paper of why the Ombudsman and Child Advocate have direct financial accountability to the Legislature while the Commission does not. The Commission told the Select Committee and the Department of Justice that some members of the public (including parties to complaints) have told the Commission they do not perceive it as neutral, because of the current funding arrangements. In the past several years, this issue has been formally raised in written submissions by complainants in several cases, as a legal issue. In Mary Cornish's expert paper, she says at page 4 “with the government often the respondent in human rights complaints, funding and appointments must be structured so as to ensure the independence and expertise of human rights institutions.” She also points out that chronic under-funding and inadequate staffing lead to significant backlogs and delays with individual complaints and an inability to address systemic ones. (As an example of the types of costs on systemic complaints, a recent one successfully settled this year required the Commission to hire an expert on para-transit issues at the cost of \$12,529.)

Ocean Port case and Lorne Sossin's article on “Independence, Accountability and Human Rights”

There is no mention in the Justice discussion paper of any case law relevant to this legal issue of independence. However, Lorne Sossin's article does discuss a leading Supreme Court of Canada case, *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] s S.C.R. 781. In this case, the Chief Justice says that administrative bodies “span the constitutional divide between the judiciary and the executive”. However, this case did not deal with the independence of a human rights commission or tribunal-- it dealt with the independence of a licensing body for liquor control. The case also did not deal with the issue of funding, but rather the security of tenure of the administrative decision-maker, who “served at pleasure” according to the statute. The case was about a decision to suspend a pub licence for two days in B.C. after some alleged violations of the Liquor Act. The Court decided that the Legislature had clearly indicated that the decision-maker would serve at pleasure and that “the degree of independence of a particular government decision-maker or tribunal is determined by its enabling

statute”: that statute must be considered as a whole to decide the question of how much independence it would have.

In contrast, the current *Human Rights Act* is silent on the question of how the Commission is to be funded, and this should be clarified. Human rights bodies investigate and make decisions on peoples’ human rights and obligations. The Supreme Court of Canada has stated many times that human rights law is “quasi-constitutional,” which means it is of a higher order than other ordinary laws like the Liquor Control Act, for instance. The Court in *Ocean Port* also said: “the precise standard of independence required will depend on all the circumstances, and in particular on the language of the statute under which the agency acts, the nature of the task it performs and the type of decision it is required to make”. The Court explained that it is the principles of natural justice that require an independent and impartial decision-maker. Finally, the Court said “tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not. . . . Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.”

The Yukon Commission believes, as do many Yukoners who expressed their views in the Phase 1 consultation, that to do its work fairly and in a way that inspires public confidence in its independence, its funding should not come through a government department, but rather directly through the Legislature or through a standing committee of the Legislature like the Member Services Board.

2. Should the funding for the tribunal (Panel of Adjudication) be continued on the current basis (i.e., an amount set through the regular budgeting process, supplemented as required based on hearings, etc.), or should it be changed?

The commentary above applies equally to the funding of the tribunal, which hears cases where the Department funding it is either the respondent or representing the respondent government.

3. Are there other means for ensuring accountability that should be considered?

The Commission believes it is financially accountable now through its annual report to the Legislature, which is transparent and sufficient. That said, an audit by the Auditor General, as was suggested by some in the earlier Phase 1 consultation, could be a further accountability mechanism. Also, the Commission has requested to appear in the Legislative Assembly on a number of occasions as was done in the

early years to answer questions and thereby being further accountable to Yukoners for its expenditures and activities. These requests have been denied.

Theme Five - Education Mandate

1. Is there a need for more human rights education in Yukon schools?

Yes. The Yukon should ensure our children learn about their human rights and responsibilities through the public school and post-secondary education system.

In the spring of 2008, the Commission did a survey of Yukon youth between the ages of 13 to 25 years. A total of 142 youth responded: 84 from Whitehorse and 58 from Destruction Bay, Haines Junction, Mayo, Ross River, Watson Lake and Stewart Crossing. Forty percent – almost half – said they know “nothing” about human rights and 78% said they did not know what the Human Rights Commission does. Many youth said schools should provide human rights education. The Commission agrees. During the Select Committee on Human Rights community consultations in 2008, Yukoners at public meetings about human rights in Dawson City, Old Crow, Faro, Whitehorse and Watson Lake also said there needed to be more education about human rights, particularly for students. The Select Committee on Human Rights recommended that there be increased education on human rights and responsibilities in the school system.

The Commission believes considerable effort is required from all sectors of society, including the education system, to eliminate discrimination and build a culture of human rights.

Although the current section 4 of the *Education Act* says that one of the goals and objectives of the Yukon education system is to promote the recognition of equality consistent with the *Charter* and the *Human Rights Act*, there is no comprehensive and age-appropriate curriculum to achieve this throughout the K-12 grades. This is a gap that needs to be filled in order to create a culture of human rights in every school learning environment and in society as a whole.

Human rights embody values for citizenship and social responsibility in terms of resolving conflict, creating social harmony and full citizen participation, and fostering peace, social stability and prosperity.

It is now well-established under human rights instruments such as United Nations conventions and the Universal Declaration of Human Rights to which Canada is signatory that education about human rights is a necessary part of the rights themselves: without knowledge and understanding of human rights, human beings cannot use their rights or respect, promote and protect them. Therefore, every

Yukon child should learn, in an age-appropriate way, from Kindergarten to grade 12 about his or her human rights, as well as the corresponding legal obligation and responsibility to respect the rights of others, all as part of that child's learning, social responsibility and citizenship. This is an essential part of building capability and capacity in our children and our society for the future and all its challenges.

The discussion paper says that no jurisdiction in Canada includes in its human rights legislation a requirement for mandatory human rights education in the schools. In Quebec, human rights and related themes, such as justice, are included in ethics, religious and cultural studies, history and citizenship in the Kindergarten to grade 12 public school system. Also in a survey of Commissions across Canada, Quebec, Newfoundland, and Nova Scotia Commissions told the Yukon Human Rights Commission that human rights related topics are covered in business, trades, social work and other career related programs covering human resource topics, employment issues and readiness skills for employment. The Yukon Commission provides presentations to high school Law 12 classes and college courses related to human resource management or work readiness for older workers or Yukon Nominee candidates. Some presentations have also been provided to teacher education students in the Yukon Native Teacher Education Program, on a request basis, not annually and not as part of the prescribed curriculum. Candidates for employment require information about discrimination prevention, as do employers looking for potential workers.

Calls for human rights education in public schools go back to the 90's. Mary Cornish is one of the experts hired by the Department of Justice to write one of the five expert papers available for this law reform consultation. In the groundbreaking report "Achieving Equality" which Ms. Cornish co-authored on reforming the Ontario human rights system, it states at page 176:

From the earliest years, human rights should be part of the school curriculum. This would bring many advantages. Children who belong to groups who experience discrimination would be affirmed in their sense of self-esteem and confidence. Children would learn the importance of respecting and including all members of society.

The history and present reality of discrimination in Canada and the ongoing struggle for human rights should be taught to all students. Students should learn what human rights protections exist and how to access those protections. Students should be encouraged and assisted in spreading human rights information in their own communities.

In other words, such education can have a ripple effect out into the larger community. In Saskatchewan, there is mandatory Treaty education in the Pre-Kindergarten to Grade 12 Saskatchewan education system, which functions as a

form of anti-discrimination education. As part of a new Four Pillar model for the Saskatchewan Human Rights Commission, Judge David Arnot, Chief Commissioner, is planning a strategic pedagogy for civics education in the pre K to 12 provincial school system, as a tool to prevent and eliminate discrimination. The Yukon Commission has done some work in this area. In 2006, it developed a module on racial discrimination in conjunction with the development of video public service announcements on human rights and offered it to the Department of Education.

The Commission believes that in order to meet one of the major objectives related to human rights mentioned in the *Education Act*, the Department of Education in cooperation with the Commission, must develop curriculum and training for teachers in order to meet the objectives outlined in the *Act*. Adequate funding for this work would be required.

The Commission also believes that an introduction to human rights issues which relate to providing education services, such as the duty to accommodate or harassment prevention should be a mandatory component in teacher education.

2. If so, how can this best be accomplished? Is it necessary and/or appropriate to mandate such curriculum changes by way of legislation?

In her paper, "Building a Culture of Equality Through Human Rights Enforcement", Mary Cornish says her report "Achieving Equality", called for "the embedding of human rights education in all levels of the education system." As noted earlier, The Select Committee on Human Rights recommended that there be increased education on human rights and responsibilities in the school system.

Canada signed the *Universal Declaration of Human Rights* in 1948. That document which is referenced in the Preamble and Objects of the Yukon's *Human Rights Act* states: "Everyone has the right to education. . . . Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms."

The Commission believes that what gets legislated gets done. Part of Yukon children's right to education is the right to education about their human rights and responsibilities. It is necessary and appropriate to mandate this as part of the Yukon's *Human Rights Act*, which is paramount over all other Yukon legislation, including the *Education Act*. The Commission believes the *Human Rights Act* should be amended to require human rights education from Kindergarten to grade 12 as part of the prescribed curriculum.

3. If mandating by way of legislation, which statute is the more appropriate vehicle: the Education Act or the Human Rights Act?

The *Human Rights Act* is the more appropriate vehicle. Education is already a part of the Commission's mandate. Section 16(1) says: "There shall be a Yukon Human Rights Commission accountable to the Legislature and the commission shall . . . promote education and research designed to eliminate discrimination." A right to education about human rights is part of the right to education, which under the *Universal Declaration of Human Rights* and international treaties is a human right. It makes sense, therefore, to mandate this specifically in the legislation that deals with human rights.

Also, the Yukon's *Human Rights Act*, is paramount over all other Yukon legislation, including the *Education Act*, because of section 39, which says under the title, "Paramountcy" that the Act "supersedes every other Act, whether enacted before or after this Act, unless it is expressly declared by the other Act that it shall supersede this Act."

Summary of Recommendations:

1. The Yukon *Human Rights Act* should be amended to strengthen the Commission's human rights education and prevention mandate and this work should be adequately funded.
2. The *Act* should be amended to allow the Commission to refuse to take a case to hearing if after the investigation is completed a complainant refuses what the Commission thinks is a reasonable settlement offer. This change would encourage reasonable settlements, avoid wasting valuable resources and speed the human rights process up.
3. The Commission recommends either improvements to the current (conventional) system or a hybrid model with a commission, tribunal and specialized legal clinic for both complainants and respondents.
4. The Commission recommends that the current appeal and judicial review process be maintained as an important oversight mechanism by the courts to ensure decisions by the Commission and the Board of Adjudication are both fair and according to law.
5. The Commission recommends that appointments to the Commission and the Board of Adjudication be merit-based, transparent and that the *Act* set out the required qualifications and process for appointments.

6. The Commission recommends that the *Act* be amended to ensure that at least some members of the Board of Adjudication have legal training and that all members have a demonstrated working knowledge in human rights law and administrative law principles.
7. The Commission recommends that the appointments to the Board of Adjudication and the Commission should reflect the diversity and demographics of the Yukon Territory and people it serves and that there should always be at least one member who is a First Nations person.
8. The Commission recommends it be funded by the Member Services Board rather than the Department of Justice due to perceptions of conflict of interest arising in the current funding arrangement and to ensure that the Commission is independent and at arm's length from government (which it often investigates and deals with as a respondent).
9. The Commission recommends that the *Human Rights Act* be amended to state that all Yukon students in the public school system shall learn about their human rights and responsibilities as part of the prescribed Kindergarten to Grade 12 curriculum.
10. The Commission recommends that an introduction to human rights law as it relates to providing education services such as the Duty to Accommodate or harassment prevention be a mandatory component of teacher education and training in the Yukon.

Conclusion:

The Commission appreciates the opportunity to provide input into this part of the law reform process and is available to answer questions and provide further information, if needed and requested.

The Commission looks forward to the next stage in modernizing and improving the Yukon's *Human Rights Act* and system.

BIBLIOGRAPHY

1. *Yukon Human Rights Act*, R.S.Y. 2002, c.116 as amended
2. *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 (CanLII), [2001] 2 S.C.R. 781
3. Human Rights Modernization Project, *Modernizing the Human Rights System in Yukon* (Discussion Paper) (Whitehorse: Department of Justice, Yukon Government, 2010)
4. Law Reform Commission of Saskatchewan, *Appeals from Exercise of Statutory Powers of Decision*, Consultation Paper (2009) (Saskatoon: Law Reform Commission of Saskatchewan) [Online at <http://sklr.sasktelwebhosting.com/Papers.htm>]
5. Bill Black, "The Importance of Considering Human Rights Structure and Procedures", Commissioned Comment on Human Rights Modernization Project – Phase 2 (2010) (Whitehorse: Department of Justice, Yukon Government)
6. Mary Cornish, "Building a Culture of Equality Through Human Rights Enforcement", Commissioned Comment on Human Rights Modernization Project – Phase 2 (2010) (Whitehorse: Department of Justice, Yukon Government)
7. Heather MacNaughton, "Lessons Learned: the BC Direct Access Human Rights Tribunal", Commissioned Comment on Human Rights Modernization Project – Phase 2 (2010) (Whitehorse: Department of Justice, Yukon Government)
8. Geri Sanson, "Streamlining Conventional Human Rights Systems", Commissioned Comment on Human Rights Modernization Project – Phase 2 (2010) (Whitehorse: Department of Justice, Yukon Government)
9. Lorne Sossin, "Independence, Accountability and Human Rights", Commissioned Comment on Human Rights Modernization Project – Phase 2 (2010) (Whitehorse: Department of Justice, Yukon Government)