



July 26, 2024

Jason Pedlar  
Ombudsman, Yukon Ombudsman  
3162 3rd Avenue  
Whitehorse, YT Y1A 1G3

CC: Mark Radke, Deputy Minister and Deputy Attorney General, Department of Justice  
Judith Hartling, Chief Adjudicator, Yukon Human Rights Panel of Adjudicators  
Michael Dougherty, Chair, Yukon Human Rights Commission  
Caroline Grady, A/Legal Counsel, Yukon Human Rights Commission

Dear Mr. Pedlar:

**Re: Response from the Yukon Human Rights Commission to the Investigation Report of June 10, 2024**

The Yukon Human Rights Commission (the “Commission”) received the advance copy of the investigation report into files OMB-INV-2023-02-47, OMB-INV 2023-02-048 and OMB-INV-2023-04-084, on June 10, 2024. Thank you for the extended opportunity to respond to the report. We are also grateful for the opportunity over the last few months to discuss our shared values of procedural fairness, rule of law, justice, and stewardship over public resources.

The Commission accepts the five recommendations made to it by the Ombudsman’s report. Furthermore, the Commission agrees with the three recommendations made to the Department of Justice and the Legislative Assembly. We look forward to working with them to support our mutual goals of meeting the statutory obligations of the Yukon *Human Rights Act*, as well as holding up the moral responsibility inherent in our role.

While we acknowledge the effort your office has made to respond to the information the Commission provided in Spring 2024, we remain disappointed that some of the errors, omissions and misrepresentations we brought to the Ombudsman’s attention have not been fully addressed. With this response, we will attempt to correct the record in key areas for reasons of the public interest and the importance of an accessible and well-understood human rights mechanism.

We share the Ombudsman’s deep concerns about the timelines to review, investigate, screen, and adjudicate human rights complaints. The Ombudsman’s report has highlighted systemic challenges to justice that are felt across the country. It has been noted that Yukon timelines are some of the swiftest in

the country. We take no solace in that and refuse to accept this as the norm. The Ombudsman's report has provided impetus to prioritize some operational challenges over others with a view to addressing these issues. The Commission takes ownership of those areas that are our responsibility, and we commit to never relent in our efforts to defend and promote human rights in Yukon.

Sincerely,

YUKON HUMAN RIGHTS COMMISSION



Karen Moir

Director of Human Rights

Encl.: Response to Ombudsman's Investigation Report

July 26, 2024

**RE: Response to Ombudsman’s Investigation Report**

The Yukon Human Rights Commission (the “Commission”) welcomes the opportunity to comment on the Ombudsman’s report into files OMB-INV-2023-02-47, OMB-INV 2023-02-048 and OMB-INV-2023-04-084, dated June 10, 2024.

The Commission accepts all five of the recommendations directed to it in the report.

The Commission also agrees with the recommendations to the Government of Yukon Department of Justice. The Commission welcomes, in particular, the Ombudsman’s recognition of the impact of significant resource constraints on the Commission’s work, in the face of an ever-increasing caseload.

This response outlines the Commission’s commitment to addressing the recommendations alongside our Justice partners, while continuing our important work of promoting the objects of the *Human Rights Act*. The response also offers important additional context on the Ombudsman’s findings in the following areas:

1. The Commission’s practice in promoting settlement and evaluating the fairness and reasonableness of settlement offers;
2. The Director’s authority to stop and suspend complaints; and
3. The important role of legal counsel in advising the Director and Commission Members.

The Commission is a small operation, with limited resources and a broad statutory mandate. We will continue improving the enforcement and administration of the *Human Rights Act* each and every day, in the public interest.

**A. BACKGROUND: THE YUKON HUMAN RIGHTS COMMISSION**

The Yukon Human Rights Commission was established by the Legislative Assembly in 1987 to promote equality and diversity through research, education, and enforcement of the *Human Rights Act*. The *Human Rights Act* is a “quasi-constitutional” law<sup>1</sup> that “declares public policy”.<sup>2</sup> Its objects include eliminating and discouraging discrimination.<sup>3</sup>

Section 16 of the Act sets out the Commission’s broad mandate in the administration of the Act:

---

<sup>1</sup> *Canada (House of Commons) v. Vaid*, 2005 SCC 30 (CanLII), [2005] 1 SCR 667 at para 81.

<sup>2</sup> *Winnipeg School Division No. 1 v. Craton*, 1985 CanLII 48 (SCC), [1985] 2 SCR 150 at 156.

<sup>3</sup> *Human Rights Act*, s. 1(1)(a).

## 16 Human Rights Commission

- (1) There shall be a Yukon Human Rights Commission accountable to the Legislative Assembly and the commission shall
  - (a) promote the principle that every individual is free and equal in dignity and rights;
  - (b) promote the principle that cultural diversity is a fundamental human value and a basic human right;
  - (c) promote education and research designed to eliminate discrimination;
  - (d) promote a settlement of complaints in accordance with the objects of this Act by agreement of all parties;
  - (e) cause complaints which are not settled by agreement to be adjudicated, and at the adjudication adopt the position which in the opinion of the commission best promotes the objects of this Act.
- (2) The commission shall conduct education and research on the principle of equal pay for work of equal value in the private sector.

The Act gives the Commission considerable discretion as to how to carry out its mandate.<sup>4</sup>

The Commission consists of the Commission staff and three to five Commission Members. During the period of the Ombudsman's inquiry, the Commission was staffed by a Director of Human Rights, a general legal counsel, and three to five other staff members.

### **1. Commission's role in receiving, investigating, and screening human rights complaints**

The administration of human rights complaints – but one aspect of the Commission's mandate – was the focus of the Ombudsman's report.

The *Human Rights Act* provides that any person having reasonable grounds for believing there has been a contravention of the *Act* against them may complain to the Commission.<sup>5</sup> The Commission is a "forum of last resort", meaning that complainants are generally required to have exhausted grievance or other available redress procedures before engaging the Commission's complaint process.<sup>6</sup> As such, the matters that come before the Commission are often complex and protracted.

The Commission is a neutral party throughout the complaint process. Commission staff provide information and assistance to both parties, and cannot provide legal advice or representation to either party.<sup>7</sup> Contrary to the comments in the Ombudsman's report, Commission staff do not assist

---

<sup>4</sup> *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para 1 and 40 ["HRM"].

<sup>5</sup> *Human Rights Act*, s. 20(1).

<sup>6</sup> *Human Rights Act*, s. 20(1)(h), (i).

<sup>7</sup> Yukon Human Rights Commission "Complaint Process Guide", p. 1, 3, 6.

complainants to form the substance of their complaint, or draft complaints or responses on behalf of either party.<sup>8</sup>

Prior to accepting a complaint for investigation, the Commission conducts an initial screening process. The Director of the Commission reviews the complaint to confirm that:

1. The complaint falls within the *Human Rights Act*, by describing events that, if believed, could meet the legal test for discrimination;
2. The events described in the complaint happened within the last 18 months; and
3. The events described in the complaint do not fall under the jurisdiction of another human rights commission (e.g., federal) or tribunal.<sup>9</sup>

All three of the complaints that were examined in the Ombudsman's report were accepted for investigation by the Commission.

Consistent with the remedial purpose of the *Human Rights Act*, the Commission has a specific mandate to "promote a settlement of complaints in accordance with the objects of this Act by agreement of all parties".<sup>10</sup> The Commission's important statutory mandate to promote settlement is discussed in more detail later in this response.

Where complaints are not settled, the Commission investigates complaints to determine whether the complaint should be referred to an adjudicative body for a hearing. This is a screening or gate-keeping function, which the Supreme Court of Canada has described as "more administrative than judicial in nature".<sup>11</sup> The Commission does not decide whether discrimination in fact occurred, nor does it make findings of fact or assess credibility. Rather, the Commission assesses whether the investigation has disclosed a reasonable basis in the evidence to warrant taking the complaint to the next stage: a hearing before a Yukon Human Rights Board of Adjudication.<sup>12</sup> If, after investigation, the Commission determines that an adjudicative hearing is not warranted, the Commission can dismiss the complaint.<sup>13</sup>

The statutory framework also empowers the Commission to stop or suspend an investigation into a complaint prior to the conclusion of the investigation in a number of circumstances, which are discussed in more detail later in this response. One of the complaints that was the subject of the Ombudsman's report (OMB-INV-2023-04-084) was stopped at this stage of the process.

Throughout its administration of the complaints process – including receiving, investigating, settling, and screening complaints – the Commission is guided by a well-developed body of Canadian human rights law and jurisprudence. Based on this law and jurisprudence, as well as best practices developed by statutory

---

<sup>8</sup> Contra Report, p. 8, para 13(1)(i).

<sup>9</sup> Yukon Human Rights Commission "Complaint Process Guide", p. 6; *Bachli v Yukon Human Rights Commission*, 2022 YKSC 49 ["*Bachli*"], paras 66-67.

<sup>10</sup> *Human Rights Act*, s. 16(1)(d); s. 21(b).

<sup>11</sup> *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para 26.

<sup>12</sup> *Cooper v Canadian Human Rights Commission* (1996), 27 CHRR D/173 (SCC); *Cohen v British Columbia (Council of Human Rights)* (1990), 72 DLR (4th) 306, 14 CHRR D/99 at 23 (BCSC); *SEPQA v Canada (Human Rights Comm.)*, [1989] 2 SCR 879 at 899; *Mis v Alberta Human Rights Commission*, 2001 ABCA 212.

<sup>13</sup> *Human Rights Act*, s. 21(a).

human rights agencies across the country, the Commission has adopted written policies and procedures to inform much of its work.

## **2. Commission is independent from the Yukon Human Rights Panel of Adjudicators**

Important context for the Ombudsman's report and findings is that the Commission is a separate and independent body from the Yukon Human Rights Panel of Adjudicators.

If the Commission decides that a human rights complaint warrants a public hearing, the Commission refers the complaint to the Panel of Adjudicators, which is an independent adjudicative body created by the *Human Rights Act*, separate and distinct from the Commission.<sup>14</sup> The Panel of Adjudicators selects a number of its members to form a Board of Adjudication.

The Board of Adjudication holds a public hearing, which includes hearing witness testimony under oath and subject to cross-examination. The Commission participates in the hearing before the Board of Adjudication as a party, presenting evidence and arguments about discrimination in the public interest. At the hearing, the Commission is a separate party from Complainants and Respondents.<sup>15</sup> The *Human Rights Act* directs that the Commission at the hearing will "adopt the position which in the opinion of the commission best promotes the objects of [the *Human Rights Act*]."<sup>16</sup>

It is the Board of Adjudication – not the Commission – that ultimately decides whether a complaint of discrimination is proven on a balance of probabilities.<sup>17</sup>

Even after a complaint is referred to a hearing, parties can – and often do – resolve the complaint by negotiated settlement. This occurred in two of the complaints that were the subject of the Ombudsman's report (OMB-INV-2023-02-47 and OMB-INV 2023-02-048).

## **B. RESPONSES TO THE OMBUDSMAN'S RECOMMENDATIONS**

The Commission accepts the five recommendations directed to it in the Ombudsman's report. The Commission's work toward implementing each of the recommendations is outlined below.

### **1. Recommendation #1 - Implement a written policy on the manner in which the YHRC Director exercises their discretion regarding the application of each applicable subsection of s. 20(1) of the Human Rights Act (the HRA) within 12 months of the date of the Investigation Report.**

The Commission welcomes the Ombudsman's work in identifying potential gaps in its policies and procedures. The Commission commits to reviewing, updating, and – where necessary – developing written policy to guide the exercise of its discretion under each subsection of s. 20(1) of the *Human Rights Act*. It will do so as soon as possible and no later than 12 months of the report.

---

<sup>14</sup> *Human Rights Act*, s. 22.

<sup>15</sup> *McKenzie forest Products Inc v. Ontario Human Rights Commission and Adam Tilberg*, 2000 CanLII 5702 at paras 33-34 (ONCA);

<sup>16</sup> *Human Rights Act*, s. 16(1)(e).

<sup>17</sup> *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para 23.

For context, subsection 20(1) of the *Act* lists nine circumstances in which the Commission, in performing its screening or gate-keeping function, is not required to investigate a human rights complaint:

## 20 Complaints

(1) Any person having reasonable grounds for believing that there has been a contravention of this Act against them may complain to the commission who shall investigate the complaint unless

- (a) the complaint is beyond the jurisdiction of the commission;
- (b) the complaint is frivolous or vexatious;
- (c) the complainant asks that the investigation be stopped;
- (d) the commission asks a board of adjudication to decide the complaint without investigation;
- (e) the commission asks the Director of Human Rights to try to settle the complaint on terms agreed to by the parties prior to or during investigation;
- (f) the complainant abandons the complaint or fails to cooperate with the investigation;
- (g) the complainant at any time prior to the conclusion of the investigation declines a settlement offer that the commission considers fair and reasonable;
- (h) the complainant has not exhausted grievance or review procedures which are otherwise reasonably available or procedures provided for under another Act; or
- (i) the substance of the complaint has already been dealt with in another proceeding.

In turn, *Human Rights Regulation* 5(1) empowers the Director of Human Rights to suspend or stop an investigation if the Director believes on reasonable grounds that the Commission is no longer required to investigate the complaint under s. 20(1) of the *Act*.

Currently, the Commission has implemented policies, legal memos, and other guidance material for all but two of the circumstances referred to in s. 20(1) of the *Act*.<sup>18</sup> The Commission commits to developing a written policy for the two outstanding subsections (g and e) as soon as possible and no later than within 12 months. The Commission will also strategically review and update the whole operational policy suite

---

<sup>18</sup> No Reasonable Grounds Policy (2010); Stopping or Suspending a Complaint Policy (2013); Abandonment of Complaint Policy (2010); Death of a Complainant Policy (2010); Legal Memo re: Guidelines for Directly Referring a Complaint Under Section 20(1)(d); Commission's Standing Order to Director to Attempt Settlement (2009); Informal Resolution Process Guide for Complainants and Respondents(2020); Canadian Association of Statutory Human Rights Agencies Best Practice Guide for Complaints where Jurisdiction is Unclear (2014).

as soon as possible and no later than 12 months, to ensure its operational policies continue to reflect recent developments in the law, jurisprudence, and human rights best practice.

**2. Recommendation #2 - Expand and clarify the YHRC's written procedures for the HRA "fair and reasonable evaluation in s.20(1)(g) within six months of the date of this report.**

The Commission accepts this recommendation. Consistent with the Commission's screening or gate-keeping function, paragraph 20(1)(g) of the *Human Rights Act* and s. 5(1) of the *Human Rights Regulations* gives the Commission discretion to stop an investigation into a human rights complaint where a complainant has declined a settlement offer that the Commission considers "fair and reasonable":

20(1) Any person having reasonable grounds for believing that there has been a contravention of this Act against them may complain to the commission who shall investigate the complaint unless

...

(g) the complainant at any time prior to the conclusion of the investigation declines a settlement offer that the commission considers fair and reasonable;

...

5(1) The Director may decide to suspend or stop an investigation if the Director believes on reasonable grounds that the Commission is no longer required to investigate the complaint under subsection 20(1) of the Act.

As outlined in response to Recommendation #1 above, the Commission has committed to developing a policy to guide the exercise of its discretion in stopping investigations under s. 20(1)(g). The Commission also commits to further expanding and clarifying its process for the exercise of this discretion within 6 months, as recommended in Recommendation #2. Currently, this process is outlined in general terms in the Commission's "Informal Resolution Process Guide", provided to complainants and respondents during the complaint process.

**3. Recommendation #3 - Submit recommendations to the Executive Council to harmonize the HRA with its regulations such that it addresses the concerns and gaps in this report. To be identified within 12 months of the date of this report.**

The Commission welcomes the Ombudsman's work in identifying concerns and gaps in the existing framework and language of the *Human Rights Act* and its Regulations. The Commission is already in advanced stages of discussions with the Department of Justice on necessary amendments to the Act and Regulations. The findings of the Ombudsman's report will continue to inform these discussions, including about the need to clarify the Commission's authority to stop or dismiss complaints where investigation is no longer required under s. 20(1) of the Act. The Commission is confident that its work with the Department of Justice to advance amendments to the Act and Regulations will ultimately strengthen the protection of human rights in Yukon.



**4. Recommendation #4 - Map current duties of general counsel for the authority and identify instances where the activities could be performed by the Director or an HRO- operational constraints notwithstanding. To be completed within 12 months of the date of this report.**

The Commission accepts this recommendation. As with any small agency, the Commission constantly seeks ways to use its limited resources efficiently to discharge its broad statutory mandate most effectively. As such, where it is fair and appropriate to do so, the Commission's small complement of staff, including legal counsel, is often called upon to perform a variety of roles and tasks within the organization. The Commission acknowledges the observations of the Ombudsman's report that the involvement of legal counsel at different stages of the complaint process has on occasion contributed to confusion, a lack of role clarity, or ambiguity around issues of privilege. The Commission commits to mapping the current duties of legal counsel, as well as those activities that legal counsel will be responsible for on an ongoing basis, within 12 months.

**5. Recommendation #5 - Evaluate and select comprehensive case management software which monitors and tracks key performance indicators for all relevant statistics within twelve months of this report.**

The Commission agrees without reservation with the value of case management software to better inform its policies, procedures, and responses to trends or challenges. The Commission will identify and evaluate case management software capable of monitoring and tracking key performance indicators for all relevant statistics. The Commission's ability to select and implement such software will be subject to budgetary constraints. To date, the Commission has submitted a project proposal to the Department of Justice for training and up-to-date technology, including case management software.

**C. ADDITIONAL CONTEXT AND CLARIFICATION ON OMBUDSMAN'S REPORT**

This section of the Commission's response offers important additional context on the Ombudsman's report in the following areas:

1. The Commission's practice in promoting settlement and evaluating the fairness and reasonableness of settlement offers;
2. The Director's authority to stop and suspend complaints; and
3. The important role of legal counsel in advising the Director and Commission Members.

Each topic is addressed in further detail in turn below.

**1. Commission practice in promoting settlement and evaluating the fairness and reasonableness of settlement offers is consistent with the Act and human rights jurisprudence**

The Commission respectfully submits that its practice in promoting settlement and evaluating the fairness and reasonableness of settlement offers under s. 20(1)(g) of the *Act* is consistent with the Act, Regulations, human rights jurisprudence, and procedural fairness.

One of the roles of the Commission, as set out in the *Human Rights Act*, is to promote the settlement of complaints:

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

... (d) promote a settlement of complaints in accordance with the objects of this Act by agreement of all parties; ...

The priority placed by the legislature on the settlement of complaints is consistent with the remedial objectives of the *Human Rights Act*. That is, the legislature has emphasized the prevention, elimination, and remedying of discrimination, rather than fault, moral responsibility or punishment.<sup>19</sup>

Settlement or informal resolution is a voluntary process whereby parties agree to try and resolve a human rights complaint with assistance from Commission staff. Generally, if a complaint is accepted for investigation by the Director, the Commission will ask both parties if they are interested in settlement. If either party indicates that they are interested in settling the complaint, Commission staff will try to facilitate a settlement discussion between the parties. If either party is not or no longer interested in settling the complaint, they will not be expected to participate in settlement discussions.

To the extent the Ombudsman's report suggests any inherent value or enhanced fairness in prioritizing investigation over settlement,<sup>20</sup> the Commission respectfully submits that this is not consistent with the scheme or remedial objects of the *Human Rights Act*, or the public interest. It is in the public interest to remedy discrimination at the earliest possible opportunity. There are other jurisdictions in Canada that encourage settlement before a formal complaint is submitted. In many cases, meaningful resolution and remedies are possible as soon as the respondent becomes aware of a complaint, without the need for a lengthy investigation.

Early resolution of human rights complaints advances the public interest in other ways as well. Negotiated resolution offers the opportunity for flexible and creative solutions to remedy or prevent discrimination that may not be within the power of a Board of Adjudication to order. Many parties, including complainants, also place significant value on maintaining a degree of control over the outcome of their complaint.

That said, the settlement process is optional. Parties are offered the choice of whether to explore early resolution before investigation. Parties can elect to proceed directly to investigation, and can reengage settlement discussions at any time before a final decision is reached by a Board of Adjudication.

During the settlement process, the Commission is neutral. The Commission cannot advocate for or provide legal advice to any party, whether the complainant or respondent. The Commission provides information to both parties about past human rights awards, to allow them an equal opportunity to evaluate settlement options. The Commission acknowledges and shares the Ombudsman's concerns about the challenging dynamics created when one party (often the complainant) is not represented by legal counsel. These access to justice issues are not unique to the Commission's process, and have been well documented throughout the Canadian administrative justice system. The Commission will continue to make efforts to mitigate this imbalance through its process, within the scope of its procedural fairness

---

<sup>19</sup> *Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (SCC), [1987] 2 SCR 84 at para 15.

<sup>20</sup> E.g., Report, paras 62-72.

obligations and statutory mandate – which does not include any authority to provide legal advice or representation to unrepresented parties.

As noted previously in this response, s. 20(1)(g) of the *Human Rights Act* and s. 5(1) of the *Regulations* confer discretion to stop an investigation where a complainant has declined a settlement offer that the Commission considers “fair and reasonable”. Consistent with the remedial purpose of the Act discussed above, these provisions serve to incentivize the early resolution of complaints. Human rights adjudicators in other jurisdictions have interpreted equivalent provisions as aiming to encourage respondents to make reasonable settlement offers, and to encourage complainants to act reasonably in deciding whether to accept an offer.<sup>21</sup> Human rights adjudicators have also interpreted these provisions as aiming to eliminate an expensive investigation and adjudication process where a respondent has made an offer that reasonably approximates what an adjudicator would order if the complaint were proven after a hearing.<sup>22</sup>

The Commission’s process for exercising its discretionary power under paragraph 20(1)(g) is currently outlined in its “Informal Resolution Process Guide” provided to complainants and respondents during the complaint process:

The Act grants the YHRC with discretionary power that incentivizes settlement between the parties under paragraph 20(1)(g) and section 5 of the Act’s Regulations, ... The Respondent can request that the Director consider applying paragraph 20(1)(g) and Regulation 5 at any time before an investigation is complete. A staff person (different from the individual who investigates the complaint) will then prepare a memorandum and recommendation for the Director’s consideration. This memorandum will be provided to both parties, who will then have at least 21 days to prepare submissions in response to the memorandum, before the Director makes their decision on whether or not the complaint should be stopped because the Complainant declined a fair and reasonable offer.<sup>23</sup>

The Commission also regularly brings this provision to parties’ specific attention during settlement discussions. The Commission is accordingly confident that the concern expressed by the Ombudsman that “any number of respondents [may] have been entitled to use this provision but, without the benefit to counsel, were unaware of their rights” is unfounded.<sup>24</sup>

The Commission’s “Informal Resolution Process Guide” emphasizes that the power is discretionary in nature. So too did the legal memos prepared for the “fair and reasonable” assessment in the complaint considered by the Ombudsman. The Commission respectfully submits that there is no merit to the concern expressed by the Ombudsman that the Director has ever treated s. 20(1)(g) as mandatory or an imperative.<sup>25</sup>

---

<sup>21</sup> *Jewish Community Campus*, *ibid* at para 28.

<sup>22</sup> *Manitoba (Human Rights Commission) v. Jewish Community Campus of Winnipeg Inc.*, 2015 MBQB 47 [“*Jewish Community Campus*”] at para. 26, citing *Nachuk v. City of Brandon (Brandon Police Services)*, 2014 MHRBAD 3.

<sup>23</sup> Yukon Human Rights Commission, “Informal Resolution Process Guide”, p. 2-3.

<sup>24</sup> Report, para 103.

<sup>25</sup> Report, paras 124-29.

The Ombudsman’s report also expresses concern that the “triggering mechanism” for these provisions is a request by the respondent.<sup>26</sup> Important context for this aspect of the report is that the triggering mechanism for evaluating settlement offers is set out in the legislation itself. It is not the result of any process or procedure introduced by the Commission. In particular, s. 20(1)(g) of the Act reads that a complaint must be investigated unless, *inter alia*, “the complainant at any time prior to the conclusion of the investigation declines a settlement offer that the commission considers fair and reasonable” [emphasis added]. In other words, it is by operation of the statute that the fairness and reasonableness of a settlement offer can only be evaluated *after* it has been declined by the complainant.

Once the complainant has declined a settlement offer, it is logical that only a respondent would engage s. 20(1)(g) to request a stop to the Commission’s investigation. The complainant has no interest in stopping the investigation of their own complaint. The Commission does not have a practice of engaging s. 20(1)(g) on its own initiative; if neither party asks for an evaluation of a rejected settlement offer, the Commission’s continues its investigation.

The Commission’s practice in assessing whether an offer is “fair and reasonable” is informed by human rights caselaw. In particular, human rights adjudicators have consistently directed that the “fair and reasonable” assessment should proceed on the basis that the allegations in a complaint are proven.<sup>27</sup> The Director considers the range of monetary damages the Board of Adjudication would normally award, even if they do not mirror the remedies sought by a complainant.<sup>28</sup> The Director also considers any nonmonetary remedies the Board of Adjudication may order.<sup>29</sup> The Commission respectfully disagrees that its approach to assessing settlement offers on the basis that the allegations in the complaint are proven reflects any bias or creates unfairness to either party.<sup>30</sup> To the contrary, this approach is in line with well-established human rights law principles.

In assessing whether a settlement offer is “fair and reasonable”, the Director also considers whether the previously rejected settlement offer remained open for a complainant’s acceptance through the evaluation process.<sup>31</sup> The Commission submits that doing so mitigates any potential unfairness to the complainant of not having had the benefit of the Commission’s evaluation at the time of their initial decision.<sup>32</sup> There is no prejudice or jeopardy to a complainant if they still have the chance to accept the offer after having received the Commission’s assessment.

In the Commission’s current process, both parties and the Director have the benefit of a memorandum and recommendation as to the fairness and reasonableness of the settlement offer, prepared by Commission staff (often legal counsel).<sup>33</sup> This memorandum provides procedural fairness to the parties by ensuring they have an opportunity to know the principles and cases the Director may rely on, and

---

<sup>26</sup> Report, para 102.

<sup>27</sup> *Damianakos and University of Manitoba, Re*, 2015 CanLII 11275 (MBHRC), para 35.

<sup>28</sup> *Issa v. Loblaw Cos.*, 2009 BCHRT 264 at para. 35; *Frick v UBC and another (No. 3)*, 2009 BCHRT 85, para 58.

<sup>29</sup> *Mancusi and 5811725 Manitoba Inc., Re.*, 2012 MHRBAD 104 at para 23 [“Mancusi”] and *Carter v. Travelex Canada Ltd*, 2008 BCSC 405 at paras. 44-45 [“Carter”]; and *Issa v. Loblaw Cos.*, 2009 BCHRT 264 at para. 35.

<sup>30</sup> Report, para 63.

<sup>31</sup> *Issa v Loblaw*, 2009 BCHRT 264 at para 35.

<sup>32</sup> Report, para 104.

<sup>33</sup> Yukon Human Rights Commission, “Informal Resolution Process Guide”, p. 2-3.

provide submissions in advance of the Director making a decision. It also ensures the Director's decision is based on applicable legal principles in circumstances where many parties are not represented by counsel. The Commission accordingly disagrees with the concerns expressed in the Ombudsman's report that this memorandum creates procedural unfairness and bias.<sup>34</sup> To the contrary, the Commission submits that it could be procedurally unfair for the Director to rely on legal research not disclosed to the parties, as suggested by the report.<sup>35</sup> The Commission's practice of relying on memoranda from legal counsel is discussed more fully later in this report.

In summary, while the Commission welcomes the opportunity the Ombudsman's report presents to review and clarify its process under s. 20(1)(g), and settlement more generally, the Commission's perspective is that its existing practice is consistent with the intention of the legislature, as set out in the Act, as well as human rights jurisprudence in this area.

## **2. Authority of the Director to stop or suspend complaints**

The Commission welcomes the opportunity presented by the Ombudsman's report to clarify the status of a complaint when an investigation is stopped by the Director under s. 20(1) of the Act and s. 5(1) of the Regulations. The Commission respectfully submits, however, that the Director and Commission acted at all times within their authority in respect of the complaints that are the subject of the Ombudsman's report.

The *Human Rights Act* and Regulations confer on the Director the authority to stop an investigation into a complaint in certain circumstances. In this regard, Section 5 of the Regulations reads:

### **5. Disposition of complaint by Director**

- (1) The Director may decide to suspend or stop an investigation if the Director believes on reasonable grounds that the Commission is no longer required to investigate the complaint under subsection 20(1) of the Act.
- (2) If the Director decides to suspend or stop an investigation, the Director shall give the complainant written notice of the decision setting out the reasons why the Director believes that the Commission is no longer required to investigate the complaint.
- (3) The complainant may, within 30 days of receiving written notice of the Director's decision to suspend or stop an investigation, ask the Commission to review the decision by delivering a written request to the Commission.
- (4) The Commission shall give the complainant at least 30 days notice of when it will review the Director's decision to suspend or stop the investigation.
- (5) In reviewing the Director's decision, the Commission shall consider:

---

<sup>34</sup> Report, paras 120-123.

<sup>35</sup> Report, para 113.

- a) The Director's written notice of the decision given to the complainant under subsection (2); and
  - b) any written or oral submissions by or on behalf of the complainant pertaining to the Director's decision to suspend or stop the investigation.
- (6) Upon reviewing the Director's decision, the Commission shall
- a) confirm the Director's decision to suspend or stop the investigation if the Commission is satisfied on reasonable grounds that the Commission is no longer required to investigate the complaint under subsection 20(1) of the Act; or
  - b) instruct the Director to continue with the investigation if the Commission is satisfied that the Commission is required to investigate the complaint under subsection 20(1) of the Act.

Section 20(1) enumerates the circumstances in which an investigation may be stopped under Regulation 5:

- (a) the complaint is beyond the jurisdiction of the commission;
- (b) the complaint is frivolous or vexatious;
- (c) the complainant asks that the investigation be stopped;
- (d) the commission asks a board of adjudication to decide the complaint without investigation;
- (e) the commission asks the Director of Human Rights to try to settle the complaint on terms agreed to by the parties prior to or during investigation;
- (f) the complainant abandons the complaint or fails to cooperate with the investigation;
- (g) the complainant at any time prior to the conclusion of the investigation declines a settlement offer that the commission considers fair and reasonable;
- (h) the complainant has not exhausted grievance or review procedures which are otherwise reasonably available or procedures provided for under another Act; or
- (i) the substance of the complaint has already been dealt with in another proceeding.

While the Act and Regulations do not use the term "dismissal" in this context, stopping an investigation has the practical effect of finally disposing of the complaint. It involves a determination that the Commission no longer required to investigate the complaint, and brings the investigation to an end. This

interpretation is supported by the context, text, and purpose of the Act – in particular, the screening function of the Commission.<sup>36</sup>

In addition to the Director’s power to stop investigations in enumerated circumstances, the Director also has the power under Regulation 5 to suspend investigations. This power is commonly exercised, for example, to pause the complaint process while a parallel grievance process is pending.<sup>37</sup>

The Commission acknowledges that its occasional colloquial use of the word “dismiss” following an exercise of discretion to stop an investigation under Regulation 5(1) may have contributed to the confusion identified in the Ombudsman’s report, such as in the case of complaint OMB-INV-2023-04-084. However, the Commission submits that the practical effect of the decision is the same: to terminate the complaint.

The Commission looks forward to advancing amendments to the *Human Rights Act* and Regulations that will clarify the Director’s authority, including to dismiss complaints for the reasons listed at s. 20(1) of the Act, in the public interest.

### **3. Commission practice of receiving recommendations in legal memoranda is fair and appropriate**

The Commission has committed to clarifying the duties and roles of legal counsel within its organization (see Recommendation #4, above). The Commission has concerns, however, about certain comments in the Ombudsman’s report critical of the role of legal counsel in preparing legal memoranda and recommendations to the Director and Commission Members. The Commission respectfully disagrees that counsel’s memoranda or recommendations taint the impartiality of either decision-maker or the fairness of the Commission’s processes.

Memoranda and recommendations from legal counsel or other Commission staff are an integral part of the Commission’s decision-making at various stages of its administrative process. It is essential that, as a statutory decision-makers, they have the benefit of clear and unequivocal legal advice to ensure their decisions are well supported by both the facts and the law. The Director or Commission Members – who may or may not have legal training – require assistance to understand the legal principles applicable to the often-complex matters before them. They should not be left guessing at the opinion of its legal counsel.<sup>38</sup> In the case of requests to stop a complaint under s. 20(1)(g), for example, the Director must understand the factors considered by courts and tribunals in such matters, the range of remedies awarded in similar cases, as well as the likely outcome if the relevant factors and legal principles were applied to the facts at hand.

The recommendations of legal counsel are just that: recommendations. They are not decisions, and do not bind the Director or Commission Members, who remain free to adopt or reject counsel’s analysis as they deem appropriate. In the case of evaluations of settlement offers under s. 20(1)(g), described above, both parties have an opportunity to respond to counsel’s memorandum. The Director makes a final

---

<sup>36</sup> See *Bachli* and *HRM*, above.

<sup>37</sup> *Human Rights Act*, s. 20(1)(h).

<sup>38</sup> Report, para 115, which suggests that memoranda “should not reach any conclusion(s)”.

decision only after taking all relevant documentation – including the parties’ comments – into account. A similar process is followed by Commission Members in evaluating a human rights officer’s investigation report and recommendation to refer a complaint to the Panel of Adjudicators. The Commission respectfully disagrees with the Ombudsman’s report’s characterization of such legal memoranda or recommendations as “decisive”.<sup>39</sup>

The public interest is best served when the Commission’s decisions are informed by competent legal advice. The Commission is concerned that the Ombudsman report’s preference for memoranda prepared by non-legally trained staff, such as HROs, could undermine the quality of the Commission’s decision-making. As a statutory body subject to judicial review, the approach proposed by the Ombudsman’s report could also increase the Commission’s litigation risk, and the financial and resource demands such litigation entails.

The Commission is confident that the involvement of legal counsel in the preparation of legal memoranda and recommendations is the most appropriate use of the Commission’s limited human resources. Because legal counsel does not process or investigate complaints, their involvement in preparing legal memoranda does not detract from that work, contrary to the concerns expressed in the Ombudsman’s report.<sup>40</sup> Similarly, the suggestion that legal research be performed by the Director would simply transfer this task from one busy person and another, who may or may not have the legal qualifications to carry it out. In the case of s. 20(1)(g) requests in particular, the Commission’s practice of assigning the memorandum to someone other than the human rights officer assigned to the file avoids biasing the investigator with settlement privileged communications.

The Commission accordingly submits that its current practice of preparing legal memoranda and recommendations to assist the Director and Commission Members in exercising their discretion is fair and appropriate.

#### **D. CONCLUSION AND NEXT STEPS**

In conclusion, the Commission accepts the recommendations of the Ombudsman’s report, and commits to their timely implementation. In particular, the Commission commits to continuing its work with the Department of Justice on necessary amendments to clarify and strengthen the *Human Rights Act* and its Regulations. The Commission also looks forward to addressing the resourcing and institutional independence concerns identified by the Ombudsman’s report. The Commission will continue to advocate for adequate resources for its important work in the areas of human rights education, policy, and pay equity. The presentation of the Commission’s Annual Report to the Legislative Assembly will offer one opportunity for such advocacy.

---

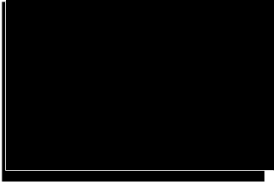
<sup>39</sup> Report, para 115, 270.

<sup>40</sup> Report, para 109.



Finally, the Commission would like to thank our staff for their tireless efforts to cooperate fully with the Ombudsman's office, respond to all of the information requests, and resolve complex procedural, jurisdictional, and other legal issues. We look forward to ongoing discussions with the Ombudsman's office to reflect on lessons learned from this investigation process and to continue to work together to address our shared values of fairness and equality within Yukon.

All of which is respectfully submitted this 26<sup>th</sup> day of July, 2024.



Karen Moir  
Director of Human Rights