Yukon
Ombudsman

Yukon Human Rights Commission complaints

Investigative Report

Yukon Human Rights Commission complaints

Files: OMB-INV-2023-02-047, OMB-INV-2023-02-048, OMB-INV-2023-04-084
Pursuant to section 11 of the *Ombudsman Act*
Authority: Human Rights Commission

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August 2024

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August 6, 2024

The Honourable Jeremy Harper
Speaker of the Yukon Legislative Assembly

Dear Mr. Speaker:

***Re:* Special Report of the Ombudsman**
Our Files: OMB-INV-2023-02-047, OMB-INV-2023-02-048, OMB-INV-2023-04-084

It is my pleasure to submit the attached special report to the Legislative Assembly on our investigation of three complaints of the Human Rights Commission.

This report is presented pursuant to section 31 of the *Ombudsman Act*, believing it is in the public interest to do so.

Yours sincerely,

Original Signed

Jason Pedlar, BA, MA
Ombudsman

Summary

The Ombudsman received three complaints regarding the Yukon Human Rights Commission (the "Authority") within a two-year period. These complaints, while separate, had similar allegations of unfair delay, settlement bias, and unfair processes.

When informal attempts to resolve the complaints failed, the Ombudsman escalated these complaints to formal investigations that he later consolidated into one investigation due to their similarity.

Our investigation uncovered operational concerns that have to do with both the specific circumstances of the complaints at hand and the Authority's general operation. In particular, we found the Authority's operationalization of certain provisions of its act to be problematic; procedural and statutory factors which lead to delays; a lack of discretion exercised by the Authority's director (the "Director") resulting in unfairness; and unfairness in the settlement process employed by the Authority generally.

As a result of our investigation, we make five recommendations to the Authority and three recommendations to the Department of Justice ("Justice"). These recommendations are intended to assist the Authority in carrying out its work in a more fair and efficient manner; benefiting the organization and those it serves.

The five recommendations made to the Authority include creating written policy on how they exercise discretion, developing procedures on how to evaluate "fair and reasonable" settlement offers, harmonizing the *Human Rights Act* (the "HRA") with its regulations, outlining and clarifying the responsibilities of their legal counsel, and acquiring case management software to monitor and track key performance indicators identified by the Authority to track case management statistics. These recommendations, provided in more detail in the recommendations section, have timelines ranging from six to 12 months from the date of this report.

In addition to the recommendations to the Authority, we make three recommendations to Justice as it is the department under which the Authority is organized. These recommendations include amending the Act so that the Authority is funded at arms-length from government, support the Authority in closing the gap between the HRA and its regulations through regulations changes, and increasing the number of the Authority's commission members.

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History of Complaints to our Office

On May 25, 2021 –

Complainant One (OMB-INV-2023-02-047) filed an Ombudsman complaint with our office (the "First Ombudsman Complaint"). As is procedure, the matter was first investigated through our Informal Case Resolution ("ICR") process.

After initially cooperating with our ICR investigation, the Authority took the position that the Ombudsman did not have jurisdiction over it. We then suspended the ICR process because the Authority and Ombudsman agreed to bring the matter to the Supreme Court of Yukon (YS Court) for an opinion on jurisdiction.

On March 22, 2022 –

Complainant Two (OMB-INV-2023-02-048) filed a complaint with our office ("Second Ombudsman Complaint") and was first investigated through our ICR process. The ICR investigation was then suspended while awaiting determination of Ombudsman jurisdiction over the Authority.

The investigations were resumed in April of 2022 when we received the opinion of J. Wenckebach stating that the Authority is subject to the *Ombudsman Act*.

By February 10, 2023 –

The Ombudsman escalated the First and Second Ombudsman Complaints to a Formal Investigation (FI) and assigned an investigator due to the inability to reach agreement with the Authority in the ICR process.

On April 12, 2023 –

Complainant Three (OMB-INV-2023-04-084) filed a complaint with our office ("Third Ombudsman Complaint"). Given its similarity to the previous two complaints, the Ombudsman added this complaint to the formal investigation.

Jurisdiction

In the early stages of the investigation a question arose as to the jurisdiction of the Ombudsman over the Authority, as described above.

In September 2021, the Authority and the Ombudsman filed jointly to the YS Court to determine whether the Ombudsman has jurisdiction to investigate the Authority. The matter was heard on November 19, 2021. On April 11, 2022, the judge issued their decision which opined that the Ombudsman has the jurisdiction to investigate the Human Rights Commission because they are an authority pursuant to the Act.

Beyond the general question of jurisdiction, a more specific disagreement arose. The Authority's legal counsel were actively involved in the complaints under investigation and the Authority challenged our jurisdiction to investigate specific matters handled by their legal counsel.

> **12 Jurisdiction of Ombudsman**
>
> *(1) This Act does not authorize the Ombudsman to investigate a decision, recommendation, act or omission*
>
> *…*
>
> *(b) of a person acting as a solicitor for an authority or acting as counsel to an authority in relation to a proceeding.*

The Authority refused production of certain documents which involved their counsel by citing the above provision. In a typical investigation this would not be an issue as s. 12(1)(b) clearly sets the conduct of lawyers outside of the jurisdiction of the Ombudsman. However, this only applies when counsel is acting as counsel (e.g. providing legal advice to the authority). In the matter at hand, our investigation revealed that counsel for the Authority formally acted as Interim Director during one of the complaints and informally acted outside of the scope of counsel in negotiating the settlement of complaints. As such, certain actions of counsel in our view, fell under the jurisdiction of this office. This position by the Authority significantly impeded our investigation and contributed to delays in reaching our conclusions.

Statutes Cited

In their discussion order:

Human Rights Act, RSY 2002, c. 116

Financial Administration Act, RSY 2002, c.87.

Ombudsman Act, RSY 2002, c.163

Cases and Documents Cited

Cases (in their discussion order)

Yukon Ombudsman v. Yukon Human Rights Commission, 2022 YKSC 16

Glencoe v. B.C. (Human Rights Commission), 2000 SCR 308

Law Society of Saskatchewan v. Abrametz, 2022 SCC 29

Bachli v. Yukon Human Rights Commission, 2022 YKSC 49

Documents

Fairness by Design: An Administrative Fairness Assessment Guide, Canadian Council of Parliamentary Ombudsman (2022)

Explanatory Note

All sections, subsections, paragraphs, and the like referred to in this investigation report (the "Report") are to the *Ombudsman Act* (the "Act"), unless otherwise stated.
References to specific emails will only identify third parties outside the Authority by a letter, such as 'X', 'Y' or 'Z', as the case may be, for privacy protection purposes.

The 2022 Canadian Council of Parliamentary Ombudsman publication *Fairness by Design: An Administrative Fairness Assessment Guide* (Fairness by Design) is used by all ombudsman entities in the country. It is a fairness assessment tool to determine whether a program decision-making process is administratively fair in design and delivery.

This Report will avail itself of Fairness by Design to investigate the issues and reach conclusions.

I BACKGROUND

Legislation, Authority, Organization, and Procedures

Legislation

[1] On February 12th, 1987, the Legislative Assembly passed the HRA, creating both the Authority and the Yukon Human Rights Panel of Adjudicators (the "Panel"). The *Human Rights Act* was last amended in 2002 and its Regulations went into effect in 1988.

[2] The Authority works to screen and refer human rights complaints made in compliance with the HRA. The Chief Adjudicator then assembles a Board of Adjudication from the members of the Panel which adjudicates any matter referred to it by the Authority.

[3] In addition, the Authority has a further mandate to provide education and training on human rights legislation within the Yukon generally, with an emphasis on equal pay for work of equal value[1].

Organization

[4] The Authority is headed by a commission comprised of up to five members (the "Commission"). Day to day operation is managed by the Director who is empowered by the HRA to make decisions regarding complaints in certain circumstances.

[5] The Authority employs administrative staff, legal counsel, and Human Rights Officers ("HRO") who conduct investigations and other duties under the Director's supervision.

[6] Sometimes the Authority's employees performed tasks outside of the scope of their official duties. One HRO, who is a licensed lawyer, handled at least two litigation files for the Authority, while legal counsel acted in the place of the Director, and as an investigator.

Funding

[1] S. 15 and 16(2) of the HRA.

[7] Much like our office, the Authority is accountable only to the Legislative Assembly, and therefore arms-length from government. However, unlike our office, the Authority does not receive a direct transfer of funds from the Legislative Assembly but is funded instead as part of the budget of Justice.

[8] The Authority submits its budget requests annually to Justice who then presents a consolidated budget to the Management Board and, on legislative appropriation, provides the Authority with its budget allotment.

[9] As part of this investigation, we examined records detailing budgets and caseloads of the Authority dating back to the 2011/2012 financial year.

[10] Our observations regarding the Authority's use of resources, Justice's funding decisions, and the impact of those two factors on the complaints brought to the Ombudsman will follow below.

Procedures

[11] The Authority's procedures are set by the Commissioner in Executive Council pursuant to s.36 of the HRA and are found in the HRA regulations. If the HRA or its regulations do not create a process for a particular situation, it is left to the Authority to develop best practices.

[12] As part of our investigation, we set out to determine whether the practices, processes, and procedures employed by the Authority align with the HRA and its regulations.

[13] Our investigation of the Authority revealed that it has developed the following procedure to resolve complaints:

1) A complainant makes a complaint to the Authority that is typically received by administrative staff.

    i. If a potential complainant needs assistance forming the substance of their complaint, then Authority staff will provide accommodation.

2) Once a complaint is received, it is screened by the Director for whether the complainant has a "reasonable ground."

3) The Authority has an obligation to investigate any complaint which is found to have reasonable grounds.

4) During an investigation, the Director may "suspend or stop" the investigation for a number of reasons, as detailed in s. 20(1) of the HRA. Should the complaint be suspended or stopped for any reason listed there, then the Commission can review the Director's decision to do so.

5) The first stage of investigation is for the Director to determine that the Authority has jurisdiction to investigate:

    i. If the Authority is determined to have jurisdiction, then the investigation of the complaint enters queue for assignment of an investigator.

    ii. If the Authority is determined not to have jurisdiction, then the investigation of the complaint is stopped or suspended.

    iii. Should a complainant disagree with the decision of the Director, the complainant may request a review of the Director's decision by the members of the Commission.

6) Time spent in queue is not tracked and no timeline is promised to a complainant. No evidence is gathered by the Authority during this time, other than documents submitted by a complainant.

7) While in queue, parties are encouraged to engage in settlement discussions. As discussed in paragraphs 61 - 71 below, counsel for the Authority will often proactively attempt to settle complaints.

    i. If a complainant refuses an offer to settle deemed "fair and reasonable" by the Director, then the Director may exercise their discretion to "suspend or stop an investigation."

ii. In the event that the Director opts to exercise its discretion to "suspend or stop an investigation", the Commission may review that decision.

8) Should a complaint not settle while in queue, an investigator is assigned to the complaint based on available resources. There is no service standard prescribing the amount of time to assign an investigator.

9) Once an investigator is assigned to the complaint, the investigation begins in earnest.
   i. Investigations, once an investigator is assigned, are prescribed to take no longer than 120 days by internal policy of the Authority; and

   ii. Investigations consist of document disclosure and interviews with identified individuals. The Authority has no power to subpoena witnesses, so it conducts interviews on a voluntary basis. The Authority can seek an order for production of records from the YS Court but no ability to subpoena records itself.

10) Once the investigator has completed the investigation, they will produce an investigation report that details the testimony and documentation that they have collected along with legal analysis and recommendations.

11) The investigation report is then circulated to the complainant and the respondent, both of whom can respond (in writing) to anything in the report.

12) The investigation report and responses from the parties (if any) are then submitted to the Commission.

   i. The Commission may decide to dismiss the complaint, continue attempts to settle the complaint, or ask the complaint to be decided by a board of adjudication. According to the HRA, this is the only time that a complaint can be dismissed.

13) The Chief Adjudicator of the Panel then establishes a Board of Adjudication for final determination of the Complaint.

14) Settlement talks may continue, and are encouraged, up to the time the Board of Adjudication hears the matter.

[14] Having described the Authority and its procedures generally, we now turn now to a description of the events leading to each party bringing a complaint to our office.

Events leading to Ombudsman Complaint One:

[15] On September 12, 2018, the Authority accepted a complaint which named Complainant One as the respondent in a Human Rights complaint by a former employee of their business.

[16] Complainant One alleged that Authority employees misplaced documents provided to them, throughout the resolution process.

[17] Complainant One also alleged that Authority employees pressured them to settle the matter, during the resolution process. They alleged that this pressure amounted to harassment. Regardless of how vocal Complainant One was in their position that they are innocent, the pressure continued. In their view, this determination to settle the matter biased the Authority in favour of the complainant.

[18] In May of 2019, the Authority assigned an investigator to the complaint against Complainant One.

[19] On July 09, 2020, the Authority issued an investigation report regarding the complaint.

[20] On September 23, 2020, the Authority formally referred the matter to the Panel for determination. The matter was accepted by the Panel and a board of adjudication was then formed.

[21] In October of 2020, Complainant One submitted a motion to “Dismiss the Case without a hearing” to the board.

[22] By April of 2021, Complainant One had no scheduled hearing for their motion.

[23] In May of 2021, Complainant One brought an Ombudsman complaint against the Authority alleging delays, bias, and unprofessional conduct of Authority employees.

[24] On January 4, 2022, the Panel denied Complainant One's motion to have the matter dismissed without a hearing.

[25] On January 7, 2022, the matter was settled before the Panel met.

[26] Complainant One maintains that they only settled the matter out of fear that the Panel would be similarly biased and prejudiced against them.

Events leading to Ombudsman Complainant Two:

[27] In November of 2020, Complainant Two brought an allegation of discrimination to the Authority.

[28] The Authority advised Complainant Two that there was a significant backlog in its caseload, the effect of which could lead to a significant wait time for an investigator to be assigned to the file.

[29] More than 18 months later, the Authority had still not assigned an investigator to Complainant Two's file.

[30] On May 31, 2022, Complainant Two filed an Ombudsman complaint against the Authority alleging unfair delay. Complainant Two was advised that the Ombudsman could not investigate the matter until jurisdiction was determined.

[31] On June 19, 2022, following the YS Court decision, the Ombudsman formally accepted Complainant Two's complaint alleging unfair delay.

[32] On September 26, 2022, the Authority assigned an investigator to Complainant Two's matter.

[33] On or before December 14, 2022, Complainant Two and their respondent entered into a settlement agreement.

Events leading to Ombudsman Complainant Three:

[34] On December 13, 2019, Complainant Three filed a complaint with the Authority, alleging discrimination on multiple grounds.

[35] On or about January 3, 2019, the Authority advised Complainant Three that it had accepted the complaint on one of the grounds and dismissed the other two.

[36] On August 25, 2020, Complainant Three made a settlement offer to the respondent. The respondent rejected the offer.

[37] On October 13, 2020, the respondent made an offer to settle. Complainant Three declined this offer.

[38] On October 20, 2020, the respondent asked the Authority to determine whether their offer constituted a "fair and reasonable" offer for the purposes of s.20(1)(g) of the HRA. This provision states as follows:

> *(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.*

[39] In response to the respondent's request, the Authority's legal counsel drafted a legal memo that examined the range of awards for similar complaints.

[40] On December 9, 2020, the Authority's legal counsel completed their legal opinion, and a copy was given to each party to the dispute. One conclusion stated that the respondent's offer was unfair and unreasonable in the circumstances.

[41] On January 28, 2021, the respondent made a second offer to settle for double the amount, plus human rights training for the respondent's board of directors and staff. This training was to be provided by the Authority.

[42] Complainant Three rejected this second offer based on the legal analysis of the first memo.

[43] The respondent then asked the Authority to determine if this latest offer was "fair and reasonable" for the purposes of s.20(1)(g) of the HRA.

[44] On July 16, 2021, a different lawyer for the Authority prepared another legal memo on this question. They concluded that the second offer was fair and reasonable. The matter then went before the Director.

[45] Only the Director has the authority to determine that an offer is "fair and reasonable". That various counsel for the Authority also came to a determination of this question prior to it being considered by the Director is an issue we will address below.

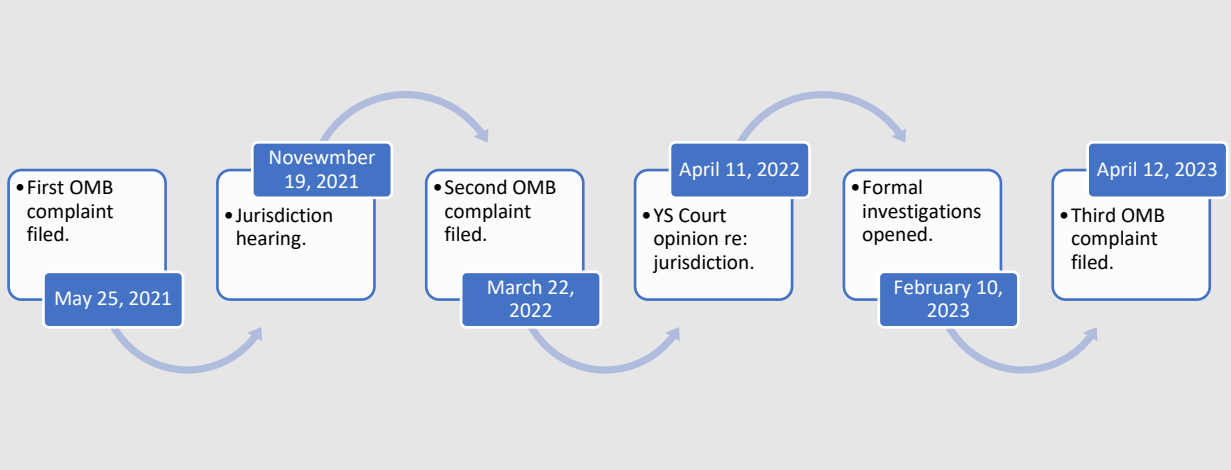
[46] On November 30, 2021, the Director issued a letter stating that they agreed with the second memo's conclusion. As such, the Authority would stop investigating Complainant Three's complaint.

[47] On December 9, 2021, Complainant Three requested a review of the Director's decision by the Commission.

[48] On August 18, 2022, the Commission conducted its review and upheld the Director's decision.

[49] On April 12, 2023, Complainant Three filed a complaint with our office alleging unfair processes, bias, and undue delay.

TIMELINE OF EVENTS



II ISSUES

[50] There are five issues for investigation that may apply to one or more of the three complaints:

1) Is the Authority fair when it evaluates whether an offer is "Fair and Reasonable"?
2) Did the Authority's settlement mandate unfairly bias its settlement process?
3) Did the Authority unjustly bias its own process(s)?
4) Does the HRA and its regulations (i.e., the statutory framework) allow the Authority to resolve complaints efficiently?
5) Did the time required by the Authority to resolve the three complaints constitute an unfairness?

III DISCUSSION OF THE ISSUES

[51] All three Ombudsman complainants allege that the Authority took too long to handle their human rights complaints and that this was unfair. As such, it is important to explore the role of fairness in the context of evaluating delay. This role has a necessary legal dimension that, once explained, frames and informs the issues.

[52] Delay of administrative bodies being considered by the courts is generally referred to as "undue delay, where delay complained of to the ombudsman may simply be referred to as unfair. Although related, the standards are distinct. While an ombudsman is not bound by caselaw, it may be informative in evaluating a complaint.

[53] The Supreme Court of Canada considered whether undue administrative delay breached the government's Constitutional obligations and the requirements of fundamental justice in the cases of Blencoe[2] and Abrametz[3]. In the Court's view, such delay requires "significant prejudice" or serious harm in order to qualify.[4] Delay in the context of fairness need not reach the threshold contemplated by the SCC as fairness is its own unique standard.

[54] What exactly constitutes an unfair delay will vary on the circumstances of a particular complaint. It does not lend itself easily to a set standard where any delay beyond a certain point is unfair.

[55] Arising out of similar principles of administrative fairness, the threshold for a delay to be unfair in the context of an ombudsman investigation is not as onerous. While an individual complainant to an ombudsman may suffer little or marginal prejudice, the ombudsman has leeway to make a finding of unfairness in circumstances where a matter has not reached the Court-held threshold.

[56] Put simply, an ombudsman has the scope to examine systemic issues that may be recurring within the operation of an Authority and then make recommendations to address them.

[57] Some factors considered by the Ombudsman share characteristics with the considerations set out in Blencoe,[5] such as prejudice to a complainant's case or whether there have been extended periods of time without any activity in the processing of the complaint from receipt to referral. Others include the unequal treatment of complaints, the availability of reasons for a decision, the efficiency of internal processes, and/or the fair use of discretion.

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[2] *Blencoe v. B.C. (Human Rights Commission)*, 2000 2 S.C.R 308 ("Blencoe").
[3] Law Society of Saskatchewan v. Abrametz, 2022 SCC 29 ("Abrametz").
[4] *Ibid* at paras 43 and 67.
[5] *Blencoe at* para 122

[58] Efficient use of resources is also one of many factors that may be considered in the contextual nature of an ombudsman investigation. As the Court in Abrametz notes,

> *…whether the administrative body used its resources efficiently should be considered in the analysis of inordinate delay. That said, insufficient agency resources cannot excuse inordinate delay in and case. Administrative* Panels *have a duty to devote adequate resources to ensure the integrity of the process.*[6]

[59] Accordingly, lack of resources is not a cure all to excuse the shortcomings of an Authority with regard to delay. As further stated in Blencoe,

> *Lack of resources cannot explain every delay in giving information, appointing inquiry* officers*, filing reports, etc.; nor can it justify inordinate delay where it is found to exist. The fact that most human rights commissions experience serious delays will not justify breaches of the principles of natural justice in appropriate cases.*[7]

[60] In our view, lack of resources will not justify an unfairness in the face of an ombudsman investigation.

First Ombudsman Complaint:

[61] Complainant One was the respondent in a human rights complaint to the Authority. The complaint was referred to the Panel for hearing and then settled. As such, our analysis will focus on issues two, three, and five.

Issue Two – Settlement Bias

[62] The Authority shall *"promote a settlement of complaints in accordance with the object of this* Act *by agreement of all parties,"* as stated in section 16(1)(d) of the HRA.

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[6] *Abrametz* at para 64
[7] *Blencoe at* para 135

[63] The Authority has operationalized this section by inserting settlement discussions into the early stages of the complaint life cycle. Settlement is often promoted before any investigative work is done on a complaint. Therefore, the Authority relies on a complainant's version of events as the only frame of reference to determine what would constitute an appropriate settlement. Doing so, however, is problematic. It can make the Authority appear to be agreeing with the narrative put forward by a complainant, even if it has not formally taken any position. Using the complainant's version of events as a benchmark to determine settlement ranges can therefore cause the process to appear biased towards the complainant, as alleged by Complainant One.

[64] While it is certainly commendable for the Authority to attempt to settle matters where both parties acknowledge harm, its practice of treating the complainant's claim as a framework to further settlement discussions certainly signal, in our view, an unfairness. This is especially the case in the absence of recognition of unlawful discrimination by the respondent. Prior to an investigation, and without the agreement of the parties, it is extremely difficult for the Authority to recommend a range of settlement in an unbiased manner.

[65] During our investigation we also discovered instances where Authority staff recommended that the respondents settle because the cost of fighting an allegation would be at least as much as the cost of settlement.

[66] Putting these two pieces together, a problematic picture emerges. A respondent is drawn into a complaint against them and immediately faced with daunting legal costs to defend themselves, or risk self-representation. The respondent is then told by the Authority that, for the sake of setting a settlement range, it will rely entirely on the complainant's version of events in the absence of an investigation.

[67] Not only is this process unfair to the respondent, but it also deprives the complainant of the discovery process of an investigation. It is conceivable that, through investigation, it would

be discovered that the width or breadth of discrimination against a complainant was even greater than understood by the complainant.

[68] Individually, each of these pieces are unfair. When brought together, however, we are of the view that the process is not just unfair but unjust.

[69] In addition to the problems raised by the Authority's procedure employed for settlement, Complainant One alleged that the Authority's employees exacerbated the adverse situation because they were continually pressed to settle the matter, almost to the point of harassment.

[70] While our investigation did not uncover any conduct that we would classify as harassing, it is clear that Authority employees took their mandate for settlement to heart and frequently encouraged it. In addition, we discovered that this policy of encouraging, or even promoting, settlement goes beyond mere statutory imperative but is a practical one. The Authority does not have the resources to investigate each complaint in a proper manner or to litigate every complaint that comes to its attention, so it must attempt to settle most of its complaints.

[71] The encouragement of settlement, by itself, isn't unfair. However, prompting the settlement process must be done in a way that exemplifies the principles of natural justice and procedural fairness. Using the complainant's version of events as a framework to structure such discussions prior to an investigation denies both. Each party is denied agency in the Authority's rush to settle complaints. Despite what may be good policy reasons for preferring settlement, we found the Authority can lose sight of its other mandates for the fulfillment of only one aspect of the HRA. While the Authority and complainants are subject to s.20(1)(g), as discussed below, we believe the clause may be proceduralized in such a way that embodies the principles of the Authority.

[72] Issue two is substantiated.

Issue Three – Procedural Bias

[73] Complainant One alleged various procedural biases against them, including the loss of certain documents submitted to the Authority, and unprofessional conduct by Authority employees.

[74] Much of the unprofessional conduct alleged by Complainant One falls under the umbrella of the "settlement bias" discussion above. However, allegations of losing documents deserve to be addressed on their own.

[75] It is undisputed that the Authority misplaced documents submitted by Complainant One but our investigation uncovered no attempt to prejudice Complainant One through any intentional misplacement of their documents. No doubt the issue was very frustrating, as Complainant One suggested, but the Authority finally rediscovered the documents and added them to its file for consideration.

[76] In our view, the Authority's misplacement of Complainant One's documents appears to have been due simply to human error. However, we are of the view that this error was aided by the confusing and archaic nature of the Authority's file storage and retrieval process. This latter point speaks to the lack of a case management system as discussed in Part IV.

[77] Issue three is not substantiated.

Issue Five – Delay

[78] As described above, Complainant One had their matter before the Authority from September of 2018 to September of 2020, a period of approximately two years.

[79] The Authority assigned an investigator to the matter some eight months following September of 2018 and the actual investigation took another year to complete. The matter then went before a board of adjudication for an additional 15 months before finally being scheduled for hearing and subsequently settled in January of 2022.

[80] As discussed above, there is no legal test that states exactly when a delay has become unfair. In our view, undue delay is contextual and depends on the circumstances. An unfairness can occur both in the outcome of a matter as well as the process which parties are subjected to.

[81] The time required to assign an investigator to the matter was somewhat faster than in many complaints before the Authority. However, a timeline of one year is still well above the service standard of 120 days set by the Authority for the production of an investigation report once an investigator has been assigned.

[82] Despite this, our investigation did not uncover any evidence that Complainant One was prejudiced in any way by the delay in having the matter heard.

[83] There was also no evidence that any delay was as a result of bad faith on the part of the Authority or any of its employees. In fact, the delay experienced by Complainant One was somewhat shorter than many of the other matters before the Authority. While this may be seen as an indictment of the Authority's ability to manage its caseload, there was no evidence to suggest that it dealt with this complaint in a prejudicial manner compared to other complaints before it.

[84] That said, a comparison to average wait time will not be a saving grace for an authority should a delay be determined to be unfair in the circumstances. However, it may be an indicator that an Authority has dealt unfairly with a matter if there is a significant unexplained discrepancy between averages and specific cases.

[85] In conclusion, the two-year wait experienced by Complainant One in deciding their matter by the Authority does not, in our opinion, constitute an unfairness.

[86] As such Issue five is not substantiated.

Second Ombudsman Complaint:

[87] The primary component of this complaint was delay, so this analysis will focus exclusively on issue five (delay).

[88] This matter was before the Authority for slightly more than 24 months. It took the Authority approximately 21 of those months to assign an investigator to the matter. The matter was settled shortly thereafter.

[89] On review of the facts, there is insufficient evidence to conclude that such a delay constituted an unfairness. As discussed above, the issue of delay does not lend itself to an easy description as to when fairness concerns will be engaged.

[90] While this is certainly longer than our office would expect to see from the Authority, there is no evidence that the matter took more time to administer than other matters before it, or that the delay caused any prejudice to the Complainant Two's matter. No other markers of unfairness were present regarding their treatment before the Authority.

[91] As such, issue five is not substantiated in the case of the Second Ombudsman Complainant.

[92] While the complaint, as presented, did not reach the threshold of unfairness due to its settlement, taking 21 months to assign an investigator borders on the precipice.

Third Ombudsman Complaint:

[93] The human rights complaint of the Third Ombudsman Complainant was dismissed as they rejected an offer deemed "fair and reasonable" by the Authority. Accordingly, our analysis will focus on issues one, two, four, and five respectively, but we will also address issue three (procedural bias) as it may intertwine with the others.

Issue One – "Fair and Reasonable"

[94] Section 20(1)(g) of the HRA states as follows:

> *Any person having reasonable ground 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 decline a settlement that the commission considers fair and reasonable.*

[95] This section of the HRA is augmented by s.4(1) of the act's regulations:

> *(1) The investigation of a complaint by the Commission shall be conducted or directed on its behalf by the Director.*

[96] This is further elaborated on in s.5(1), and 5(2) of the act's regulations:

> *(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.*

[97] Together, these provisions form a framework for the Director to determine when it has discretion to stop investigating complaints. This includes where reasonable settlement offers have been rejected.

[98] Unfortunately, and as will be discussed in greater detail in the Issue 4: Statutory Framework section below, there is little guidance in the legislation about the status of a complaint where an investigation has been suspended or stopped by the Director. As such, the Authority has had to construct a procedure to accommodate the above provisions.

[99] Through investigation, we understand that the "fair and reasonable" procedure of having the investigation into a complaint stayed generally goes as follows:

1) A respondent makes an offer to settle, and the complainant rejects it.

2) The respondent (often represented by legal counsel) then requests that the Authority determine if the rejected offer was fair and reasonable.

3) The Authority's legal counsel drafts a memo outlining the state of the law outlining the caselaw awards in similar circumstances.

4) In this memo, the lawyer also applies the case law to the facts at hand, to determine if the offer in question is "fair and reasonable" in the circumstances.

5) The Authority provides this "legal" memo to the complainant (often unrepresented) and the respondent. It then advises that they can make written submissions to the Director in response to it.

6) The Authority provides the Director with the parties' submissions along with the legal memo for final determination.

7) If the Director finds the offer to be fair and reasonable they will "stop or suspend" the investigation into the complaint.

8) Should the complainant disagree with this determination by the Director, they may then request the Commission to review that decision.

9) The Commission, with the advice of the Authority's legal counsel, then determines whether to uphold the stay of investigation or require the Director to resume the investigation.

[100] During our investigation into the above "fair and reasonable" procedure, we have identified several fairness concerns.

[101] In the case of Complainant Three, these concerns around the "fair and reasonable" process were exacerbated by departures from the usual procedure. In our view, the usual procedure is problematic on its own, and a departure from it creates increasing levels of concern.

Triggering Mechanism

[102] The first fairness concern with the Authority's "fair and reasonable" procedure is the triggering mechanism; that is, how it gets started. During our investigation, we could not uncover even one circumstance where the provision was triggered by any party other than a respondent who, again, are generally represented by legal counsel.

[103] This raises two important issues. First, there may be any number of unrepresented respondents who may have been entitled to use this provision but, without the benefit of counsel, were unaware of their rights. Second, the process of only triggering the provision by respondent's request is fundamentally unfair. It leaves the complainant in the uninformed

position of having to decide whether to accept or reject an offer without the benefit of first having the Authority consider whether it was a "fair and reasonable" offer ahead of time.

[104] Without this benefit, a complainant is left on their own to guess if the offer falls within a range that later may be found acceptable by the Authority. This lack of certainty represents an unfairness to complainants.

[105] In testimony, the former Director alluded to the possibility that the Authority would consider a complainant's request to have an offer evaluated prior to acceptance or rejection but admitted that this scenario had never occurred. Given the jeopardy of having an investigation stopped or suspended if the complainant guesses wrong, it is difficult to theorize why this would be the case.

[106] The evidence shows that Complainant Three had the respondent to their human rights complaint repeatedly invoke s.20(1)(g) in the wake of subsequent offers to settle. In our view, complainants ought to be educated in a proper manner about the stakes of rejecting an offer, and their right to have an offer evaluated.

Abuse of Process

[107] The second fairness concern with the Authority's "fair and reasonable" procedure is its lack of process to accept or reject requests to review whether settlement offers are viewed to be "fair and reasonable."

[108] This absence of guidance and guidelines is an unfairness in and of itself, but it can also lead to abuse of process. Respondents can make marginally higher offers to a complainant, the effect of which delays the process and requires the Authority to dedicate substantial resources to this situation.

[109] As discussed below in Part IV, Authority resources, including work hours, are in scarce supply. The writing of a "legal" memo for the purposes of a "fair and reasonable" evaluation requires both legal counsel and the Director to devote significant time that could otherwise be spent on processing, evaluating, and investigating complaints.

[110] Even if such a review did not tax an already strained organization, repeated requests for evaluation can cause hardship for complainants who are, again, often unrepresented.

Legal Memo

[111] The third fairness concern regarding the Authority's "fair and reasonable" procedure involves step three described above: the Authority's "legal" memo. Recall that when asked to do an assessment of whether an offer is "fair and reasonable" the Authority's procedure was to have legal counsel opine on the issue prior to submissions by the parties and determination by the Director.

[112] There are three issues with the memo generally and an additional one with how the Authority conducted itself regarding Complainant Three's complaint.

[113] Firstly, there is no requirement for a memo to be drafted by anyone, let alone legal counsel. It would be well within the scope of the legislation for the Director to ask for submissions from the parties and then, relying entirely on their own research, make determinations as to the "fair and reasonable" nature of an offer in question.

[114] We are therefore of the view that, if a memo is required in a set of circumstances, it would more appropriately be drafted by an HRO. The legal research required to determine a set of relevant settlement ranges is not challenging and is conducted by investigators in other jurisdictions. Not only would this free legal counsel for more appropriate work but it would address, in part, procedural bias concerns that are discussed below.

[115] Secondly, and regardless of who writes the "memo", the document should only contain a review of the relevant law and settlement ranges. Put simply, the "memo" should not reach any conclusion(s). Otherwise, this creates an unfairness as having the "memo" take a position

on the matter creates a *de facto* case where the, usually unrepresented, complainant must argue against the Authority's own legal counsel. This has the effect of creating at least the appearance of bias, as will be discussed below.

[116] Thirdly, as discussed above, the HRA does not allow for the delegation of any authority outside of investigation. It empowers only the Director to make a determination as to whether an offer is "fair and reasonable". Having legal counsel for the Director come to a *de facto* determination whereby the Director adopts it afterwards constitutes a circumvention of the HRA in both the spirit and the letter of the law.

[117] In the case of Complainant Three's human rights complaint, not only were all of these factors at play but the Authority decided, inexplicably, to write two separate memos, by two different lawyers, for two offers in the same matter.

[118] Our investigation uncovered no procedural reason for this action. All of the facts in the matter had remained the same. The only difference was that the respondent varied their settlement offer. It is unclear, therefore, why the statement of law in the first "legal" memo was not simply applied to the second offer for determination by the Director.

[119] This duplication of efforts caused significant confusion for the complainant who based the decision to reject the subsequent offer on the framework set out in the first memo. It is fundamentally unfair, in our view, that a complainant be subject to not only a review conducted after the fact, but one conducted by different legal counsels each of whom came to different conclusions.

Perception of Bias

[120] The fourth fairness concern regarding the Authority's "fair and reasonable" procedures shares a root cause with the procedural fairness concerns addressed above but it will also be addressed separately here.

[121] In the event that the Director determines that an investigation should be suspended or stopped, then a complainant may have the Director's decision reviewed. While this process is mandated by the HRA, the unfairness arises in the form of the "perception of bias". The Authority's legal counsel writes the original memo that takes a position on the merits of the

offer. The same lawyer then becomes the Commission's only source of legal advice should it review a decision of the Director.

[122] It is difficult to imagine that a Director or Commission member would find arguments from an, often unrepresented, complainant convincing when weighed against the opinion of their own legal counsel. This once again strongly suggests that the role of legal counsel in this process ought to be removed or significantly mitigated, particularly at the early stages.

[123] Decisions by the Director and Committee should be based on a summary of the law and submissions of the parties, instead of the findings of counsel. This is particularly the case when that same counsel will go on to advise the decision makers at every step of the process. Such a process is patently unfair and biased against a complainant.

Discretion

[124] The next fairness concern regarding the Authority's "fair and reasonable" procedure is the fair use of discretion.

[125] In communications between the parties, the Authority makes it clear that, should the Director find that a rejected offer was fair and reasonable, the complaint's investigation *will* then be stopped. However, this does not align with the HRA because it states that a Director *may* do so, as opposed to being compelled to do so.

[126] The language of s.20(1) specifies that a complaint *must* be investigated *unless* one or more of certain conditions are met. When one of those conditions are satisfied, the regulations to the HRA then specify that the Director *may* stop or suspend an investigation. The word *unless* works to tell the Director that their discretion has become activated, not that there is an imperative to stop or suspend an investigation.

[127] In none of the decisions reviewed by our office was there any consideration paid to the fair exercise of discretion, nor whether it would be just to exercise the Director's discretion. The circumstances of the complainant were never considered, nor was there any even perfunctory

consideration paid to the fact that the provision provides the Director with the *option* of exercising their judgment to stop or suspend, instead of the requirement that they must do so.

[128] Given the confusion caused to the complainant by multiple legal memos, the case at hand may have provided an opportunity for the Director to exercise their discretion. Instead, they applied s.20(1)(g) as a fixed rule with no consideration of whether it ought to have been applied at all.

[129] The fair use of discretion is a fundamental aspect of fairness, and an Authority cannot turn its back on any discretion granted to it by its legislation. While the outcome may have been the same in the present case even if the Authority had considered its exercise of discretion, it is unfair that it declined to do so.

Accessible Language

[130] The final concern we identified regarding the legal memo used by the Authority in its s. 20(1)(g) evaluation is that of accessibility. As identified throughout this Report, HRC complainants are often marginalized and unrepresented. That means they are generally unfamiliar with legal jargon and writing. Avoiding this type of language is particularly important where the principles being described are to be applied to the dismissal of a complainant's case and so much turns on it.

[131] The memos reviewed by our office were clearly written for a legal audience. Given the background of most Directors, the presumptive recipient of the memo, this makes some sense. However, it puts most HRC complainants at a distinct disadvantage because the implications of a memo taking a legal position are not necessarily clearly stated in plain language.

[132] In reviewing correspondence between Complainant Three and the Authority, Complainant Three often seemed confused by the memos. However, the evidence does show that the Authority repeatedly tried to simplify both the memos and the process in a general manner. Unfortunately, their efforts did not appear to be effective because, many months later, Complainant Three reiterated their continuing confusion regarding the process when they made a complaint (Third Ombudsman Complaint) to our office.

[133] Accordingly, Issue One is substantiated.

Issue Two – Settlement Bias

[134] In addition to the concerns raised for this issue under the First Ombudsman Complaint (see paras 61 to 71 above), Complainant Three repeatedly asked to "opt out" of the settlement process. This request was fueled by a fear that the respondent was abusing the process by repeatedly asking for reviews of their offers.

[135] Unfortunately, it is clear that Complainant Three did not understand the consequences of this request because "opting out" could amount to the Authority deeming their rejection of subsequent offers, leading to a "fair and reasonable" stay of the investigation.

[136] For greater clarity, there is no statutory obligation on the part of the Authority to conduct such a review on request from a respondent, nor did we find any evidence of a written policy indicating that it must do so.

[137] Simply electing to subject the often-unrepresented complainant to a "fair and reasonable" evaluation, on demand of the respondent, demonstrates a bias towards settling matters. In this respect, this provision acts as a "stick" threatening to deprive a complainant of their claim should they not accept an offer. Given the stakes, procedural fairness requires, at a minimum, the provision of fulsome guidance to a complainant beforehand as to whether an offer is at least fair and reasonable.

[138] As such, a "fair and reasonable" review, as procedurally implemented by the Authority, is fundamentally at odds with s. 16(1)(d) of the HRA. This provision, as described above, calls for the Authority to promote settlement "*by agreement of all parties"* (emphasis added). It does not call for the Authority to shut down a complaint that is reasonable in the circumstances.

[139] There may indeed be times when, having been fully informed of the potential award range of a claim, a complainant acts so unreasonably that investigation into their complaint ought to be stopped or suspended. Complainant Three was not such a complainant and denying their right to an investigation was unfair in the circumstances.

[140] Issue two is substantiated.

Issue Four – Statutory Framework

[141] During our investigation, it became apparent that there are several gaps between the procedures created by the Authority and its statutory authority. In addition, we identified several legislative issues that may hinder the efficient disposition of complaints by the Authority.

[142] In particular, there are four issues as follows:

1) Does the Director have authority to dismiss a complaint?
2) What is the status of a complaint where the investigation has been "suspended or stopped" but the complaint has not yet been dismissed?
    a. Is there a difference between stopping or suspending an investigation?
    b. Is there a mechanism to restart an investigation into the complaint if suspended?
    c. Is there a mechanism to restart an investigation that has been stopped?
3) Is five (5) Committee members enough to allow for the efficient resolution of complaints?
4) Ought the Director have the power to delegate, in whole or in part, their responsibilities under the HRA and its regulations?

Director's power to dismiss complaints

[143] During the course of Complainant Three's complaint before the Authority, it was repeatedly stressed to them that the Director would dismiss the complaint should an offer be rejected deemed to be "fair and reasonable." The decision letters of both the Director and the Commission echoed the language of dismissal. While the Commission has this power, it does not have the authority to delegate it to the Director.

[144] Authority employees did not cite any provision of the HRA or its regulations to support the Director having the authority to dismiss a complaint. As such, it was difficult to determine how this power to dismiss became attributed to the Director.

[145] A review of the legislation reveals that the power to dismiss a complaint is only mentioned once, in s. 21(a) of the HRA. It states that:

> ***21 Disposition of complaints by the commission***
>
> *After investigation, the commission shall…*
>
> *(a) Dismiss the complaint; or*
>
> *(b) Try to settle the complaint on terms agreed to by the parties; or*
>
> *(c) Ask a board of adjudication to decide the complaint.*

[146] The ambiguity in s.21, as it connects to the rest of the HRA, lies in the first two words "After investigation". It is unclear whether this means that the provision only applies to an investigation that has been successfully carried out to completion or whether the complaint, where its investigation has been stayed, is now to be disposed of by the Commission.

[147] The latter, in context, is the interpretation that makes the HRA read harmoniously with its regulations. However, it does not align with the Authority's current procedures.

Suspending or Stopping an Investigation

[148] If the Director does not have the power to dismiss a complaint, what exactly is the effect of electing to "suspend or stop" an investigation into a complaint, and what is the status of the complaint once the investigation has been stayed?

[149] Neither the terms "suspend" or "stop" are defined in the HRA or its regulations. They are also not defined in the Yukon's standard statutory interpretation legislation. As such, we looked to the ordinary dictionary definitions of the words and then applied them to the HRA and its regulations. We chose two sources.

[150] Merriam-Webster's dictionary offers several definitions for the word "stop"; however, the ones we found the most appropriate are as follows:

1) to cause to give up or change a course of action;

2) to keep from carrying out a proposed action;

3) to cause to cease; and

4) to cease activity or operation.

[151] Black's Law Dictionary defines "suspend" as follows:

1) to interrupt;

2) to postpone; and

3) to temporarily keep (a person) from performing a function, occupying an office, or exercising a right or privilege.

[152] In comparing the two, a clear difference emerges. "Suspend" refers to a temporary or limited stay whereas "stop" is more permanent in nature.

[153] As applied to the HRA and its regulations, we are of the view that a remedial reading makes clear the intention of the Legislature to give the Director the power to "stop" or "suspend" an investigation, but it does not make clear the difference between the two terms. If the Director elects to "suspend" an investigation, an action that may be construed as only temporary in nature, then under what conditions may it be re-started? And by whom? The legislation lacks clarity on this.

[154] Given the lack of guidance in the HRA and its regulations, it is perhaps understandable that none of the Director's decisions or Commission reviews examined by our office are conclusive as to whether a matter ought to be stopped or, alternatively, suspended. As discussed above, the only remedy that the Authority has applied has been a dismissal of complaints, something beyond the Director's power.

Number of Commission Members

[155] With regard to the number of Commission members engaged by the Authority, our investigation uncovered several instances, including the Third Ombudsman Complaint, where the Commission delayed reviewing a matter due to insufficient quorum to have the matter heard.

[156] The Authority attributed this fundamental inability to make quorum to several recurring factors. They include illness, scheduling conflict, conflicts of interest, and the appearance of bias.

[157] While not a cure all for a reasonably expeditious resolution of complaints, it is clear to us that, where complaints are referred to the Commission, increasing the pool of Commissioners from which to draw from would minimize the possibility of delays for the factors cited by the Authority.

Delegation

[158] With regard to the issue of delegation, the area in which the ability to delegate may have the greatest impact is in the intake phase. Currently, the Director must review every application to make a determination as to whether the Authority has the necessary jurisdiction to investigate.

[159] This designation in the HRA, in our view, creates a serious bottleneck that could be reduced or eliminated should a Director have the power to delegate. This would allow the Director to bring to bear all Authority's resources to ensure that claims are processed quickly as they are received.

[160] In light of the above, issue four (statutory framework) is substantiated.

Issue Five – Delay

[161] Complainant Three had their complaint before the Authority between December 13, 2019 and August 18, 2022. During that time, it never assigned an investigator to the matter.

[162] The respondent made their final offer to settle in January of 2021, something Complainant Three did not reject until May of that year. The respondent then requested a "fair and reasonableness" review and the Director made their decision on the matter in November of that year.

[163] The request to review the Director's decision by the Committee was made in December and a decision was rendered the following August.

[164] Of the 32 months that the matter was before the Authority, it spent approximately 26 months in the "fair and reasonable" process. If Complainant Three had been found to have been within their rights to reject the offer, only then would the investigation have commenced.

[165] Given these issues, it is unclear whether the failure to assign an investigator to the matter was due to having the "fair and reasonable" process invoked. If so, then it is unclear why this would be the case as the investigation of a complaint had not yet been "stopped or suspended."

[166] It is also unclear whether an investigation would have been paused if the provision was invoked sometime after the investigation began or if the investigation would continue in full force.

[167] Such procedural ambiguity is, in and of itself, an unfairness to the complainant. As will be reflected in our recommendations, it would be appropriate for the Authority to develop processes and procedures that address these serious concerns.

[168] This extended timeline for resolution brings into focus the procedural concerns raised above. Simply by asking for these reviews, the respondent was almost able indefinitely to extend the period that the complaint spent in administrative limbo.

[169] Despite the inefficiency and potential for abuse in the Authority's resolution process, we are hard pressed to find evidence that the delay caused an unfair outcome. Once again, the matter was "resolved" within a comparable timeline to other similar complaints before the Authority. Notwithstanding the lack of an unfair outcome, the unfairness of a delay may be in the delay itself.

[170] Furthermore, our investigation uncovered no evidence that Complainant Three's substantive case before the Authority was compromised by the delay. As an additional consideration, it was the complainant asking in several instances for extensions that caused part of the delay.

[171] While the delay suffered by Complainant Three did not itself lead to an unfair outcome, we find that delay in investigating the complaint for 32 months unquestionably constituted an unfairness in process.

[172] As such issue 5 is substantiated.

IV RESOURCES

Annual Funding

[173] During the course of our investigation, the Authority repeatedly made representations that funding challenges contribute significantly to delays experienced by complainants.
[174] While a factor to be considered, we are of the view that the Yukon government has a statutory obligation to fund the Authority such that its mandate can be achieved. In the case of the Authority, it is funded under the umbrella of Justice.

[175] Our investigation included disclosure of records that detail Authority budgets dating back to the 2011/12 fiscal year. At that time, it was $575K, including $537K for itself and $38K for the Commission. In the fiscal year 2023/24, the Authority's annual budget is $756K, including $658K for itself and $98K for the Commission.

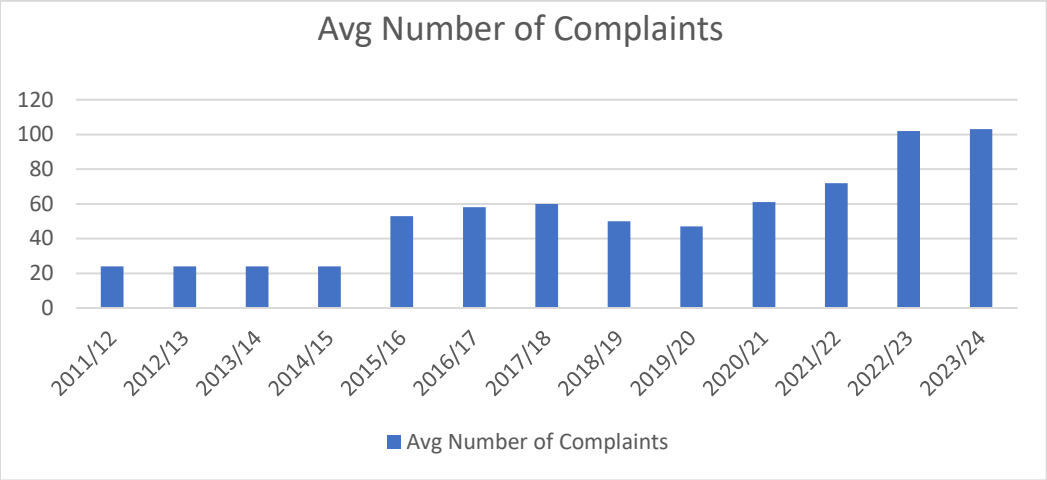
[176] In the past 12 years; that is, between 2011/12 and 2023/24, the Authority's budget has grown only $121K (22.53%) for its core operating expenses.

[177] For reference, the official rate of inflation in Canada over the same time-period was 31.70%[8] and the population of the Yukon grew by 33.19%.[9] The closest comparable organization, the Northwest Territories Human Rights Commission (the "NWT-HRC"), has a

[8] https://www.bankofcanada.ca/rates/related/inflation-calculator/.
[9] https://www12.statcan.gc.ca/census-recensement/2011/as-sa/fogs-spg/Facts-pr-eng.cfm?Lang=Eng&GC=60. (add second cite)

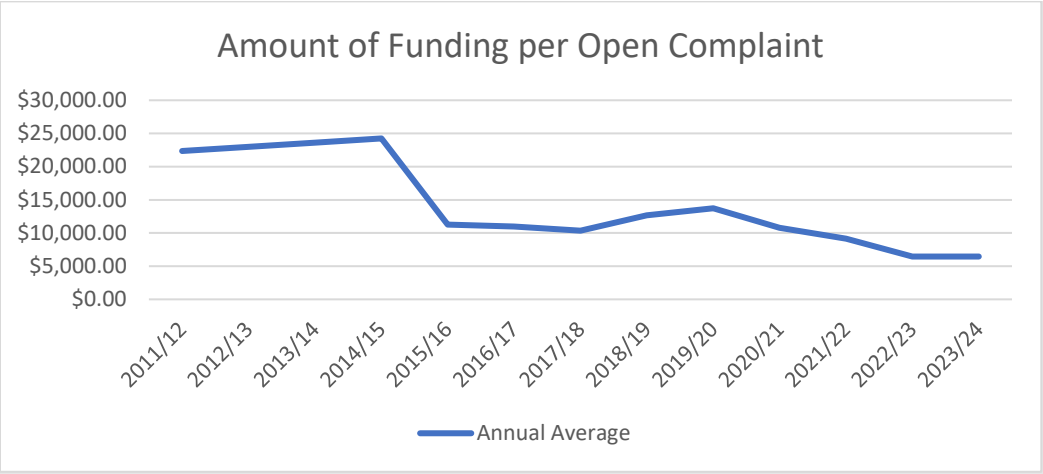
2023/24 budget of $1.64M.[10] Notably, the NWT-HRC is an independent office of the NWT Legislative Assembly, much like our office.

[178] The Nunavut Human Rights Panel, while somewhat different in structure, is also funded under the umbrella of the Nunavut Department of Justice yet it serves a smaller population base and had a budget of $812K in the 2023/24 fiscal year[11].



[179] In this same 12-year period, investigations conducted by the Authority more than quadrupled and with this has also come a proportionate increase in Director reviews, judicial reviews, and applications to the YS Court for production of documents. Such activities are extremely time consuming and require the allocation of Authority resources away from such core mandate activities as investigations.

[10] Northwest Territories 2023-2024 Main Estimates - Legislative Assembly Statutory Offices Operations Expenditures Summary at page 20. (https://www.fin.gov.nt.ca/sites/fin/files/resources/2023-24_main_estimates_supporting_schedules_0.pdf).
[11] Nunavut Main Estimates Budget 2023-2024 at page E-10 (https://www.gov.nu.ca/sites/default/files/documents/2023-11/2023-24_main_estimates.pdf).



[180] The gap between Authority funding and its ever-increasing caseload likely has a number of causes but, in our opinion, one of the primary issues is the lack of financial independence of the Authority from the Department of Justice, an entity of the very government department that the Authority can and has investigated.

[181] This issue reached a critical point in 2015 and 2016 with the filing of 18 human rights complaints against the Whitehorse Correctional Centre (WCC), a facility run by the Department of Justice.

[182] From the records, it appears that none of the 18 complainants were originally prepared to settle their complaints prior to its referral to the Commission for consideration and then hearing. However, litigating 18 complaints before the Board of Adjudication was beyond the capacity of Authority staff and far outside its budget to engage outside counsel.

[183] In attempting to prepare for the surge in matters before the Board of Adjudication, the Authority was forced to go to Justice for additional funding.

[184] In emails obtained by this office, a senior Justice official stated the following regarding the surge in complaints:

> The various actors in the H[uman] R[ights] system (HRC, panel of adjudicators, CJ&PS, Legal Services) **simply can't afford the number and type of hearing that the HRC has referred to the board of adjudication**. That's why **the Minister doesn't believe that the public interest**

> **will be served by running hearings for all or even half of the 18 complaints** and why he would like the department's efforts to go towards resolving the complaints both through settlement and **by having the HRC agree … that on a go forward basis new complaints would first go to ISO and then, if necessary, to the HRC with the complete ISO investigation record.** [Emphasis added]

[185] The then Deputy Minister stated the following:

> …they [the Authority] **have the sole discretion** – not the Minister, not the Legislature, not the Department [of Justice], not the courts – **to decide if a matter should go to adjudication**. That is a heavy responsibility. It requires them to consider the objects of the Act (s.1) and their five statutory responsibilities (s.16). … **To refer numerous matters to adjudication on an unprecedented scale without knowing the true costs (except that they are well beyond the HRC's budget) is to abdicate their public responsibility to manage their program responsibly.** [Emphasis added]

[186] Another Justice official stated, regarding the Authority seeking funding from Justice to fulfill its statutory mandate, the following:

> [It] … may be attempting to leverage the ask [increased funding] in order to prompt direction from our senior management or even our Minister that <u>all</u> of the complaints filed by inmates must be settled. Of course, that direction might prove expensive and even problematic to implement, given some of the exorbitant damages amounts recently proposed by complainants, and the expanding systemic remedies being demanded by the Commission (in some cases, without proper grounding in the facts). [Emphasis in original]

[187] Finally, this same official stated:

> … and I think this merits highlighting, <u>the Director indicates that Commission staff is responding to an excessive workload</u>, **without acknowledging their control over that workload**. Commission staff, including the Director, **decide when to accept complaints**, if complaints are frivolous or vexatious, whether offers to settle are appropriate, when and how to conduct investigations, what to recommendation to the Commission, and how to argue a complaint at hearing, including the witnesses to be called. They are not simply responding: **they are actively making decisions and applying policy approaches which determine how many complaints they will deal with** and in what way. This is not just at the stage where matters are referred to the Panel (an important point you've made), but at all stages.

> There's going to be discussion over the next weeks … as the Director continues to campaign for funding and settlement. And I do think that some of these complaints should settle – we will highlight those for the new ADM as we have for the acting ADM. **But they should settle for appropriate amounts and with appropriate policy change in mind, and not because of the commissions proposed budget**. [underlined emphasis in original, **bolded** emphasis mine]

[188] Even a cursory review of the HRA shows that the Authority *must* (shall) investigate all complaints brought to it that meet the criteria for its jurisdiction. While some discretion exists once a complaint has been referred to the Commission, it would be patently unjust for a complaint with merit to be dismissed or forced into settlement due to the lack of resources on behalf of the Authority.

[189] These quotes indicate that Justice attributed the Authority's failure to manage (read: "settle") its workload as the primary factor driving any strain of resources. By holding the Authority's purse-strings, Justice can influence Authority policy to such an extent that any departure is "to abdicate [the Authority's] public responsibility" simply on the grounds that it is inconvenient to the budget that Justice sets for it.

[190] This is contrary to the HRA which specifies that the Authority is responsible only to the Legislative Assembly. By Justice controlling the finances of the Authority, it can effectively set the mandate to settle regardless of what direction the Authority may receive from the Legislative Assembly.

[191] In fairness to Justice, these email exchanges occurred in 2016; however, there is little to suggest that the overall attitude towards the Authority has changed significantly. Indeed, the records suggest that, despite occasional requests for funding increases, almost no meaningful internal discussion occurred within Justice regarding the Authority between 2018 and 2023 other than annual budget briefs.

[192] It is of little surprise that, operating under these funding conditions, the mandate of the Authority has become so focused on settlement.

[193] In our view, if the Authority were to make submissions directly to the Management Board, the government would be acknowledging the alleged independence of the Authority and would allow the Authority to directly appeal to key decision makers rather than rely on the representations of Justice.

[194] Records which detail Justice's submissions to the Management Board regarding the Authority, were certified such that their disclosure to our office would be "contrary or prejudicial to the public interest" according to s.18(c) of the Act and as such were withheld from our investigation.

[195] Even with the ability to make submissions directly and bypass Justice, it will be difficult for the Authority to make a case to any responsible entity for increased funding without measurable, objective data. Such data has been glaringly absent from previous requests to Justice.

[196] In order to obtain such data, the Authority will need to develop and implement a "business plan" based on current workloads and available resources. The ability to do so is hindered significantly by a lack of comprehensive case management tracking software.

[197] Such a business plan would require it, for example, to evaluate the effectiveness of its work as set out in its mandate, consider its opportunities and weaknesses, analyze its successes and failures, add main goals to its plan, create a responsive budget, identify targets for improvement (especially those that align with both goals and growth trajectory), create metrics for accountability, implement the plan, and review it through a budget cycle to determine its effectiveness while, at the same time, making changes if necessary.

[198] As such, the Authority has serious budget issues that require effective and timely solutions, noting that it has a continuing obligation to manage the resources it currently receives and to advocate for any perceived shortfalls.

Resource Management

[199] Our investigation revealed that the Authority has little to no established infrastructure to track, quantify, or evaluate the efficiency and effectiveness of its complaint resolution process.

[200] When asked to provide a current case list, the Authority provided an excel spreadsheet. When pressed, the former Director indicated that it does not have any dedicated case management software.

[201] This was not a surprising development. Our investigation continually ran into roadblocks attempting to determine the average length of settlement discussions, investigation, referral to the Commission, or any other metric which may be useful in evaluating the performance of the Authority.

[202] This lack of case management data is harmful in two ways. Firstly, it becomes almost impossible to identify pressure points or areas of improvement where the Authority can focus resources to reduce wait times.

[203] Secondly, this lack of accurate measurement makes it extremely difficult for the Authority to make a business case for funding. Without being able to demonstrate how an increase in resources would alleviate wait times, such requests are, in our experience, at a significant disadvantage.

[204] Another common justification for delays in processing complaints was that of high employee turnover. This high turnover is alleged to be caused by uncompetitive salaries due to the budget constraints described above.

[205] Notwithstanding any other issues facing retention, which are beyond the scope of this investigation, there does appear to be some merit to the idea that the Authority is not able to offer attractive salaries. According to latest figures, the Authority is offering a range of $70K-$90K for the position of HRO. The same position in the NWT is listed at $104K to $125K.[12] Even within the Territory, this is not competitive with other agencies that draw on a pool of similar employees.

V CONCLUSIONS

[206] Our investigation found that the Authority strives to meet its mandates despite persistent funding issues, high staff turnover, and limitations found in their governing act (HRA). This report identifies operational issues that are unfair including: gaps in policies and procedures, incorrectly interpretating the HRA to meet their statutory obligations, and over-reliance on settlement to manage an ever-increasing caseload. As some of the issues

[12] https://www.fin.gov.nt.ca/en/position/00015015

surrounding funding, independence and amendments to the HRA are beyond the control of the Authority, we have made recommendations to the Department of Justice directly.

[207] We have reached the following conclusions:

Issue 1 – "Fair and Reasonable" review

1) The Authority's procedure for reviewing settlement offers as fair and reasonable (applying s. 20(1)(g)) needs to be simplified, codified, and streamlined with the above fairness considerations in mind.

2) Leaving s. 20(1)(g) to be exclusively triggered by a respondent is unfair.

3) The practice of having legal counsel write decisive memos regarding the application of s. 20(1)(g) is unfair to complainants.

4) The lack of discretion exercised by the Director in applying s. 20(1)(g) constitutes an unfairness.

5) The dismissal of Complainant Three's complaint was unfair in the circumstances.

Issue 2 – Settlement Bias

1) Settlement can be a useful tool where the only question at issue is the amount to be paid.

2) Despite its utility, unfairness can be created where settlement is not conducted impartially by an authority.

3) A lack of such impartiality can be real or perceived and we found that the Authority operates in such a way that unfairly creates at least the appearance of bias towards complainants during settlement discussions. Bias, real or perceived, can undermine public trust in the operation of the Authority and is a hallmark of fairness.

4) In addition, the Authority unfairly encourages settlement within ranges that have no rigorous evidentiary basis.

5) These processes are undertaken in name of a settlement mandate from the Commission, however we find the interpretation of s. 16(c) of the HRA as mandating settlement discussions is contrary to both the spirit and text of the HRA.

6) Ultimately, the Authority's mandate for settlement is motivated as much by a lack of resources as a desire to achieve just results.

Issue 3 – Procedural Bias

1) Having the Authority's employee(s) reach a preliminary determination on whether an offer is "fair and reasonable" prior to the evaluation being put before the Director creates, at least, the appearance of bias in its process of evaluating the offer.

2) Lack of a case management system creates systemic barriers in the efficient resolution of complaints.

3) In addition, lack of a case management system creates roadblocks to efficient allocation of resources as well as an inability to make objective, data-driven representations regarding funding.

Issue 4 – Statutory Framework

1) An Authority's statutory framework often determines the tools it has available to implement its mandate.

2) An Authority operating fairly does so within the constraints imposed upon it by the Legislative Assembly. It is unfair to exercise powers outside of this grant as it creates a lack of transparency, accountability, and predictability.

3) Several of the Authority's policies and procedures do not align with its statutory authority.

4) The HRA and its regulations do not provide the Authority with the tools to manage and dispose of complaints in an efficient manner.

5) While many examples are provided throughout this report, the most glaring is that the Authority is outside of its statutory authority in asserting the Director can dismiss complaints.

Issue 5 - Delay

1) Fairness is a concern that touches every aspect of an authority's services, not just the result.

2) None of the three complainants experienced an unfair result as a consequence of the delays they experienced.

3) However, the uncertainty and lack of transparency surrounding Authority timelines constitutes an unfairness in its own right - regardless of whether an unfair result was found in a given matter.

4) The lack of transparency renders the Authority unable to hold itself accountable for delivery of service in a timely, efficient manner.

5) The uncertainty can create confusion, stress, and pressure on the part of complainants, many of whom do not have the resources for a protracted dispute.

VI RECOMMENDATIONS

As a result of our investigation, we make the following five recommendations to the Authority:

1) Implement a written policy on exercising its discretion regarding the application of each applicable subsection of s.20(1) of the Human Rights Act (the "HRA") within twelve months of the date of this report.

2) Expand and clarify its written procedures of the HRA "fair and reasonable" evaluation in s.20(1)(g) within six months of the date of this report.

3) Submit recommendations to the Executive Council to harmonize the HRA with its regulations such that it addresses the concerns and gaps identified in this Report. To be completed within twelve months of the date of this report.
4) Map current duties of general counsel for the Authority and identify instances where activities could be performed by the Director and/or an HRO – operational constraints notwithstanding. To be completed within twelve months of the date of this report.

5) Evaluate and select comprehensive case management software which monitors and tracks key performance indicators for all relevant statistics within twelve months of the date of this report.

In addition, we make the following three recommendations for consideration by the Department of Justice:

1) Amend the HRA so that the Authority is funded directly by the Legislative Assembly. Alternatively, allow the Authority the opportunity to make submissions on its budget directly to the Management Board[13].

2) Remedy the concerns and gaps identified in this Report by creating, in consultation with the Authority, new or amended regulations to clarify and harmonize the HRA with its regulations.

3) Amend the HRA so that the Commission (defined below) is increased from a maximum of five members to a maximum of seven, as described in s. 17 of the HRA.

Observation(s)

Settlement Privilege

[208] The Ombudsman is a creature of statute and its investigative powers are broad, as defined in s. 16 of the Act.

[13] As described in s.3 and s.4 of the *Financial Administration Act*, RSY 2002, c.87.

[209] Despite this broad authority, the Authority asserted throughout our investigation that certain records could not be produced, or must be redacted, on the basis of "settlement privilege".

[210] Settlement privilege, in short, is a category of legal privilege that precludes documents, as shared between parties for the purpose of settling a legal dispute, from being entered into evidence at trial.

[211] Legal privilege is a concept used by the courts to designate certain records as inadmissible as evidence at trial. The most common and well-known type is solicitor and client privilege.

[212] The convention of settlement privilege is meant to encourage parties to a litigation to be full and frank in their negotiations, without the fear of negotiating positions being used against them at trial.

[213] An Ombudsman investigation is not a litigation, there is no "trial" of the facts from which evidence can be excluded. As such settlement privilege has no application to an Ombudsman investigation.

[214] Unfortunately, the Authority continued to maintain that settlement privilege applied to certain records, a position which greatly inhibited our investigation. Discussions regarding the application of this rule not only hindered the investigation but also extended the investigation by arguing over its application.

[215] Despite the inapplicability of settlement privilege to an Ombudsman investigation, this office elected to forego taking the matter to court for determination of the issue. Given the already protracted nature of this investigation, a second trip to the YS Court would have created, in our view, an intolerable amount of delay for our complainants.

Report regarding Investigation of Complaint(s)

[216] I provided the Authority the opportunity to make representations about our draft report and our preliminary recommendations, in accordance with section 17. I received

representations from the Authority on April 17th, 2024, and considered them as part of this report.

[217] I am reporting the results of our investigation along with my recommendations to the Authority as required under section 23.

[218] Under the authority granted to me under section 24, I request that the Authority advise me no later than July 5, 2024, on whether it accepts our recommendations. If the Authority does not accept any of our recommendations, please provide your reasons for doing so. Your response will accompany our final report when published.

Report of the Ombudsman if No Suitable Action(s) taken

[219] As per section 25, if I am of the view that no suitable action has been taken within a reasonable time by the Authority in response to the findings, reasons and recommendations made under section 23, then I may, after considering any reasoned response by the Authority, submit a report to the Commissioner in Executive Council, and later to the Legislative Assembly, about the matter as I consider appropriate.

Complainant(s) to be informed if No Suitable Action(s) taken

[220] As per section 26, if the Ombudsman makes recommendations and no action that the Ombudsman believes adequate or appropriate is taken by the Authority within a reasonable time, then the Ombudsman shall inform the Complainant of the recommendations. The Ombudsman may also make any additional comments they consider appropriate.

Original Signed

_____

Jason Pedlar, BA, MA
Ombudsman

Original Signed

_____

Kelly Hjorth – BA, JD
Investigator

Distribution:

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- Department of Justice

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YUKON HUMAN RIGHTS COMMISSION | COMMISSION DES DROITS DE LA PERSONNE DU YUKON

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

YUKON HUMAN RIGHTS COMMISSION | COMMISSION DES DROITS DE LA PERSONNE DU YUKON

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[1] that "declares public policy".[2] Its objects include eliminating and discouraging discrimination.[3]

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

[1] *Canada (House of Commons) v. Vaid*, 2005 SCC 30 (CanLII), [2005] 1 SCR 667 at para 81.
[2] *Winnipeg School Division No. 1 v. Craton,* 1985 CanLII 48 (SCC), [1985] 2 SCR 150 at 156.
[3] *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.[4]

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.[5] 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.[6] 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.[7] Contrary to the comments in the Ombudsman's report, Commission staff do not assist

[4] *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para 1 and 40 ["*HRM*"].
[5] *Human Rights Act*, s. 20(1).
[6] *Human Rights Act*, s. 20(1)(h), (i).
[7] 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.[8]

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.[9]

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".[10] 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".[11] 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.[12] If, after investigation, the Commission determines that an adjudicative hearing is not warranted, the Commission can dismiss the complaint.[13]

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

[8] Contra Report, p. 8, para 13(1)(i).
[9] Yukon Human Rights Commission "Complaint Process Guide", p. 6; *Bachli v Yukon Human Rights Commission*, 2022 YKSC 49 [*"Bachli"*], paras 66-67.
[10] *Human Rights Act*, s. 16(1)(d); s. 21(b).
[11] *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission), 2012 SCC 10 at para 26.*
[12] *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.
[13] *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.[14] 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.[15] 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*]."[16]

It is the Board of Adjudication – not the Commission – that ultimately decides whether a complaint of discrimination is proven on a balance of probabilities.[17]

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.

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[14] *Human Rights Act*, s. 22.
[15] *McKenzie forest Products Inc v. Ontario Human Rights Commission and Adam Tilberg*, 2000 CanLII 5702 at paras 33-34 (ONCA);
[16] *Human Rights Act*, s. 16(1)(e).
[17] *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*.[18] 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

[18] 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 in 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.[19]

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,[20] 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

[19] *Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (SCC), [1987] 2 SCR 84 at para 15.
[20] 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.[21] 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.[22]

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.[23]

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.[24]

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.[25]

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[21] *Jewish Community Campus, ibid* at para 28.
[22] *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.
[23] Yukon Human Rights Commission, "Informal Resolution Process Guide", p. 2-3.
[24] Report, para 103.
[25] Report, paras 124-29.

The Ombudsman's report also expresses concern that the "triggering mechanism" for these provisions is a request by the respondent.[26] 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.[27] 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.[28] The Director also considers any nonmonetary remedies the Board of Adjudication may order.[29] 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.[30] 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.[31] 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.[32] 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).[33] 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

[26] Report, para 102.
[27] *Damianakos and University of Manitoba, Re*, 2015 CanLII 11275 (MBHRC), para 35.
[28] *Issa v. Loblaw Cos*., 2009 BCHRT 264 at para. 35; *Frick v UBC and another (No. 3)*, 2009 BCHRT 85, para 58.
[29] *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.
[30] Report, para 63.
[31] *Issa v Loblaw*, 2009 BCHRT 264 at para 35.
[32] Report, para 104.
[33] 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.[34] 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.[35] 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:

[34] Report, paras 120-123.
[35] 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.[36]

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.[37]

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.[38] 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

[36] See *Bachli* and *HRM*, above.
[37] *Human Rights Act*, s. 20(1)(h).
[38] 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".[39]

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.[40] 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 to 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.

[39] Report, para 115, 270.
[40] 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 26th day of July, 2024.

Karen Moir
Director of Human Rights

Justice
PO Box 2703, Whitehorse, Yukon Y1A 2C6

June 28, 2024

Jason Pedlar
Yukon Ombudsman
www.yukonombudsman.ca

Dear Mr. Pedlar,

Re: Investigation report recommendations regarding files OMB-INV-2023-02-047, OMB-INV-2023-02-048, and OMB-INV-2023-04-084

I am writing in response to your letter of June 10, 2024, in which you requested to be advised whether the Department of Justice accepts recommendations regarding the operation of the Yukon Human Rights Commission (the Commission). Please be advised that the Department of Justice accepts Recommendations two and three.

For reference, the Recommendations in the investigation report are:

1. Amend the HRA so that the Authority is funded directly by the Legislative Assembly. Alternatively, allow the Authority the opportunity to make submissions on its budget directly to the Management Board.

2. Remedy the concerns and gaps identified in this Report by creating, in consultation with the Authority, new or amended regulations to clarify and harmonize the HRA with its regulations.

3. Amend the HRA so that the Commission (defined below) is increased from a maximum of five members to a maximum of seven, as described in s. 17 of the HRA.

The Department cannot accept Recommendation one, as it is not within the Department's authority to implement. Acceptance of Recommendation one would require a decision by the Legislative Assembly or, alternatively, by Executive Council Office.

Regarding Recommendations two and three, officials from the Department have contacted the Commission to begin consultations. We look forward to working with the Commission to implement these Recommendations over the coming months.

Yours truly,

[redacted]

Mark Radke
Deputy Minister and Deputy Attorney General

cc. Karen Moir
Director, Yukon Human Rights Commission