

Toward Equal Opportunity for all Albertans:

*Recommendations for Improvement of the
Alberta Human Rights Commission*



Toward Equal Opportunity for all Albertans:

*Recommendations for Improvement of the
Alberta Human Rights Commission*

Submitted by
**The Sheldon Chumir Foundation
for Ethics in Leadership**

Calgary, Alberta
September 2008



**Toward Equal Opportunity for all Albertans:
Recommendations for Improvement of the
Alberta Human Rights Commission**

Sheldon Chumir Foundation for Ethics in Leadership

Suite 970, 1202 Centre Street S.
Calgary, Alberta, Canada T2G 5A5

Phone: 403-244-6666

Fax: 403-244-5596

info@chumirethicsfoundation.ca

www.chumirethicsfoundation.ca

Copyright © 2008 Sheldon Chumir Foundation for Ethics in Leadership

ISBN 978-0-9730197-4-2





Contents

Executive Summary	1
1.0 Introduction	4
Background	
2.0 Leadership on protecting equal opportunity in Alberta	5
3.0 Alberta’s anti-discrimination statute – an overview	9
4.0 Involvement of the Sheldon Chumir Foundation in human rights issues	12
Recommendations	
5.0 Issues confronting the Alberta Human Rights Commission	15
5.1 The stature, structure, and independence of the Human Rights Commission	16
5.1.1 The structure of the Commission	17
5.1.2 Appointees to the Commission	18
5.1.3 The independence of the Commission	19
5.1.4 Eliminating the confusion around the names of both the Commission (Human Rights and Citizenship Commission) and its legislation (Human Rights, Citizenship and Multiculturalism Act)	21
5.2 Adjudication of complaints	22
5.3 Access to the Human Rights Commission	24
5.3.1 User-friendliness of the Commission	25
5.3.2 Need for legal assistance with complaints	27
5.3.3 Aboriginal people and the Commission	29
5.4 The Commission’s mandate to promote human rights	31
5.5 Need for a transparent Human Rights Commission	34
5.6 Some specific reforms	36
5.6.1 Statements or publications which expose people to “hatred or contempt”	37
5.6.2 Addition of “sexual orientation” to the list of prohibited grounds of discrimination	38
5.6.3 Commission’s authority to initiate a complaint	39
6.0 A list of our recommendations	40
7.0 Conclusions on the need for ethical leadership on combating discrimination	42
Appendix	
Section 3 of the Human Rights, Citizenship and Multiculturalism Act: The current wording and the pre-1996 version	43



Executive Summary

This Report identifies problems with the Alberta Human Rights and Citizenship Commission and with the legislation which governs its activities, the *Human Rights, Citizenship and Multiculturalism Act*. It also makes recommendations for their solution.

The Report is submitted by the Sheldon Chumir Foundation for Ethics in Leadership, a non-profit organization and registered charity, which is located in Calgary. Sheldon Chumir served as MLA for Calgary-Buffalo from 1986 until his death in 1992.

The Report makes the following primary points:

Regarding the need for leadership on protection of human rights in Alberta:

- Alberta is a vibrant, forward-looking province, which is leading the country in many ways. But not everyone living in Alberta has a fair chance at achieving the good life the province has to offer. Discrimination prevents many people from living with full dignity and from getting ahead in very tangible ways.
- Discrimination harms all of us. Therefore, all Albertans will benefit if strong leadership is shown by the provincial government on combating discrimination.
- In the past, Alberta has been a leader in the legal protection of human rights, but this position of leadership has been lost.
- Alberta could lead again in the struggle against discrimination, if the issues facing our human rights protection system are addressed with the seriousness and determination they deserve.

Regarding the stature and structure of the Human Rights and Citizenship Commission:

- The current Commission suffers from low profile and poor reputation, both of which have resulted from years of little support from the provincial government. This lack of political support must be reversed.
- Albertans need a Human Rights Commission which speaks with a strong voice in support of human rights and sets a high moral standard on protection of human rights in the province. The Commission should carry out much more education on Albertans' rights and responsibilities under our human rights legislation. It should also engage directly with the public when issues of societal significance arise, such as eruptions of anti-Semitism, Islamophobia, or homophobia.

- To overcome the perception of a weak and politically dependent Commission, the provincial government must create an independent Commission in which the public can have full confidence. To this end, the Human Rights Commissioners should be empowered to function as a Board of Directors for the Commission, setting its overall tone, priorities, and approaches. The people appointed to the Commission should be well-known Albertans with significant experience on human rights issues.
- The Commission must also be made to operate in a transparent fashion so that Albertans can have full confidence in it.
- To enhance the stature of the Commission and its independence, the Alberta Human Rights Commission should report through the Chief Commissioner directly to the Alberta Legislative Assembly, as does, for example, the provincial Information and Privacy Commissioner. If such a change is not acceptable to the current government, then the Commission should report to the Minister of Justice.
- Another way to enhance the stature of the Human Rights and Citizenship Commission is to remove the confusion surrounding its name and the name of the statute which governs its activities. The word “multiculturalism” should be dropped from the name of the statute and the word “citizenship” should be deleted from the name of the Commission and from the name of the statute. So, the Commission would be called the “Alberta Human Rights Commission” and the statute the “Alberta Human Rights Act.”

The credibility of the complaints adjudication process must be enhanced:

- As originally created, human rights commissions in Canada have had mandates both to promote protection of human rights and to provide a forum for the adjudication of discrimination complaints. But this two-fold jurisdiction is inherently conflicted. The two functions should be separated in order to ensure the fairness and credibility of the adjudication process. We recommend the creation of a fully independent tribunal for the hearing and decision of human rights complaints.

In order that Albertans be better served by the Commission:

- The Human Rights Commission must become more user-friendly. In particular, Albertans must have better access to the Commission. For example, the Commission must have a meaningful presence throughout the province, not just in the major cities – Calgary and Edmonton.



- Also, to enhance access to the Commission, legal assistance should be made available to those involved in human rights disputes, both to those making complaints and to those accused of violating human rights law.
- Aboriginal people in the province feel particularly unwelcome at the Commission. This is a difficult problem to address, but one way to encourage their use of the Commission would be to add “Aboriginal heritage” as an illegal ground of discrimination under the legislation.

Some specific problems with the *Human Rights, Citizenship and Multiculturalism Act* should be immediately addressed:

- First, section 3 – which makes it possible to file complaints on the basis of statements or publications which may “expose” people to “hatred or contempt” – presents an unacceptable limitation on free expression. This section must be amended as soon as possible. We recommend that it be amended so as to read as it did prior to amendments made in 1996 which unwisely expanded the scope of the section.
- Second, the words “sexual orientation” must be added to the text of the *Human Rights, Citizenship and Multiculturalism Act*. This would not change the actual law – discrimination on the basis of sexual orientation is already illegal in Alberta by virtue of the Supreme Court of Canada decision in the *Delwyn Vriend* case. But addition of those words where required by the Supreme Court would show respect for the rule of law and enhance the transparency of our human rights statute.
- Third, the statute should be amended so as to give the Human Rights Commission authority to file complaints where there are “reasonable grounds for believing that a person has contravened” the Act. Without this power, many instances of discrimination escape identification and remedy.

A full list of the recommendations made by the Sheldon Chumir Foundation for Ethics in Leadership may be found in section 6.0 of this Report.

1.0 Introduction

Alberta is a vibrant, forward looking province, which is leading the country in many ways. But not everyone living in Alberta has a fair chance at achieving the good life the province has to offer. Discrimination happens in Alberta and prevents many people both from living with full dignity and from getting ahead in very tangible ways. And discrimination harms not only its immediate victims, but all of us.

Albertans as a whole will benefit, if strong leadership is shown by the provincial government on combating discrimination.

The overwhelming majority of allegations of discrimination and established cases of discrimination arise in connection with employment. We need every single worker to find his or her appropriate job; every person denied a job for a discriminatory reason is a blow to the economy.

The other areas covered by Alberta's anti-discrimination law¹ – that is, rental accommodation and accessibility to public goods and services, such as education and health care – also concern “meat and potatoes” issues. Along with fair employment practices, people cannot prosper without non-discriminatory access to housing and the full range of public services.

Discrimination is also a safety issue. People who suffer discrimination can become bitter, disillusioned, and resentful. Instead of productive citizens contributing to the common good, they can become anti-social causing harm in the community. Our communities are safer and healthier places when all are treated fairly. For Alberta to flourish, all Albertans must feel respected and valued, discrimination must be curtailed and the provincial government has a leadership role to play in achieving these results.

¹ The Human Rights, Citizenship and Multiculturalism Act (HRCMA), RSA 2000, c. H-14.



Background

2.0 Leadership on protecting equal opportunity in Alberta

Alberta used to be a leader in protecting equal opportunity

Many people don't realize it, but Alberta has more than once led in the legal protection of human rights. For example, in 1916 the provinces of Manitoba, Saskatchewan, and Alberta were the first jurisdictions in Canada to give women the vote. Women could not vote in federal elections until two years later. And in 1918 two women were elected to the Alberta Legislature; they were the first females elected to public office in the entire British Empire.² Better known is that in 1929, five Alberta women initiated the "Person's" Case, which culminated in the declaration by the courts that women are "persons" in Canadian constitutional law.

When our original anti-discrimination statute was enacted in 1972, it was, many believe, the best law of its kind in the country. This was no accident, for then Premier Peter Lougheed believed the Human Rights Commission was the most important of the province's commissions. The government's strong commitment to the Human Rights Commission was also evident in the people appointed to sit on it. These were well-known and highly respected Albertans and included Max Wyman, former President of the University of Alberta, who served as the first chair of the Commission.

But this momentum on the legal protection of human rights was long ago lost.

When the performance of the current Alberta Human Rights and Citizenship Commission is compared on a statistical basis with that of other human rights commissions across the country, little of great significance is revealed. For example, the Alberta statistics on new cases accepted annually, cases carried forward per year, and average case duration are pretty much middle of the road.

And on other measures, for example, the types of discrimination which are prohibited in Alberta, as compared with other Canadian jurisdictions, Alberta is again in the middle of the pack. The outstanding exception is connected with discrimination on the basis

²They were Louise McKinney and Roberta MacAdams. See generally Debbie Marshall, *Give Your Other Vote to the Sister: A Woman's Journey into the Great War* (Calgary: The University of Calgary Press, 2007).

of sexual orientation, which cannot be found in the text of the Alberta Act but is nevertheless covered by it and thus illegal in the province.³

Still, most of the ways in which Alberta has failed to keep up in the area of human rights protection are not readily disclosed by such comparisons. For the problems with the Human Rights Commission in Alberta stem from lack of political support. The result has been demoralization, low profile (many Albertans don't even know it exists) and failure to undertake the major reforms that have been pursued in other Canadian jurisdictions. To those Albertans who do know of the Commission, it tends to have a very poor reputation.⁴

All human rights commissions in Canada have encountered significant challenges. For example, all have struggled with the fact that discrimination cases, on average, take much longer to bring to completion than anyone thinks is reasonable. When human rights commissions were set up, the choice was made to go the administrative agency route rather than send complaints to the courts, in the belief that avoiding the courts would result in a faster processing of cases.

This assumption has proven quite wrong. One especially remarkable Alberta case has taken – at last count – 17 years to resolve.⁵ Indeed, across the country, it is not at all uncommon for complaints to remain unresolved for many years.

The primary difference in the way that this issue and others faced by human rights commissions have been dealt with in other jurisdictions is that in those other jurisdictions they have, in fact, been dealt with: those human rights systems have been reformed and some considerable successes have been achieved. In Alberta, since at least the early 1990s, this has not been the case.

In 1994 the provincial government appointed a panel led by a former Chief Commissioner of the Human Rights Commission – Jack O'Neill – to travel throughout Alberta inquiring into Human Rights Commission issues. The panel made a series of

³ See the Foundation's report on such comparisons: *The Alberta Human Rights and Citizenship Commission: A Comparison with Human Rights Commissions in Canada*, which is available on the Foundation's website at www.chumirethicsfoundation.ca/main/page.php?page_id=131

⁴ We recognize that there are some talented and dedicated staff at the Alberta Human Rights and Citizenship Commission. The serious problems with the Commission are largely systemic in nature and not the fault of employees.

⁵ The case involved a complaint of discrimination against a major oil company, with a woman asserting she had been in effect barred from working in the land department because of her gender. See "Appeal court rules company 'held back' agent," *Calgary Herald*, August 6, 2008, p. B2.



recommendations on improvement of Alberta's human rights protection system.⁶ Many of those recommendations are the same or similar to the recommendations made in this report. Very few were fully embraced and the most important recommendations – such as that the Commission should report to the Legislature and that the Commission should have greater visibility in the community – were not acted on at all.

Since then, the provincial government has continued to largely ignore the Human Rights Commission and the challenges facing it. Instead of supporting searches for solutions to the very real problems faced by the Commission – for example, how to provide competent and sensitive resolutions of complaints within a reasonable period of time – the government has in a sense let the Commission wither on the vine. The government commitment to protection of human rights has now reached such a low point that many people both in and out of government view human rights protection with disdain. What should be recognized as of highest importance – the protection of human rights – is thought to be trivial, not worthy of governmental concern.

In our view, this governmental inaction on matters related to human rights is not acceptable. It never was. But Alberta's now greatly increased diversity means this failure to recognize and respond constructively to issues facing the Human Rights Commission is an ever more serious problem.

That Alberta is significantly more diverse is evident on the streets of our towns and cities and is clearly reflected in the statistics. For example, by 2017 between 14% and 19% of Albertans are expected to be visible minorities, up from 11% in 2001. This is a direct reflection of the Government of Alberta's aim to increase international immigration to Alberta to 24,000 per year from 17,400 in 2004-05.⁷ Accordingly, a strong commitment on the part of the provincial government to combating discrimination, through an improved Commission and better human rights law, is needed more than ever.

We can be leaders again

Albertans are leaders on so many fronts – in our “can do” attitude, our glittering, modern cities, and our world-famous resource development companies, technologies, and projects. But we are not leaders in the development of people. Maximizing human development cannot occur without strong measures against discrimination. But we could

⁶ The title of the report is *Equal in Dignity and Rights*. The provincial government published a response to it. Government of Alberta, *Our Commitment to Human Rights. The Government's Response to the Recommendations of the Alberta Human Rights Review Panel* (Edmonton: Ministry of Community Development, 1995).

⁷ See “A snapshot of demographic trends in Alberta” on the Alberta Ministry of Culture and Community Spirit website, <http://culture.alberta.ca/educationfund/priorities/docs/Trends.pdf>.

lead here, too, if the issues facing our Human Rights Commission and human rights statute are addressed with the seriousness and determination they deserve.

Constructive engagement with those issues would include a careful review of reforms that have been made in the anti-discrimination laws and human rights commissions in other parts of Canada, especially in Ontario, and a willingness to adopt those measures that would be useful in Alberta.

We are not suggesting that solutions to all Albertan problems in this or any other area are to be found in what has been done in other provinces or territories or what has been done at the federal level. Alberta should go its own way when there is good reason to do so. However, a great deal of effort has been expended in several Canadian jurisdictions on the human rights front. Alberta can learn from that experience, improve upon it, and generate brand-new solutions where necessary. If handled in this way, Alberta would emerge as a national – perhaps even international – leader in the struggle against discrimination.



3.0 Alberta's anti-discrimination statute – an overview

Alberta's anti-discrimination law, the *Human Rights, Citizenship and Multiculturalism Act* (HRCMA), is very similar in content to the province's original anti-discrimination statute – the *Individual's Rights Protection Act* (IRPA) – which was enacted in 1972 when the first administration led by Peter Lougheed took office. The IRPA and a companion statute called the *Alberta Bill of Rights* were the first two pieces of legislation put forward by the Lougheed government: they signalled to Albertans and others that human rights and civil liberties had highest priority on the government's political agenda. The government was, in effect, telling the world that protecting human dignity was its number one concern.

The purpose of HRCMA is to promote anti-discrimination measures and to provide a remedy to people who have been discriminated against contrary to that law. A body is created by the legislation to administer both aspects of the law. This agency was first called the Alberta Human Rights Commission. Later, in the 1990s – although the content of the law remained basically unchanged – the name of the Commission became the Alberta Human Rights and Citizenship Commission.

The HRCMA makes it illegal to discriminate in three key areas – employment, rental accommodation (both residential and commercial), and the availability of public goods and services, for example, policing, libraries, education, and health care. The kinds of discrimination which are prohibited are listed in each section of the Act specifying an area that is to be discrimination free. For example, discrimination in employment is addressed by section 7(1) of the Act:

No employer shall (a) refuse to employ or refuse to continue to employ any person, or (b) discriminate against any person with regard to employment or any term or condition of employment, because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, [sexual orientation]⁸ or family status of that person or of any other person.

We note that the purpose of HRCMA is not to punish – it does not take a criminal law approach to dealing with allegations of discrimination. Instead, the spirit that motivated this kind of legislation across the country was one of spreading enlightenment on the need to protect human dignity and prevent discrimination, and – where conflicts arise over allegations of discrimination – encouraging conciliation where possible.

⁸See footnote 9 below.

Nevertheless, the human rights conflict resolution process is an inherently legalistic one and when a person or organization is found to have discriminated contrary to the law, there are consequences: public embarrassment, the costs of defending oneself, and the remedies that can be imposed, such as payment of damages for lost wages or humiliation. Being accused of a human rights violation is not a trivial matter.

Finally, we want to draw attention to the advocacy side of the Commission's mandate. It is absolutely central to the work of all human rights commissions in Canada that they promote human rights and educate the public on human rights. In the Alberta statute (HRCMA), this mandate is found in section 16(1) which states that:

It is the function of the Commission

- (a) *to forward the principle that all persons are equal in: dignity, rights and responsibilities without regard to race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, [sexual orientation]⁹ or family status,*
- (b) *to promote awareness and appreciation of and respect for the multicultural heritage of Alberta society,*
- (c) *to promote an environment in which all Albertans can participate in and contribute to the cultural, social, economic and political life of Alberta,*
- (d) *to encourage all sectors of Alberta society to provide equality of opportunity,*
- (e) *to research, develop and conduct educational programs designed to eliminate discriminatory practices related to race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, [sexual orientation]¹⁰ or family status,*
- (f) *to promote an understanding of, acceptance of and compliance with this Act,*
- (g) *to encourage and co-ordinate both public and private human rights programs and activities, and*
- (h) *to advise the Minister on matters related to this Act. (Emphasis added)*

In sum, the legislation states that the Commission should be a proactive force in the community advocating for human rights and for compliance with human rights law.

⁹According to the Supreme Court of Canada's decision in the *Vriend* case the words "sexual orientation" must be understood as appearing as one of the prohibited grounds of discrimination in the Alberta Act, that is, they must be "read in."

¹⁰As in footnote 9 above, according to the Supreme Court of Canada's decision in the *Vriend* case, the words "sexual orientation" must be read into this provision of the Alberta Act.



For many years, the Alberta Human Rights Commission has been no such thing. But Albertans need the leadership that has been missing on human rights issues to be reinstated. Why? Because leadership can help shape attitudes and opinions and so decrease the likelihood of discrimination.

Questions of human rights and the avoidance of discrimination are matters of public morality. We need a Commission, which is fully supported by the provincial government, to set a high moral standard on human rights generally and on the avoidance of discrimination, in particular.

We used to have a Human Rights Commission that spoke with a strong voice in support of human rights in the province. We need to hear that voice again.

4.0 Involvement of the Sheldon Chumir Foundation in human rights issues

What is the Sheldon Chumir Foundation for Ethics in Leadership?

The Sheldon Chumir Foundation for Ethics in Leadership is a non-profit organization, and a registered charity, created from a bequest by Sheldon M. Chumir. Mr. Chumir was a Rhodes Scholar, lawyer, businessman, and humanitarian. He served as MLA for Calgary-Buffalo from 1986 until his death in 1992.

The objective of the Foundation is the betterment of society through encouragement of, and education on, the vital importance of leadership motivated by high ethical purpose.

The Foundation strives to achieve this objective through various activities, by running an internship program and discussions and educational sessions for the public on issues which have an ethical leadership focus.

The Foundation takes a non-partisan approach to all of its activities.

Why has the Chumir Foundation become involved in these issues?

The legal protection of human rights generally, but especially in Alberta, was one of Sheldon Chumir's greatest passions. So the decision of the Foundation's Board of Directors in 2005 to launch a major project in this area was perfectly consistent with Mr. Chumir's core beliefs and life's work.

What has the Chumir Foundation done in this area in recent years?

The Chumir Foundation has carried out a number of activities in connection with the legal protection of human rights in Alberta, as enacted in the *Human Rights, Citizenship and Multiculturalism Act* (HRCMA) and administered by the Human Rights and Citizenship Commission, since late 2005 when our work in this area was formally begun. The following is a list of some of those activities. It is not exhaustive. Most of the costs incurred in carrying out these activities were borne by the Chumir Foundation. Where significant funding was provided by others, that funding source is noted.

- Our staff carried out two pieces of research. One compared the Alberta Human Rights Commission with others in Canada according to such factors as number and type of cases dealt with and rate of their resolution. See our report entitled



The Alberta Human Rights Commission: A Comparison with Human Rights Commissions in Canada, which is available on our website at www.chumirethicsfoundation.ca/main/page.php?page_id=131. The other report is entitled the *Alberta Human Rights, Citizenship and Multiculturalism Education Fund and Ethical Leadership* and is also available on our website at www.chumirethicsfoundation.ca/main/page.php?page_id=131

- We also commissioned detailed legal research on issues arising from the *Human Rights, Citizenship and Multiculturalism Act* and the operation of the Commission. This research was carried out by the Alberta Civil Liberties Research Centre. The report on that work, *Alberta's Human Rights Legislation and Human Rights Commission: Legal Issues* is also available on our website at www.chumirethicsfoundation.ca/main/page.php?page_id=131
- We held a panel discussion in Calgary in December 2005, which was part of the project launch. The speakers on that panel were The Honourable Ron Ghitter, Q.C.; Justice Sheila Greckol; Professor Gerry Gall; Fil Fraser, Former Chief Commissioner of the Alberta Human Rights Commission and Janet Keeping, now President of the Chumir Foundation.
- We held a one day policy workshop in Edmonton in November 2007 with attendees from many different Alberta communities and speakers from Ontario, British Columbia, and Manitoba, as well as from Edmonton and Calgary. The issues addressed by that workshop ranged from the current realities of prejudice in Alberta to what has been done across Canada to renew and reform human rights commissions, their legal mandates and their operations. The costs of this workshop were shared by the Chumir Foundation and the Alberta Law Foundation.
- We are continuing to offer one-day educational workshops in various locations around the province (so far, we have held six workshops: one in Calgary; two in Red Deer and three in Edmonton) for groups of about twenty. The workshop is called "How the Alberta Human Rights Commission works and how it could work better." The public legal education portion of these workshops is funded by the Alberta Law Foundation. Funding remains for additional workshops in this series.
- In April of this year, we worked with the Ethno-Cultural Council of Calgary (ECCC)¹¹ on an evening event for the public called the "People's Human Rights Commission." It too was intended to teach the interested public about how the Human Rights Commission functions and about some of the issues facing the

¹¹Teresa Woo-Paw, now MLA for Calgary-Mackay, was one of the founders of the ECCC and used to be its Chair.

Commission and Alberta law and policy makers. All Nations Theatre was involved in the event, acting out discriminatory scenarios and testing the audience's knowledge of which acts would be contrary to law, which not, and why. The ECCC bore a share of the costs of putting on this event.

- From April through June of this year we held a series of consultations in eight different Alberta communities – Brooks (twice), Lethbridge, Calgary, Red Deer, Drayton Valley, Grand Prairie, Edmonton, and Fort McMurray. We hired Fil Fraser, formerly Chief Commissioner of the Alberta Human Rights Commission (1989 – 1992), to facilitate these consultations. Mr. Fraser has also helped write this Report.



Recommendations

5.0 Issues confronting the Alberta Human Rights Commission

The Chumir Foundation's staff, board of directors, partners, and colleagues throughout the province have spent countless hours since the fall of 2005 studying the activities of the Human Rights and Citizenship Commission and the legislation which governs its activities, the *Human Rights, Citizenship and Multiculturalism Act* (HRCMA). In our view, the following are the most significant issues regarding the Commission and Act. In connection with each issue, we set out our recommendations for improvement.

5.1 The stature, structure, and independence of the Human Rights Commission

We have now in Alberta a Commission, the Chief Commissioner of which is really no more than an administrator. The Chief and other Commissioners do not operate independently of the provincial government, but instead take their marching orders from it. To overcome the perception of a weak¹² and politically dependent Commission, and to demonstrate that its commitment to human rights protection has substance, the provincial government must create a Commission in which the public can have full confidence.

We cannot overstate the importance of a Commission that both is, and appears to be, independent of the provincial government. It is necessary to avoid even the perception that the provincial government is pulling the Commission's strings in the background. It is simply imperative that the interference by the government in the *Delwyn Vriend* case, where the Minister responsible for the Commission sent a letter ordering the then Acting Chief Commissioner not to accept Mr. Vriend's complaint, never be repeated.

To create a Commission in which the public can have confidence, four primary issues must be addressed:

- The structure of the Commission;
- Who is appointed to sit on the Commission;
- The independence of the Commission;
- The confusion caused by the current names of both the Commission and its legislation.

¹²The most striking evidence we have received of the Commission's perceived deterioration was offered by a participant in one of our two consultations in Brooks. She said that in the past when she had threatened to report a racist landlord to the Human Rights Commission, the person in question took notice of that threat and was likely to shape up, that is, change their behaviour for the better. She said she recently had occasion to tell a landlord, who was refusing to rent to non-whites, that his behaviour was against the law and she would report him to the Commission. In response, he just laughed and said he knew the Commission wouldn't do anything. In other words, he was saying he could discriminate on the basis of race or colour with impunity.

Sadly, similar reports are easy to come by. A Calgary lawyer recently told Janet Keeping, President of the Chumir Foundation, that she had concluded "ten years ago" that the Alberta Human Rights Commission was "a joke."



5.1.1 The structure of the Commission

The Commission has become a mere administrative unit, passively processing complaints, carrying out few educational programs and showing virtually no leadership on human rights issues in the province. It must be transformed into an independent Commission, the Commissioners of which set the organization's tone, priorities, and approaches and visibly lead on human rights issues in the community.

Recommendation 1

To this end, we recommend that the Chief Commissioner and other Commissioners be constituted as, in effect, a Board of Directors for the Commission setting its overall direction and approach. The day-to-day work of the Commission would be carried out by its staff, of course, but the Commissioners would lead the organization by establishing tone, priorities, and approaches.

We have had such a Commission in the past, one in which the government placed its trust. And because the government trusted the Commission to act on its own, it was a Commission in which the public too had confidence. Albertans need such a Commission again.

We note that a confident and trusted Commission could be useful in a variety of ways that the current Commission cannot. For example, it could act as the focal point for human rights promotion in the provincial government and could ensure coordination of those activities throughout the government and its delivery of services to the public.¹³ It could, for example, recommend human rights promotion measures to other units of the government. To play this kind of role, the Commission needs considerably greater stature within the government. The overall thrust of many of our recommendations is to give the Commission this very status.

¹³Several participants in our community consultations gave examples of where they would have expected greater coordination of services amongst provincial government agencies and the Human Rights Commission. The operation of the Worker's Compensation Board was mentioned on more than one occasion.

5.1.2 Appointees to the Commission

Although the structure of the Commission itself and its place in the overall provincial government structure (see below) are of critical importance, another key issue to enhancing the Commission's stature is who serves on it. If those appointed to the Commission are well-known Albertans with extensive experience in human rights related matters, then the public can rest assured that the government's commitment to human rights is solid and that the people appointed as Commissioners have the competence to carry out their responsibilities well.

Accordingly, we recommend that the provincial government make every effort to recruit well-known Albertans with significant experience on human rights issues to serve as Human Rights Commissioners. The Chief Commissioner should be an outstanding individual with a demonstrated commitment to advancement of human rights.

Recommendation 2



5.1.3 The independence of the Commission

To enhance the stature of the Commission and to make evident its independence, we recommend that the place of the Human Rights Commission in the overall structure of the Alberta government be changed. People who have given the matter careful thought usually conclude that in order to best protect the independence of a human rights commission, and minimize the possibility of political interference in its work, a human rights commission should report directly to the legislative assembly,¹⁴ as do the following commissions: the Canadian Human Rights Commission (reporting to Parliament) and the Yukon and Nunavut territorial human rights commissions (reporting to their respective territorial assemblies).

Recommendation 3

Accordingly, we recommend that the Alberta Human Rights Commission report through the Chief Commissioner directly to the Alberta Legislative Assembly and that the Chief Commissioner be treated as an officer of the Legislative Assembly of Alberta, as are the Auditor General, the Chief Electoral Officer, the Ethics Commissioner, the Information and Privacy Commissioner, and the Ombudsman.

However, if reporting directly to the Alberta Legislative Assembly is not acceptable to government, then the Human Rights Commission should be made to report to the Minister of Justice. In all Canadian jurisdictions where the human rights commission does not report directly to the legislative assembly, except for New Brunswick (where it reports to the Department of Post-Secondary Education, Training and Labour), the human rights commission reports to the Minister of Justice or the Attorney-General, positions often held by the same person, as in Alberta.

There are three main reasons to have a human rights commission report to Justice. First, it “feels” right. After all, human rights issues are matters of justice and fairness. During our community consultations, most participants with a view on this point strongly supported having the Human Rights Commission report to the Minister of Justice, rather than the Minister of Tourism, Parks, Recreation and Culture, as was the case until the March 2008 election, or to the Minister of Culture and Community Spirit, as occurs now.

Second, the adjudication of human rights complaints affects the rights of both complainants and respondents: it is unavoidably a legalistic process and must be

¹⁴See the literature referred to in the report on our website entitled *Alberta’s Human Rights Legislation and Human Rights Commission: Legal Issues*, p. 65, www.chumirethicsfoundation.ca/main/page.php?page_id=131

understood and administered as such. The Justice Ministry is best equipped to provide a legally sophisticated environment for the Human Rights Commission.

Third, in democratic governments the Minister of Justice is always one of those with the highest stature. Moving the Commission to Justice would be evidence of the government's commitment to the human rights agenda.

We recommend that, if reporting to the Legislative Assembly is not contemplated, then the Human Rights Commission should report to Justice.

Recommendation 4



5.1.4 Eliminating the confusion around the names of both the Commission (Human Rights and Citizenship Commission) and its legislation (Human Rights, Citizenship and Multiculturalism Act)

Another way to show respect for the Commission and enhance its stature is to eliminate the confusion surrounding its name and the name of the statute that governs its operations.

Multiculturalism is important, but has almost nothing to do with Alberta's anti-discrimination statute.

Recommendation 5

We recommend that the word “multiculturalism” be dropped from the name of the statute (HRCMA).

Citizenship is crucial, of course, but has nothing to do with either the statute governing the Human Rights Commission or the work of the commission itself. In our community consultations, people reported instances where non-citizens thought that the Commission's services were not available to them because the word “citizenship” appears in the Commission name. Other people reported a different misunderstanding: some thought that they should be able to go to the Commission with questions about their citizenship.

Recommendation 6

We recommend that the word “citizenship” be dropped from the name of the Commission and from the name of the statute (HRCMA).

In the result, the commission would be called the Alberta Human Rights Commission and the statute which governs it would be called the *Alberta Human Rights Act*.

5.2 Adjudication of complaints

Many of the most serious criticisms of human rights commissions voiced in recent years go to the processes by which allegations of discrimination are resolved. For some examples: commissions have been accused of being too cavalier in refusing to accept complaints, creating a sense that they do not abide by the rule of law; commissions have been accused of bias when it is the same agency that investigates allegations of discrimination that also decides whether the law has been violated; and lately the point has been forcefully made that it is unfair that one side to a dispute have its costs covered (that is, the complainant) and the other (the respondent) does not.

These criticisms of the complaints adjudication process boil down to the accusation that the commissions – where they have not yet addressed these issues, such as in Alberta – pay insufficient attention to procedural rights. This is a very serious criticism and one which has been the subject of well-considered reform in several Canadian jurisdictions.

At the federal level, reform started in 1988. Although the Canadian Human Rights Tribunal (CHRT) was created in 1977 as part of the Canadian Human Rights Commission, by 1988 the process of separating the two had begun. By 1998, the CHRT had become a separate body. As stated on the website of the CHRT,

The Tribunal's main goal is to ensure that the *Canadian Human Rights Act* is interpreted and applied fairly and impartially at all hearings. The Tribunal is not an advocate for human rights issues: That is the role of the Canadian Human Rights Commission.

In 2003 British Columbia moved to eliminate its Human Rights Commission (not a change we advocate). Its Human Rights Tribunal is not only severed from a human rights commission, but operates on a direct access model whereby people with complaints do not need to consult another agency before filing their complaints with the Tribunal.

The most recent changes of significance have taken place in Ontario where the Commission has been retained, but the adjudication of disputes is handled by a separate Tribunal which also can be directly accessed by the Ontario public.

Several other provinces have also severed the connection between the body that handles human rights education and advocacy and that which deals with the adjudication of disputes. See information on the systems in place in Saskatchewan, Manitoba, and Quebec.¹⁵

¹⁵See "Separation of duties" in the report done by the Alberta Civil Liberties Research Centre for the Chumir Foundation entitled *Alberta's Human Rights Legislation and Human Rights Commission: Legal Issues*, pp. 66 – 68. The report is available on the Chumir Foundation website at www.chumirethicsfoundation.ca/main/page.php?page_id=131



A similar change is needed in Alberta in order to avoid the conflicts which now undermine the fairness and credibility of the adjudication process.

Recommendation 7

Accordingly, we recommend that the adjudication of complaints be carried out by a fully independent Tribunal. This Tribunal would be completely separate from the Commission which would continue to have the legal mandate to promote, educate regarding, and advocate for human rights.

If the two are split as we recommend, it is probably necessary that the head of the Tribunal be a lawyer. It may be less important that the head of the Commission be legally trained.

A related issue is whether people wanting to file complaints of discrimination must first go to the Commission for attempts at settlement and mediation – and only upon failure of these processes would their complaint go to the Tribunal – or whether they may go directly to the Tribunal for adjudication of their cases. The latter is called “direct access.” This matter requires further study, which should include consideration of how this issue has been resolved in other Canadian jurisdictions.

There is an even bolder possibility, regarding the adjudication of disputes, one which may ultimately be where human rights reform goes in the longer term anyway. It is this: Alberta could amend its legislation so as to make discrimination contrary to the Human Rights Act a “tort,” which would mean that people who think they have suffered discrimination could take their complaints directly to the courts. Such a move would respond to the failure of the human rights complaints adjudication process to ensure the cheap, quick justice human rights commissions were created to provide.¹⁶

¹⁶Whether Alberta should create a tort of discrimination is a complicated matter, but one on which some useful literature is available. See for a start, the report done for the Chumir Foundation by the Alberta Civil Liberties Research Centre. The report is called *Alberta’s Human Rights Legislation and Human Rights Commission: Legal Issues* and is available on the Chumir Foundation website at www.chumirethicsfoundation.ca/main/page.php?page_id=131

5.3 Access to the Human Rights Commission

There are three major issues which impact on access to the Human Rights Commission:

- The Commission needs to become more user friendly;
- The provision of legal assistance would increase fairness in accessing the Commission;
- Special measures need to be taken so that Aboriginal Albertans will be more likely to use the services of the Commission.



5.3.1 User-friendliness of the Commission

As matters stand today, the Alberta Human Rights Commission suffers from low-morale and an “under siege” mentality.¹⁷ Combined with its inadequate resources and lack of political support, this organizational “culture” prevents the Commission from doing its job properly. Many people at our community consultations gave examples of how user unfriendly the Commission is. Many reported to us on how they were abruptly or otherwise poorly treated by Commission staff (sometimes even laughed at when they stated their concerns). Many have detailed how difficult it was for them to communicate with the Commission, either because office hours were limited or inconvenient or because the distances required to travel to visit the Commission were too great. Many reports from the public support the impression of the Commission not as a resource to which people can turn for help and sympathy when they feel their dignity has been wounded by discrimination, but as an almost adversarial agency looking for reasons to refuse assistance.

Former employees of the Commission also provided examples of how service to the public had deteriorated over the years. One wrote lamenting the fact that the kind of help that used to be made available – she specifically mentioned assistance filling out complaint forms – is no longer provided.

Recommendation 8 **We recommend that the necessary steps be taken to ensure that the Commission becomes more user-friendly.**

Recommendation 9 **The accessibility of the Commission outside Edmonton and Calgary is of special concern in this context. Accordingly, we recommend that the Commission have a presence in as much of the province as possible.**

There are many different ways in which this could be accomplished. For example, branch offices could be opened or staff could spend more time travelling to smaller centres and more remote parts of the province. Time and again at our community consultations people referred to the enormous disadvantage of living outside the Calgary-Edmonton corridor when the services of the Human Rights Commission are needed.

¹⁷It is unfortunate to have to discuss such unsavoury matters, but it seems necessary in order to convey the seriousness of the situation and the dire conditions in which Human Rights Commission staff have had to work for many years. Some employees have reported they felt that the Commission and they personally had to keep a low profile in order not to risk the disbanding of the Commission by the provincial government. Staff knew that the Commission was not functioning properly, but they were intimidated from advocating for improvement of it.

There were some creative ideas advanced in some of our community consultations on this subject. For example, in Grande Prairie, participants suggested that the Human Rights Commission could have a local liaison office – perhaps staffed on a part-time basis – to provide information and help individuals with the initial stages of a human rights case. The consultation group was unanimous in the view that the office should not be at the local provincial building, but in a less “bureaucratic” setting so as to be more user-friendly and welcoming. One suggestion was to house the human rights office in an already existing complex shared by community groups and non-governmental organizations where, for example, daycare and other supports would be available.

We are less concerned with the details of how greater accessibility is accomplished than with the necessity that something be done to get Human Rights Commissioners and staff on a regular basis into the vast bulk of Alberta that lies outside Calgary and Edmonton. Again, there are lessons to be learned from how this issue has been addressed in other provinces, for example, Manitoba, where the Commission travels through the province on circuit. And past Alberta practice could also be instructive, as our own Commission used to hold some of its meetings outside the major cities.



5.3.2 Need for legal assistance with complaints

The Canadian legal system is without doubt one of the finest in the world. It is well-developed, stable, governed by notions of justice and equality, and not corrupt. The most glaring weakness in the system lies not actually “in” the system, but in the public’s access to it: an increasing number of Canadians – and this applies equally to Albertans – cannot access the system because they cannot afford lawyers’ fees. Legal representation for some types of legal problems – for example, many criminal matters – is provided at public expense. But for the vast majority of legal issues, legal aid is not available. In particular, legal aid is not available to allow Albertans to pursue their complaints of discrimination.

When human rights commissions were first set up, now several decades ago, it was thought that people would not need a lawyer to file and succeed with a complaint. But more than thirty years of experience in Alberta and across the country has shown this not to be true. Many complainants are unable to see their cases through to completion without legal advice, the very legal advice that they cannot afford and hence typically do not receive. This means that many cases of unjustifiable discrimination go unaddressed. In many cases, complainants have to go – sometimes literally – begging to lawyers for help with their cases. This problem continues, and in fact intensifies, if a complaint goes to appeal before the Court of Queen’s Bench or on to the higher courts.¹⁸

In some provinces, legal aid or at least some legal advice is provided to people filing complaints of discrimination. For example, in British Columbia a number of non-governmental organizations provide such legal assistance; at least one provides assistance to people who believe they have been discriminated against (complainants) and another to both complainants and respondents (those against whom a complaint has been lodged). And Ontario is in the process of setting up an agency called the “Human Rights Legal Support Centre”¹⁹ which will make independent legal information available throughout the province to people who are filing complaints of discrimination with the Ontario Human Rights Tribunal.²⁰

Citing these examples from other provinces does not mean that we think the perfect solution has been found in other jurisdictions. We do not. For example, it is difficult to

¹⁸We know of highly principled people, who have filed discrimination complaints which raise important points of public policy and had great difficulty in obtaining the legal advice or representation they needed.

¹⁹See the Legal Support Centre’s website at www.hrlsc.on.ca

²⁰The Chair of the new Legal Support Centre is the widely respected human rights and labour lawyer Raj Anand. Mr. Anand is a former Chief Commissioner for the Ontario Human Rights Commission. He spoke at the Chumir Foundation’s Human Rights Policy Workshop in November 2007 on recent changes to Ontario human rights law and at the Ontario Commission.

understand how a complaints adjudication process is fair when publicly funded legal assistance is made available only to one side of the dispute. We cite these examples to show that questions of fair access are being addressed in other jurisdictions, not to suggest that those jurisdictions have yet come up with adequate or complete answers to them.

We recommend that publicly funded legal assistance be made available to people involved in human rights disputes.

Recommendation 10

We further recommend that this legal assistance be made available, on the basis of financial need, to both complainants and to respondents.²¹

Recommendation 11

We are not suggesting that every person claiming discrimination should be awarded a lawyer at the public's expense. But at a minimum it should be possible for the Tribunal adjudicating human rights complaints to ensure that legal advice or representation be made available to people who would otherwise be unable to pursue their complaints (i.e., complainants) or to adequately defend themselves from allegations of discrimination (i.e., respondents).

²¹There are a number of different ways in which this need for legal assistance could be met. An examination of how this matter is being handled elsewhere in Canada should be part of the review of reforms made in those other jurisdictions.



5.3.3 Aboriginal people and the Commission

Amongst Aboriginal people in Alberta there is widespread confusion as to whether the provincial human rights statute applies to them. In many circumstances, it does, but most Aboriginal people we have spoken to do not know this. There is also a widespread reluctance amongst Aboriginal people to go to the Commission in any event.²²

At the same time, it is widely accepted that no Albertans face more severe discrimination than Aboriginal people. There is a massive disconnect here. Aboriginal people need the Commission desperately, but almost never use its services.

The implications of this disconnect are serious in ways that one might not expect. For example, some of the programs put in place by the provincial government to assist Aboriginal people are undermined by the discrimination against them which goes unaddressed. At the community consultation run by the Chumir Foundation in Grande Prairie we were told that, while Aboriginal workers could get good jobs through an Aboriginal Workforce Participation Initiative, some would quit those jobs because they “couldn’t take the racism.”

The Alberta Human Rights Commission must be made truly useful and accessible to Aboriginal people in the province. While we recognize the difficulty of responding to this challenge, there are changes that could be made to signal that the provincial government is serious about protecting the dignity of Aboriginal people. For example, in Nova Scotia, discrimination on the basis of “Aboriginal origin” is explicitly prohibited by law.

It can be argued that adding “Aboriginal origin” as a prohibited ground to Alberta’s legislation is unnecessary, as discrimination on the basis of Aboriginality would already be covered under the categories of either “race” or “ancestry.” Strictly speaking, this is true. As already noted, Aboriginal people are now protected by the legislation, in many circumstances.

But greater efforts have to be made to show the sincerity of our collective concern for the situation of Aboriginal people in the province.

²²There is plenty of evidence for the claim that the Commission, like many other institutions in Albertan and Canadian society, fails Aboriginal people. Indeed, the relatively low level of use of the Commission by Aboriginal people was one of the factors motivating the research the Commission contracted for with a group of researchers at the University of Calgary in the late 1990s. See the two-volume report of that research group called *Communications Research and Assessment Project for the Alberta Human Rights and Citizenship Commission*, issued by the Alberta Civil Liberties Research Centre in 1999. The report is available from the Sheldon Chumir Foundation for Ethics in Leadership.

Therefore, we recommend that “Aboriginal heritage” be added as an expressly illegal ground of discrimination in the Alberta human rights legislation.

Recommendation 12

If this were done and well publicized and several other measures were taken, as recommended in this Report, to make the human rights protection system more user-friendly to all, we could expect to see Aboriginal people approaching the Commission with greater frequency when they encounter discrimination.



5.4 The Commission's mandate to promote human rights

As originally conceived, all Canadian human rights commissions had a dual mandate: they were to promote respect for human rights through education and they were to administer a system for adjudicating allegations of discrimination. Most human rights systems in the country still operate with that two-fold mandate.²³

As we have already noted, a great deal of the critical attention that has been paid over the last few years to human rights commissions has dealt with the processing-of-complaints side of their work. But at least as important – arguably more important – is the education/prevention mandate. On this front, the Alberta Human Rights and Citizenship Commission has been largely invisible. In an increasingly diverse society, this low profile is simply not acceptable. Leadership on anti-discrimination measures and on the knowledge of how discrimination works, so that Albertans can work to combat it, was never more needed.

Recommendation 13

Accordingly, we recommend that the Human Rights Commission be encouraged – through the government's renewed endorsement of it and appropriate budgetary allocations – to do much more education on both rights and responsibilities under the legislation.

We acknowledge the existence of the Human Rights, Citizenship and Multiculturalism Education Fund. It is a considerable sum of money and Albertans are fortunate that such a fund exists. But there are some serious limitations on the usefulness of the projects supported by the Fund.

First, a high percentage of the projects are not human rights projects. (See the report of the Chumir Foundation examining the Fund.)²⁴ Second, by definition, only people and organizations motivated to find out more about human rights and responsibilities seek the funding. What about education for the people and organizations who mistakenly think they don't need it?

²³British Columbia does not. With the legal changes that went into force in March 2003, the BC Human Rights Commission was disbanded. Now an independent Tribunal (called the "BC Human Rights Tribunal") handles complaints and human rights education is carried out – where it is carried out – by means of contracts to non-governmental agencies. The elimination of the Commission is widely thought to have been a mistake, one which the more recent changes in Ontario have not repeated. It is, for example, asserted that the lack of a human rights commission in BC violates standards adopted by the UN General Assembly in 1993, which are called the "Paris Principles."

²⁴See section 4, called "The Fund in Practice," of the report *Alberta Human Rights, Citizenship and Multiculturalism Education Fund and Ethical Leadership*, pp. 8 – 11.

We have had employers attend our one-day teaching workshop (“How the Human Rights Commission Works and How it can Work better”) tell us that, had they known earlier about how the law against discrimination works, they would have had an easier time dealing with certain sensitive workplace issues, such as, explaining to a person whose English is very heavily accented why they are unsuited for a job that requires easy-to-understand English. Until they attended our workshop, these employers did not know, for example, about the “bona fide occupational requirement” defense under the Act.²⁵

The gulf between the so-called “human rights community” and those they accuse of discrimination can only grow when human rights education is carried out (i.e., with Human Rights, Citizenship and Multiculturalism Education Fund monies) only by those who examine the issues from their perspective. Human rights education requires a balanced approach. Why? Because employers, landlords, and providers of goods and services also have rights and also have obligations to the public which may go beyond the concerns of human rights activists.

For example, a business that depends upon clear communication between its staff and customers, needs to hire people who speak English clearly. And it should not be thought that such a requirement is necessarily discriminatory or racist: under the leadership of Fil Fraser, the then Alberta Human Rights Commission sent a white doctor from Scotland, who had complained of discrimination against him, to remedial English classes so as to reduce his Scottish accent. Patients had complained they couldn’t understand what he was saying to them.²⁶

We recommend that the Commission also be encouraged to engage directly with the public when discrimination issues of major significance come to the fore.

Recommendation 14

As we have already argued, leadership by the Human Rights Commission is needed and can be effective. There was a time when the Chief Commissioner was regularly in the media, speaking out on issues of current concern, when the Commission and staff were very active in the schools and when there was an advisory committee on human rights education on which members of the public sat. But this activity almost completely died out over the last 15 years. This needs to be reversed.

²⁵Where an employer can show that a trait – such as near-perfect command of English – that might otherwise be considered discriminatory is genuinely necessary to the job (hence, *bona fide* occupational requirement), the use of that trait in hiring decisions is not a violation of the anti-discrimination law. See s. 7(3) of HRCMA.

²⁶Personal communication with Fil Fraser, former Chief Commissioner, Alberta Human Rights Commission, August 22, 2008.



It would be inappropriate for Commissioners to comment on specific allegations that the statute has been violated. Those allegations must be dealt with in a judicial, or at least quasi-judicial, arena. But where broader problems arise in the community – such as waves of homophobic aggression or anti-Aboriginal sentiment – the Commission should be encouraged to be visible and to speak publicly about the values which underlie human rights law and how important it is that as a society we struggle against discrimination in all its forms.

An example may be useful. A few months ago the media reported that various businesses in Medicine Hat – largely bars, pubs and restaurants – were posting signs in their windows and generally letting it be known that British military staff (who train at the Suffield CND base nearby) would not be served in their establishments. This behaviour, if adequately substantiated, would constitute a violation of HRCMA.

But entirely apart from any specific complaints made, and even if none were lodged, the Commission could have played an important role in such a situation. The Commission, after making the necessary inquiries to confirm the general state of affairs (not to investigate a specific complaint, but to ascertain that there is a genuine problem in the community) could have held a public meeting in Medicine Hat to draw attention to the alleged discrimination. Again, the purpose would not have been to identify particular instances or to name names (which could turn out to be defamatory), but instead to explain what is wrong with this kind of reaction (that is, broad stereo-typing leading to unjustifiable discrimination) to what may have been a legitimate problem (some drunk and disorderly British military people making trouble in some establishments).

Our point is this: Albertans need the Human Rights Commission to show enlightened leadership on current issues, on the ground, out in the community, if discrimination is to be combated effectively in the province.

5.5 Need for a transparent Human Rights Commission

We recommend that operation of the Human Rights Commission be made as transparent as possible.

Recommendation 15

It may seem ironic that a Human Rights Commission should have to be urged to be transparent, but that is the situation we have come to in Alberta. The most glaring example of the lengths to which the Commission has gone to conceal its operations from the public stems from an episode in which the Commission awarded a contract to a group of researchers at the University of Calgary. When the group submitted its report,²⁷ the Commission was not entirely pleased with it and subsequently refused to release it to those who were interested in reading the document. Someone finally obtained a copy of the report under provincial access to information legislation. But a refusal to make available a study the Commission itself had contracted be done of its own operations is evidence of the need to ensure that the Commission conduct itself in a transparent manner.

Hopefully, such a refusal by the Commission to release information of concern to the public would not happen again. But there remain aspects of the Commission's operations hidden from view, aspects which are not hidden from the public in other Canadian jurisdictions.

So, for example, we recommend that the Commission keep a record of how many telephone calls it receives and what those calls are about.

Recommendation 16

Without this data we have no idea how many people are discouraged from making complaints by the way they are treated by the Commission itself or whether there are forms of discrimination being experienced by Albertans which are not protected by law and hence cannot form the basis for a complaint. (For example, Alberta law does not protect against discrimination on the basis of social condition,²⁸ although this kind of discrimination is illegal in some other provinces.) Knowing whether this is the case is essential to keeping the legislation current.

²⁷The 1999 report is contained in a two volume document entitled *Communications Research and Assessment Project for the Alberta Human Rights and Citizenship Commission*. The research team was led by the Alberta Civil Liberties Research Centre which is based at the University of Calgary.

²⁸"Social condition" would include, for example, poverty.

**Recommendation 17**

We also recommend that the Commission publicize the results of settlements reached on complaints so that future complainants know whether an offer is reasonable and thus should be accepted.²⁹

This is crucial. How can a complainant know whether the offer of a settlement made by, for example, her employer, is reasonable if she does not know what kind of a settlement other people in similar circumstances have received? And there is no need to provide identifying details – confidentiality can be preserved – if the essential facts of the complaint and the settlement reached are provided.

²⁹If a complaint is not settled and is decided by a human rights panel, then the decision of that panel will be published. But the vast majority of complaints are settled and never reach a panel for adjudication.

5.6 Some specific reforms

As should be clear from the preceding parts of this report, from the point of view of the Sheldon Chumir Foundation for Ethics in Leadership, reform of the human rights education and complaints adjudication processes in Alberta must start from the beginning by addressing fundamental governance issues and broad public policy issues within the protection of human rights area.

But there are some specific parts of Alberta's human rights legislation and some specific issues concerning it, which call out for reform in an urgent way. Here are three we think are of especial importance:

- Statements or publications which expose people to “hatred or contempt;”
- Addition of “sexual orientation” to the list of prohibited grounds of discrimination;
- Commission's authority to initiate a complaint.



5.6.1 Statements or publications which expose people to “hatred or contempt”

Many of the most virulent criticisms leveled at human rights commissions over the last few years concern provisions that seek to make statements of opinion illegal. Some of the high profile cases have concerned opinions on the part of the Christian right about the evil (in their eyes) of homosexuality and cartoons and articles perceived by some Muslims to be offensive or even, according to their faith, blasphemous. We do not endorse the sometimes offensive views expressed by the people and organizations who have come under attack pursuant to legal provisions such as section 3 of HRCMA. But we do have grave misgivings about the threats to free expression inherent in such provisions.

Recommendation 18

Accordingly, we recommend that s. 3 of HRCMA be amended to read as it did prior to 1996. This would remove the words “issue,” “issued,” “statement” and “publication” from s. 3. It would also remove the part of the law which refers to material which is “likely to expose a person or a class of persons to hatred or contempt.” In our view this would suffice to remove the menace presented by s. 3 in its current form. (See the Appendix to this Report which sets out both the current wording of s. 3 and how it read prior to the 1996 amendments.)

We do not recommend repeal of section 3 in its entirety. If it is returned to its original wording – that is, how it read prior to the 1996 amendments which expanded its scope – it will capture cases such as the posting of a sign saying “No Natives” in a restaurant window, as media reported happened in Lethbridge not long ago.³⁰ We do not see any significant threat to free expression, if the section applies to such limited forms of speech.

Recommendation 19

At the same time, we recommend that the more active and publicly engaged Human Rights Commission, which we urge in this report be established, speak out at every appropriate moment on the harm done by hurtful and offensive speech.

Strong leadership from the Commission on the *ethics* of public speech would give people, who feel they are under siege, for example, Muslims, gays, or fundamentalist Christians, support without using the force of law to stifle speech which – while unethical, obnoxious or just plain ill-considered – should not be censored by the State.

³⁰At our community consultation in Lethbridge, we were told of additional instances of the same sort of thing. Although many Albertans will be surprised to learn it, this kind of blatantly crude discrimination still occurs.

5.6.2 Addition of “sexual orientation” to the list of prohibited grounds of discrimination

Recommendation 20

We also recommend that the result of the Supreme Court of Canada judgment in the *Delwyn Vriend* case finally be acknowledged by adding the words “sexual orientation” as a protected ground of discrimination to HRCMA where they have now to be “read in.”³¹

This change is long overdue and will put an end to one of the more shameful phases of Alberta’s human rights history. As one gay rights activist so wisely put it, “My father taught me that no matter how painful it is, you have to be honest enough to admit when you have done something wrong. Once you have, then you can truly begin moving in the right direction.”³²

This change would affect not only gays in Alberta. Human rights are indivisible: respect for human dignity is either extended to all or vulnerable to erosion.³³ Another person pointed this out in a recent article: “Democracies succeed by and large by how they treat their minorities.” Adding the words “sexual orientation” to the Act “would be hugely meaningful to Muslims, women, the disabled, and all other minorities in the province.” It would in another person’s words, “revitalize a culture of human rights in Alberta.”³⁴

³¹According to the Supreme Court of Canada’s 1998 decision in the *Vriend v. Alberta* case, the words “sexual orientation” must be read into sections 3(1), 4, 5, 7(1), 9 and 16(1). They must also be read into the Preamble.

³²Quoted in an article by Ted Kerr “Queer eyes will be watching Blackett’s every move,” Xtra.ca, Wednesday, August 13, 2008.

³³This idea of indivisibility of human rights is often captured by reference to the words of Pastor Martin Niemöller (1892 – 1984) which speak of the passivity of intellectuals in Germany in the face of persecutions carried out by the Nazis. The words vary from version to version, but here is how the poem appears on the New England Holocaust Memorial in Boston:

They came first for the Communists,
and I didn’t speak up because I wasn’t a Communist.
Then they came for the Jews,
and I didn’t speak up because I wasn’t a Jew.
Then they came for the trade unionists,
and I didn’t speak up because I wasn’t a trade unionist.
Then they came for the Catholics,
and I didn’t speak up because I was a Protestant.
Then they came for me,
And by that time no one was left to speak up.

Some of the more contemporary poems or songs based on Niemöller’s words are even broader in their scope. Here are the words to a song performed in 1991:

When they came for the Jews and the blacks, I turned away
When they came for the writers and the thinkers and the radicals and the protestors, I turned away
When they came for the gays, and the minorities, and the utopians, and the dancers, I turned away
And when they came for me, I turned around and around, and there was nobody left ...

³⁴See the article by Ted Kerr in footnote 32, above.



5.6.3 Commission's authority to initiate a complaint

As the law presently stands in Alberta, the Human Rights Commission may be well aware that there is a pattern of discrimination in a particular industry or particular part of the province, but it cannot launch an investigation to look into this pattern until an individual comes forward with a specific complaint. Certain forms of discrimination – for example, as carried out by employment agencies – may never come to the attention of an individual victim, but may nevertheless be known generally in the community.

As section 20 of HRCMA is now worded, the possibility that the Commission could initiate a complaint, and so an investigation, is expressly ruled out. Here is s. 20(1) in its present form:

Any person, except the Commission, a member of the Commission and a person referred to in section 18 [i.e., anyone employed by the Commission], who has reasonable grounds for believing that a person has contravened this Act may make a complaint to the Commission.

One of the main objectives of the Commission is to educate on human rights and prevent violations. Accordingly, it is counter-productive that the Commission be prevented from initiating investigations.³⁵

Recommendation 21

We recommend that s. 20 of HRCMA be amended to give the Commission the authority to launch investigations on its own initiative.

If so changed, s. 20 would read as follows:

Any person who has reasonable grounds for believing that a person has contravened this Act may make a complaint to the Commission.

Some people have wondered whether a Commission with this power might abuse it. We see no reason why this should be the case. The Act requires that a person filing a complaint have “reasonable grounds for believing that a person has contravened this Act.” The Commission too would have to have such “reasonable grounds.” And were the Commission to pursue a complaint and launch an investigation without such grounds, it would be subject to an action in the courts (for exceeding its statutory jurisdiction) to stop that activity. We think that a well-staffed Commission, with access to sophisticated legal advice on the limits of its statutory authority, would not be prone to overstepping its legal boundaries.

³⁵Interestingly, the Alberta Commission used to have this power, but it was removed from the legislation in 1980. See *Individual's Rights Protection Amendment Act*, 1980, c. 27, s. 10.

6.0 A list of our recommendations

In this Report we have made the following recommendations:

- (1) That the provincial government create a Commission in which it and the public can have full confidence. To that end, we recommend that the Chief Commissioner and other Commissioners be constituted as, in effect, a Board of Directors setting the overall direction and approach of the Commission within the boundaries permitted by HRCMA, or any successor legislation. The day-to-day work of the Commission would be carried out by its staff. But the Commission would set tone, priorities, and approaches;
- (2) That every effort be made to recruit well-known Albertans with significant experience on human rights issues to serve as Human Rights Commissioners; the Chief Commissioner should be an outstanding individual with a demonstrated commitment to advancement of human rights;
- (3) That the Alberta Human Rights Commission report through the Chief Commissioner directly to the Alberta Legislative Assembly and that the Chief Commissioner be treated as an Officer of the Legislative Assembly of Alberta, as are the Auditor General, the Chief Electoral Officer, the Ethics Commissioner, the Information and Privacy Commissioner, and the Ombudsman;
- (4) In the alternative, we recommend that, if reporting to the Legislative Assembly is not acceptable, then the Human Rights Commission should report to the Minister of Justice;
- (5) That the word “multiculturalism” be dropped from the name of the statute (HRCMA);
- (6) That the word “citizenship” be dropped from the name of the Commission and the name of the statute (HRCMA);
- (7) That the adjudication of complaints be carried out by a fully independent Tribunal which is separate from the Human Rights Commission;
- (8) That the Commission become more user-friendly;
- (9) That the Commission should have a presence in as much of the province as possible;
- (10) That publicly funded legal assistance be made available to people involved in human rights disputes;
- (11) That this legal assistance be made available, on the basis of financial need, to both complainants and to respondents;



- (12) That “Aboriginal heritage” be added as an expressly illegal ground of discrimination in the Alberta human rights legislation;
- (13) That the Human Rights Commission be encouraged – through the government’s renewed endorsement of it and appropriate budgetary allocations – to do much more education on both rights and responsibilities under the legislation;
- (14) That the Commission be encouraged to provide leadership on human rights advancement in the province, that is, to be visible and to speak publicly about the values which underlie human rights law when discrimination issues of broad interest come to the fore, such as waves of homophobic aggression or anti-Aboriginal sentiment;
- (15) That operation of the Commission should be made as transparent as possible;
- (16) That the Commission should keep a record of how many telephone calls it receives, and what those calls are about;
- (17) That the Commission should publicize the results of complaint settlements in such a way as to protect confidentiality of the parties involved;
- (18) That section 3 of HRCMA be amended so as to read as it did prior to changes made in 1996;
- (19) That the Human Rights Commission launch a province-wide education campaign on the ethics of hurtful and offensive speech;
- (20) That the words “sexual orientation,” as a protected ground of discrimination, be added to HRCMA where they have now to be “read in;” and
- (21) That section 20 of HRCMA be amended so as to give the Commission the authority to launch investigations on its own initiative.

We want to place a caveat on the above list of recommendations: these are not the only changes we think should be made to Alberta’s human rights legislation and human rights protection system more generally. There are others which go to more detailed issues concerning the types of discrimination covered by the Alberta Act and how some of the prohibited grounds of discrimination are currently defined. For example, the way in which the legislation currently deals with discrimination on the basis of disability should be carefully reviewed, and discrimination on the grounds of gender identity is a problem which the Act should be amended to address.

But until the “big picture” issues are addressed, it is not clear how worthwhile it is to make further recommendations on points of detail.

7.0 Conclusions on the need for ethical leadership on combating discrimination

As this Report documents, many issues connected with the Human Rights Commission and human rights legislation in the province are begging for attention by the provincial government. The need for principled leadership on this file is great, and the possible gains to Albertans very considerable. Strengthening human rights protections in the province could build trust between the government and Albertans and bring all of us together in a more mutually respectful way.

We have submitted this document in the hopes that the work we have done in this area can be of use to the government as it goes forward with the much needed reforms.



Appendix

Section 3 of the Human Rights, Citizenship and Multiculturalism Act: The current wording and the pre-1996 version

This is the current version of s.3; the yellow highlighting indicates pretty accurately what was added in 1996; the 1996 version of s. 3 follows:

- 3(1) No person shall publish, **issue** or display or cause to be published, **issued** or displayed before the public any **statement, publication,** notice, sign, symbol, emblem or other representation that
 - (a)** indicates discrimination or an intention to discriminate against a person or a class of persons, **or**
 - (b)** **is likely to expose a person or a class of persons to hatred or contempt** because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status of that person or class of persons.
- (2) Nothing in this section shall be deemed to interfere with the free expression of opinion on any subject.
- (3) Subsection (1) does not apply to
 - (a) the display of a notice, sign, symbol, emblem or other representation displayed to identify facilities customarily used by one gender,
 - (b) the display or publication by or on behalf of an organization that
 - (i) is composed exclusively or primarily of persons having the same political or religious beliefs, ancestry or place of origin, and
 - (ii) is not operated for private profit, of a statement, publication, notice, sign, symbol, emblem or other representation indicating a purpose or membership qualification of the organization, or
 - (c) the display or publication of a form of application or an advertisement that may be used, circulated or published pursuant to section 8(2), if the statement, publication, notice, sign, symbol, emblem or other representation is not derogatory, offensive or otherwise improper.

This is how s. 3 [previously, s. 2] read prior to amendments made in 1996:

- 2(1) No person shall publish or display before the public or cause to be published or displayed before the public any notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against any person or class of persons for any purpose because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry or place of origin of that person or class of persons.
- 2(2) Nothing in this section shall be deemed to interfere with the free expression of opinion on any subject.
- 2(3) Subsection (1) does not apply to
 - (a) the display of a notice, sign, symbol, emblem or other representation displayed to identify facilities customarily used by one gender,
 - (b) the display or publication by or on behalf of an organization that
 - (i) is composed exclusively or primarily of persons having the same political or religious beliefs, ancestry or place of origin, and
 - (ii) is not operated for private profit, of a notice, sign, symbol, emblem or other representation indicating a purpose or membership qualification of the organization, or
 - (c) the display or publication of a form of application or an advertisement that may be used, circulated or published pursuant to section 8(2), if the notice, sign, symbol, emblem or other representation is not derogatory, offensive or otherwise improper.



Sheldon Chumir Foundation for Ethics in Leadership

Suite 970, 1202 Centre Street S.
Calgary, Alberta
Canada T2G 5A5

Phone: 403-244-6666
Fax: 403-244-5596

info@chumirethicsfoundation.ca
www.chumirethicsfoundation.ca