

Position Paper on Human Rights Renewal in the Province of New Brunswick

February 2004

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POSITION PAPER

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1. SUMMARY

This paper is based upon a comprehensive review of the *Human Rights Act* undertaken by the Human Rights Commission over the past two years. The paper includes recommendations on amendments to the *Act*, and changes to the governance structure of the Commission, and an outline of the further work that needs to be done.

Historical perspective

New Brunswick was one of the first provinces in Canada to enact human rights legislation and to establish a Human Rights Commission. This legislation has served the province well, and as a result has required no fundamental alterations. The periodic reforms to the human rights regime in New Brunswick have come about in response to the demands of the times and the need to keep pace with societal change.

A proposal for substantive changes to human rights legislation was made in 1989 in the report of the government appointed Commission into reform of human rights, *Towards a World Family*¹. Among the one hundred and fifty recommendations was the adoption of a New Brunswick Charter of Rights and Freedoms, changes to the governance structure of the Commission and the addition of prohibited grounds of discrimination. These recommendations received some government support, but only a few of the recommendations resulted in legislative reforms.

Since 1967, the human rights law in New Brunswick has been revised and added to in a number of important ways:

- The grounds of discrimination have been expanded to keep pace with the evolving public consensus on human rights principles and developments in the law of human rights. Hence the addition of grounds regarding sex, marital status, age, physical disability, mental disability, sexual harassment, and sexual orientation.
- The Commission was given carriage of complaints.
- The Labour and Employment Board was empowered to sit as a Human Rights Board of Inquiry.

The Human Rights Commission believes that we have again reached a point where a number of important changes to the *Human Rights Code* are in order. Developments in international law, the evolution of human rights law in Canada, and a changed view on the part of New Brunswickers with respect to the need for new legal protections all stand to recommend these changes.

It is the view of the Commission, based upon two years of research and consultation with the public, government officials, other human rights agencies and organizations, and key stakeholder groups in the province that we have again reached a point where the legislation requires reform. In what follows, we set out the context and specific proposals for such reforms. This paper recommends reform rather than wholesale change to New Brunswick's *Human Rights Code*. At the same time, it also recommends that the government consider the need for a more thorough reform of the *Human Rights Code* including for example replacing the *Code* with a Charter of Rights.

¹ *Towards a World Family, A Report and Recommendations Respecting Human Rights in New Brunswick* (Ferris Report), Charles Ferris, (Fredericton, New Brunswick Human Rights Commission, 1989, 270 pp.) See Executive Summary and List of Recommendations at: <http://www.gnb.ca/hrc-cdp/e/ferris2e.htm>

Recommendations

The Commission recommends the addition of the following prohibited grounds of discrimination:

- Social condition
- Political belief or activity
- Family Status
- Language

The New Brunswick Human Rights Commission recommends that it be as independent as the Office of the Ombudsman or the Language Commissioner, so as to avoid a possible perception of direct Ministerial influence. This would include a direct reporting relationship with the Legislature with its budget set by a legislative committee. The members of the Commission would continue to be appointed by the Lieutenant-Governor in Council, on the recommendation of the legislative committee.

The Commission further recommends:

- The Human Rights Commission recommends that the specific exception to age discrimination in relation to retirement plans and pension plans be removed from the *Act* as soon as is possible.
- Other amendments dealing with bona fide occupational qualifications, and bona fide qualifications.

These proposed amendments to the *Human Rights Act* support the government's *Greater Opportunity: New Brunswick's Prosperity Plan*² because they reflect the values of a socially responsible society and further the goal of making New Brunswick the best place in Canada to work, live and raise a family.

2. THE ROLE OF THE HUMAN RIGHTS COMMISSION

The mandate of the New Brunswick Human Rights Commission as described in part in the *Act* is:

- To forward the principle that every person is free and equal in dignity and rights..
- To promote an understanding of, acceptance of, and compliance with the *Act*,
- To develop and conduct educational programmes designed to eliminate discriminatory practices...

The vision of the Commission is, "to be a leader in the promotion and protection of human rights and contribute to a fair, equitable, productive and inclusive environment in which to learn, work and live."

The Commission has adopted strategic objectives in support of that vision:

- To enhance the role of the Human Rights Commission and its place in the province of New Brunswick.
- To maintain productive, positive partnerships with other key stakeholders.

² *Greater Opportunity: New Brunswick's Prosperity Plan 2002-2012*, Province of New Brunswick (2002, Fredericton, 41 pp.)

<http://www.gnb.ca/0089/speeches-discours/2002-2012/documenten.pdf>

- To implement effective public relations and communications strategy.
- To articulate the contribution that human rights make to the pursuit of prosperity and equity in New Brunswick.
- To ensure the compliance process results in a timely and fair resolution of complaints.
- To implement an education plan to enhance public knowledge of human rights.
- To advise government on appropriate revisions to the *Human Rights Act*.
- To develop a knowledge base for policy development on evolving critical issues.
- To secure the appropriate technology and skills required for the Human Rights Commission to fulfill its legislative mandate.
- To continue to assess its progress, efficiency and effectiveness.

3. REVIEW OF THE HUMAN RIGHTS ACT

The review included research by staff on the process and reforms undertaken in other provinces, the Commission's own experience with the existing *Act* and governance structure, and public consultations.

The Commission identified the following areas for improvement and reform:

- **The pace of complaint investigations**, including both investigation and resolution relies on adequate budgetary provisions, appropriate staffing, and a dynamic and responsible institutional environment.
- **The NBHRC should be independent** of other government departments and report to a legislative committee. A semi-autonomous structure would enhance the fundamental demand for probity and the principles of human rights.
- **Improved communications to the public** and other areas of social collaboration would foster an open and proactive commission, and create greater awareness and understanding of human rights in New Brunswick through press releases, Internet website, electronic newsletters, and educational activities.
- **Improving human rights by adding to the prohibited grounds of discrimination** that would align New Brunswick with other Canadian provinces. New Brunswick, once a leader in human rights has fallen behind the rest of Canada with respect to the grounds that are protected from discrimination.

Public Consultations

In addition to its own internal review, the Commission conducted public consultations. A report on the findings of that public consultation is included in Appendix A.

The public consultation was launched in October 2002 with the release of a strategy discussion paper from the Commission, *Thirty-five Years and Looking Forward!*³ A one-day conference was held in addition to public meetings in six locations around the province.

³ *Thirty-Five Years and Looking Forward! A Discussion Paper and Survey on New Directions in Human Rights for New Brunswick*, New Brunswick Human Rights Commission (2002, Fredericton, 17 pp.)
<http://www.gnb.ca/hrc-cdp/e/discus1e.htm>

During the public consultation, 20 submissions or briefs were presented. It would be disingenuous to report these findings and leave the impression that there was a significant interest from the general public in making their views known on human rights. However, the submissions that were received came from groups and organizations with an interest and expertise in human rights and the process of protecting people from discrimination. It could also be that people were unaware of the consultation or were not able to attend the meetings.

There were 29 recommendations made in the submissions. These are outlined in the report on the public consultations and have been considered in reaching the recommendations included in this report. Indeed some of the recommendations are accepted and some others are referred for further study.

The public expressed their concerns and frustrations to Commission members and encouraged change that will foster a politically independent and proactively dynamic Human Rights Commission, strengthen the *Human Rights Act* through its evolution from code to charter, expand the grounds for discrimination to include; social condition, political belief, language, family status, citizenship, and pardoned criminal offences. In addition, there was support for appropriate funding and staffing levels to assist in the reduction of time from complaint initiation to resolution, and increased proactive educational activities.

4. RECOMMENDATIONS FROM THE COMMISSION

Protected categories

Attached in Appendix C is a table listing the grounds on which a complaint of discrimination can be made in each province. This section of the paper compares those grounds and identifies the major differences in New Brunswick's *Human Rights Act*.

a) Discrimination on the basis of political belief or activity

In some cases it must be remembered that a particular ground for discrimination is a description of the values held by society rather than being necessary to combat evidence that discrimination in that area is rampant. This is true in the case of political affiliation.

Five provinces prohibit political discrimination using the following language:

- NL – political opinion
- PEI – political belief
- NS – political affiliation
- Que – political convictions
- Man – political belief, association or activity

The New Brunswick Human Rights Commission recommends adding political belief or activity as a ground of discrimination to the *Act*. This amendment will reflect the values of New Brunswick society and the *Canadian Charter of Rights and Freedoms*, and give people an opportunity to be given a remedy if they are the subjects of such discrimination.

Based on the experience of other provinces and in comparison to complaints received under the other grounds of prohibited discrimination, it is not expected that the addition of this ground will lead to a signifi-

cant increase in complaints (it should be noted that, when this ground was introduced in PEI, the HRC initially received about 900 complaints).

b) Discrimination on the basis of poverty:

Poverty continues to be a barrier to full participation in society. While the poor are often subject to the same negative stereotypes as other groups now covered by the *Act* they are given no explicit protection.

There are several terms used to describe discrimination based on poverty. The two most common are "social condition" and "source of income". The former is broader based and is more difficult to clearly define.

The New Brunswick Human Rights Commission does receive complaints based on alleged discrimination related to "social condition". Examples of such calls include:

- Landlords that have refused to rent to social assistance recipients.
- People have been approached by mall security guards because of their appearance.
- Students who have been refused apartment rentals.

New Brunswick and British Columbia are the only jurisdictions that do not include some definition of prohibited poverty-based discrimination in its human rights legislation. The other provinces include a definition of prohibited discrimination that to varying degrees cover poverty as follows:

- Five jurisdictions prohibit discrimination on the basis of "source of income", namely the Yukon, Alberta, Manitoba, Nova Scotia and Prince Edward Island.
- Saskatchewan and Ontario prohibit discrimination on the basis of "receipt of public assistance". In Ontario, however, this prohibition applies to housing only.
- Newfoundland prohibits discrimination on the basis of 'social origin' as well as with respect to "pay seizure".
- The term "social condition" is found in the Quebec statute, as is "civil status". Québec case law has interpreted 'social condition' as a person's position in society, determined by such factors as receipt of welfare, income, birthplace, past convictions and resources.

The federal review of human rights legislation completed in June 2000, led by the former Supreme Court Justice Gerald LaForest, endorsed the need to add social condition as a ground of discrimination in federal legislation⁴.

CASHRA, the Canadian Association of Statutory Human Rights Agencies, has resolved that all Human Rights Commissions should take measures to address poverty based discrimination, and specifically urged Legislatures to adopt social condition as a ground of discrimination.

The Supreme Court of Canada has ruled that a prohibited ground of discrimination can be read into a provincial *Human Rights Act* by virtue of the equality rights described under Section 15 of the *Charter*. If there was a challenge against the New Brunswick *Human Rights Act* to include "social condition," it could be successful.

⁴ *Promoting Equality: A New Vision, Report of the Canadian Human Rights Act Review Panel* (La-Forest Report), Canada, Department of Justice & Attorney General, Canadian Human Rights Act Review Panel, (2000, Ottawa, 181 pp.)
<http://canada.justice.gc.ca/chra/en/>

Including a definition of discrimination based on poverty, however it is defined, in New Brunswick's *Human Rights Act* would not mean that anyone would be compelled to provide services in cases where individuals cannot pay, or where there would clearly be negative financial risks.

The government also has to consider the broader implications of adding social condition as a ground for discrimination. Adding this provision to the *Act* may affect several government statutes and programs, including the Legal Aid system, housing programs, and investigations into social assistance irregularities.

The Human Rights Commission would prefer the *Act* to be amended to include social condition as a prohibited ground of discrimination. However, based on the current practice in other jurisdictions it would support the addition of source of income as a prohibited ground with a view to reviewing the full impact of future amendments to include social condition in the legislation.

c) Family Status

Inclusion of family status as a provision of prohibited discrimination would reflect the values of New Brunswick society that no one should be discriminated against because they have or do not have children. Seven other provinces prohibit this type of discrimination, NS, Que, Ont, Man, Sask, Alta, and BC.

To quote from the 1989 paper *Toward a World Family*⁵, "This form of discrimination is frequently manifested in the refusal to allow children into housing units or the refusal to hire parents because of the assumption that their child-rearing function will detract from their ability to perform on the job."

The Human Rights Commission recommends the addition family status as a prohibited ground of discrimination, especially if source of income is adopted as a prohibited ground instead of social condition.

d) Language

Currently Quebec is the only province that includes language as a prohibited ground of discrimination

It is noted that the *Official Languages Act* protects New Brunswickers from discrimination on the basis of language with respect to the public sector. The recent appointment of the Official Languages Commissioner is another avenue of ensuring access to government services in the language of choice.

As an officially bilingual province there is a strong argument in favour of adding language as a prohibited ground of discrimination to the *Human Rights Act* of New Brunswick.

The Commission does receive complaints based on language and these complaints are accepted under the category of ancestry (e.g. mother-tongue, Acadian origin, Italian origin). However, many people do not know that they could make a complaint based on language as it is not specifically mentioned.

Reporting structure

The Commission recommends that it report directly to the Legislature as does the Office of the Ombudsman and the Language Commissioner.

⁵ *Supra*, p. 167

This recommendation is based on the fact that an increasing number of complaints deal with government services and programs. Currently of 241 complaints over 50 deal with government departments. The Commission believes that its credibility and ability to effectively function are dependent on it being seen as independent from the government, and not subject to Ministerial control. This would also enhance the Commission's ability to work as an advocate for human rights. In addition if political belief or activity is added as a prohibited ground of discrimination it would be prudent for the Commission to report directly to the Legislature rather than to a Minister.

Information included in Appendix C shows that in all other provinces, except Quebec, the human rights commission reports to the Legislature through a departmental Minister. In seven provinces it is the Minister of Justice. In Ontario it is the Minister of Citizenship and in Alberta the Minister of Community Development. In New Brunswick, it is the Minister of Training and Employment Development. The reason for this is straightforward: human rights law grew out of employment law and labour codes. It has now evolved far beyond the realm of employment to include issues involving education, marriage, housing, government services, and services provided to the public. The issues now span the entire range of matters concerning the public good and are thus best looked after by a Department similar in scope. Moreover, departments of justice are required to deal with the full range of human rights considerations as a matter of course as all of their work is conducted within the context of the *Canadian Charter of Rights and Freedoms*. To work in the justice field necessarily requires a working knowledge of human rights legislation.

Mandatory Retirement

At present, the New Brunswick *Human Rights Act* does not prevent pension plan administrators or employers from enforcing terms of a retirement or pension plan that treat employees differently based on their age, as long as the plans are bona fide. Whether mandatory retirement schemes can be upheld as part of a bona fide pension plan or retirement plan remains a contentious issue. The definition of bona fide is not a simple one and its use in reference to pension plans and retirement plans has not been recently tested in the courts.

Mandatory retirement is currently prohibited at any age in PEI, Manitoba, Alberta, Quebec and the three territories (except when being under a specified age is a bona fide occupational qualification). The situation in Nova Scotia is similar to New Brunswick's. Prime Minister Paul Martin has recently stated that he is in favour of abolishing mandatory retirement under federal jurisdiction⁶. Following a major study and consultation on human rights issues affecting seniors, the Ontario Human Rights Commission recommended in 2001 that mandatory retirement be abolished⁷; the Ontario government introduced a bill to that effect, but it died when an election was called in 2003.

The Human Rights Commission recommends that the specific exception to age discrimination in relation to retirement plans and pension plans be removed from the *Act* as soon as is possible.

⁶ "Martin against mandatory retirement," Canadian Broadcasting Corporation, CBC Radio's *The House*, December 20, 2003

<http://cbc.ca/stories/2003/12/19/retirement031219>

⁷ *Time for Action: Advancing Human Rights for Older Workers* (2001, Ontario Human Rights Commission, Toronto)

<http://www.ohrc.on.ca/english/consultations/age-consultation-report.pdf>

Other proposed amendments

The Commission is proposing that the bona fide occupational qualification (BFOQ) and bona fide qualification (BFQ) exceptions in the *Human Rights Act* (i.e. subs. 3(5), 3(7)(a), 4(4), 5(2) & 6(3)) be replaced by a single exception that lists all the grounds (e.g. age, religion, etc.) of the *Act* and applies to all its activities (e.g. services, housing, etc.). The current exceptions invite costly litigation because they are inconsistent and incomplete. For example, there is no BFQ exception in relation to professional associations, and the sub 4(4), 5(2) & 6(3) exceptions omit several grounds (e.g. age). A single broad exception would solve a number of practical problems, including the fact that insurers are currently prohibited from charging different life and health insurance premiums based on age (except when insurance is an employee benefit under para. 3(6)(c)).

The Commission is also proposing that the words "as determined by the Commission" be omitted from the BFOQ and BFQ exception(s), since human rights boards of inquiry and labour grievance arbitrators also need to consider whether a BFOQ or BFQ exists. This amendment would make the *Human Rights Act* more consistent with the legislation of other jurisdictions, as well as the case law, and would avoid delays and uncertainty due to jurisdictional inconsistencies.

Other issues of concern to the Commission:

- **The urgent need to address the perennial budget shortfall** faced by the Commission that limits its ability to provide effective, efficient and timely services to the people New Brunswick.
- **Choice and appointment of members of the Commission:** a complete review of the criteria used to appoint members needs to be undertaken, as well as consideration given to the size of the Commission and their mandate.

5. Conclusion

The government of New Brunswick is concerned with the social and economic conditions of all people in New Brunswick and is working to ensure that New Brunswick is an inclusive society. Hence, one of the government's main priorities is to enhance the education, training and employment opportunities for all New Brunswickers. In support of that objective, it is necessary to ensure that there is equality of opportunity and that no person is discriminated against.

The Human Rights Commission is working on many fronts to ensure people are aware of their rights and responsibilities under the *Human Rights Act*, to investigate and deal appropriately with the complaints that are made under the *Act* and to modernize itself so the work can be done as effectively and as efficiently as possible.

