

**THE MANITOBA HUMAN RIGHTS COMMISSION**

**AND**

**HUMAN RIGHTS ADJUDICATION PANEL**

**REVIEW**

**Allan Fineblit  
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## **INTRODUCTION**

People in Manitoba are passionate about human rights. We are, of course, fortunate to have the Canadian Human Rights Museum as a symbol of that passion in our city, but more importantly, the diversity of our population and the diversity of their life experiences means that many Manitobans have experienced first hand, lives without human rights, or at least any effective mechanism to enforce those rights.

Manitoba's Human Rights Commission is a creature of statute, the Human Rights Code (the "Code"). Its broad mandate includes education, promotion and enforcement of human rights in Manitoba. The Commission is staffed by a dedicated group of employees committed to their work and governed by a Board of Commissioners with both a policy role and some hands-on administrative responsibility.

## **MY MANDATE**

Like every organization today, the Manitoba Human Rights Commission (the "MHRC") struggles to do everything in its statutory mandate, to do it well and to be timely and effective in their work. In July of 2018, I was asked by the Minister of Justice to undertake a review of the MHRC with the following mandate:

*The review will be focussed on a number of areas, including:*

- *the role and function of the MHRC staff, Board of Commissioners and the Adjudication Panel. This will include reviewing legislation, how each function in practice and the governance policies/practices they employ.*

- *a review of the current structure and relationship with government to determine if there are alternative models that would allow for greater efficiency and effectiveness. MHRC is required to maintain independence from government in relation to decisions made in specific cases as individual government departments are often the respondent to a complaint. However, MHRC is connected to government as all funding flows from government and it is an inter-related part of the justice system which, if working effectively, can reduce costs elsewhere, including within the department, across other departments and Crown agencies.*
- *a review of the inventory of complaints in process and the process and criteria used to assess, prioritize and manage complaints. MHRC has indicated they have a significant backlog in complaints.*
- *a review of the existing complement of staff and their functions to ensure that the organization is internally effectively aligned to deliver optimal service.*
- *a review of the process for dealing with eligibility (threshold for filing complaints) and carrying matters to adjudication, including consideration of allowing dismissal where other recourse is available.*
- *a review of potential to coordinate resources (i.e., with area or tribunal with similar mandate – e.g., Manitoba Labour Board). This would include a cross-jurisdictional review of similar programs in Canada.*

- *identifying any new initiatives or opportunities to adjust and improve services. Items identified or considered must be cost neutral.*

*This review will be completed and the report will be delivered to the Deputy Minister of Justice and the Deputy Attorney General by December 31, 2018.*

There are two key things to note with respect to my mandate. I was told to think broadly and not to be constrained by the existing legislation. If legislation needs to be amended to make the MHRC better, I was free to recommend that.

Also, I was told clearly that this was not an exercise in saving money. While nothing in this report requires any investment of new resources, I was not on a hunt for cost savings either. The only cost constraint was the final bullet point in my mandate which required new initiatives to be cost neutral.

## **THE PROCESS**

In carrying out this work, I read all of the materials produced by MHRC including its annual reports and the decisions of the Independent Adjudicators that hear Manitoba's human rights cases. I reviewed information about other Canadian human rights commissions and how they do their work. I also met with the Executive Director of MHRC, spoke with the Chair of the Commission, a past Commission Chair, and also met with the Chief Adjudicator and the Assistant Deputy Minister with responsibility for the MHRC. I also spoke with the Chair of the Manitoba Employers Council and heard his views on the intersection of labour and employment dispute resolution with MHRC jurisdiction. Finally I chatted informally with some lawyers who have experience

representing clients who have made complaints or been complained about, to hear their thoughts on process matters generally and the mediation aspect of it in particular.

Every interaction was helpful in understanding the MHRC and also as a sounding board opportunity for new ideas and new opportunities. Through that process, I identified three areas that seemed to be fertile ground for positive change:

1. timeliness,
2. mandate, and
3. adjudication.

## **1. TIMELINESS**

### **a. The problem:**

The MHRC takes too long to resolve complaints. This is unfair to those complained about and to complainants. The timelines from the beginning of the process to the end will vary widely from time to time and from one complaint to the next. It can take years from when a complaint is first made until the investigation is complete. It can take years after a hearing for an adjudicator to write a decision. The average times for a matter to be dealt with are very long.

To be clear, the MHRC is very aware of this issue and has made it a priority to significantly reduce those timelines. When I spoke to the Board Chair she told me about the angst this issue caused her when she was first appointed in 2017 and became aware of the issue, and her commitment to addressing it.

To her credit and the credit of the Executive Director and her staff, impressive progress has in fact been made in one aspect of the process: reducing the time it takes to complete an investigation. At the beginning of 2018, the wait time for an investigation was up to 23 months. There were 364 files opened and under investigation. In response to this, the MHRC made a number of changes including applying greater scrutiny at registration of complaints, tightening up time lines in mediation, triaging complaints, utilizing intake officers to support limited investigations, and better use of support staff. The MHRC hopes that by the end of 2019 the average wait time for an investigation to be completed will be six months. All that said, at present many investigations take far too long and some as long as 15 months to complete.

This is not a problem of how hard the MHRC staff work or how efficiently they do that work. From what I can tell, they are dedicated to what they do and all seem to work very hard at it. They also seem to be efficient in how they do their work.

Is it then a problem of resources? Clearly, adding more staff would enable things to go faster and clearly there are fewer staff at the MHRC today than there were a few years ago. The position of Executive Director was combined with the senior legal counsel position with a view to doing a position reclassification and some other vacancies have not been filled. It would certainly be beneficial to complete whatever reclassification plans there are and regularize the staffing, but, resources, in my view, are not the source of the problem and so adding more resources is not the solution.

The problem is how complaints are required by the Code to be investigated. Some complaints are clearly outside the jurisdiction of the MHRC. Some are clearly

frivolous. Some, even if everything in the complaint were true, do not amount to a breach of the Code. Some are very minor breaches that simply warrant a reminder. By that I mean that there is nothing to be gained by a formal investigation and it is sufficient to acknowledge the breach and create a record of how it was dealt with. Some of those minor breaches offer no opportunity to do anything further as the remedy may already be in place or the issue may have become moot. Some are in the process of being addressed in another forum, or have already been adjudicated elsewhere. Yet, each of these complaints is approached using essentially the same process as is used to investigate the most serious Code breaches. The parties are offered early mediation. If that is declined or unsuccessful, a formal complaint is registered. There may be another attempt at mediation at this stage and if that is unsuccessful, there is an investigation. In an effort to speed up investigations the MHRC has begun to triage complaints and to fast track the disposition of some matters but nevertheless, even in those matters, if the complainant chooses to proceed, the party complained about is asked to complete a response to every allegation contained in the complaint. Outside parties may be interviewed. The outcome of the investigation is analysed by MHRC staff and a report, called an Investigation Assessment Report, is prepared for the Board of Commissioners to consider. A meeting of the Board of Commissioners is convened and the complaint and analysis is reviewed and a decision is rendered. The complaint may be dismissed or referred to an Adjudication Panel. This seems like a very significant amount of resources being devoted to complaints that are *prima facie* without merit, a very low priority, or outside of the MHRC's jurisdiction.

**b. Early dismissal**

Would it not make sense to empower MHRC staff to decline to accept (without investigation) complaints that are frivolous, outside of the MHRC jurisdiction or *prima facie* without merit? What is the value of an investigation and what is the value add of having these make their long journey to the Board of Commissioners?

I asked this question of those I consulted with. Most strongly support a right to dismiss being given to MHRC staff. There was one caveat. Many complainants are unsophisticated. They may be framing their complaint ineffectively because of language, literacy or other impediments. A complaint may seem to be outside the MHRC jurisdiction but after investigation may turn out otherwise.

This is a valid concern. MHRC staff will need to be cautious in using this new authority. It is clear, however, that there are many complaints now being investigated that are a waste of the MHRC's time and resources. Take these out of the system at an early stage and it will make a big difference in timeliness. Devote resources to serious matters that appear to merit an investigation. Those matters will move more quickly and may also benefit from the availability of additional resources to conduct a more thorough investigation where appropriate.

**I recommend that MHRC Director of Investigation and Policy (or designate) be given the authority to decline to investigate a complaint if:**

- **it is frivolous;**
- **it is *prima facie* without merit;**

- **it is outside the jurisdiction of the MHRC;**
- **there is no benefit to undertaking an investigation either because a satisfactory remedy has already occurred or because the appropriate remedy in all the circumstances is a ‘reminder letter’.**

### **c. Streamlining decision making**

There is, however, another step that should be taken to make the investigation process more timely. The Director of Investigations should have the power to dismiss complaints after an investigation or to refer them directly for adjudication without the need for the Board of Commissioners’ approval. What is the value add in the Board of Commissioners’ approval process? It is rare that the staff recommendations are not followed in the current system. Staff who do this work on a daily basis develop great expertise in complaint investigation and analysis which part time Commissioners, even those with strong human rights backgrounds, may not have.

Is this too much power given to one individual given how important human rights issues are? Not really. We already give this authority to administrators and others in a variety of other forums that deal with very important matters. A police officer is given the authority to lay charges for very serious criminal offences. A Crown Attorney can stay a charge of murder without approval by a board of commissioners. Generally speaking, in administrative law, the investigation phase decision making is done administratively and the ultimate hearing phase is adjudicative and done by independent adjudicators. At the MHRC, there are two adjudicative processes, one before the Board of Commissioners

and if the matter is referred to the Adjudication Panel, there is a second adjudication that takes place. That sucks up a lot of time and resources. **I recommend that the Director of Investigation and Policy (or designate) be given the power to dismiss complaints after an investigation or to refer complaints for adjudication directly to the Human Rights Adjudication Panel.**

**d. Review process**

The people I consulted with generally supported the preceding recommendation with one caveat. Since MHRC staff are civil servants and many complaints relate to allegations against the Province, or a government department or official, is there a risk that the Director of Investigations will be seen to be unfairly influenced by their employment relationship with the government?

To address this concern, **I recommend creating a review process for complainants to appeal a decision to dismiss their complaint to a single member of the Board of Commissioners (assigned on a case by case basis by the Board Chair).**

I am not recommending that there be a review of the decision to refer a matter to the Adjudication Panel. That is because the objective is to avoid having an employee of the government (the Director of Investigation and Policy) being seen as biased in favour of their employer (the government). That issue doesn't arise if the decision is to refer the matter an Adjudication Panel.

**I recommend that the review by the single Commissioner be a paper review (not a hearing) and be based on the material before the Director of Investigation and Policy (i.e. no new submissions).**

**Finally, I recommend that the power of the Complaints Review Commissioner be limited to confirming the dismissal of the complaint or referring the matter to the Board of Commissioners to determine if the matter should be referred for adjudication.**

By having a single individual review these matters where a complainant asks for it, it allows for a timely review process but ultimately leaves the power to overturn the Director's decision to the full Board of Commissioners on recommendation of the single reviewing Commissioner. There would be plenty of time available to the Board of Commissioners to perform this function having significantly reduced the role of the Board of Commissioners by eliminating their responsibility for adjudication of every single complaint.

#### **e. Mediation**

As noted, mediation is available both before a complaint is formally registered and once an investigation is underway. I believe that mediation is a very effective dispute resolution tool. A mediated resolution is often quick and it removes the aspect of winners and losers and instead often ends with a win/win outcome. Because the MHRC takes a remedial (rather than punitive) approach to complaints resolution, their mediation process should be an important resource to them. It is clear that other Human Rights Commission's in other jurisdictions place a heavy emphasis on it with good results.

The key to a successful mediation is often the mediator. A good mediator will engage the parties, ensure they feel heard and explore creative resolutions. In Manitoba not enough matters get resolved at the mediation stages. There may be many reasons for this, but one of the comments I have heard is that the mediators do a good job of seeking 'middle ground' and giving the parties a forum to explore resolutions, but stop short of offering 'reality check' advice to parties. If a party is taking an unreasonable position or has unreasonable expectation as to the potential outcome, a good mediator will tell the party what she thinks is likely to happen and try and give that party advice as to what is reasonable and what is not. Failing to do so can in fact empower someone who is being unreasonable and feel to them like validation.

**I recommend the MHRC introduce a 'reality check' role to the mediator's mandate and direct mediators to give their opinion on the merits of the complaint and the likely outcome if it were to proceed to adjudication.**

**f. A word about 'prosecution'**

When the MHRC decides to refer a complaint to an Adjudication Panel, the Commission is required by statute to 'prosecute' the complaint: present the case arguing that a complainant has been discriminated against. The complainant may also participate and retain their own lawyer if they choose to. Does this make sense? Can the Commission comfortably shed its role as an independent investigator and then don the robes of a vigorous advocate for one side?

While this does at first seem a bit off putting, it is not unusual and in the context of a hearing, where the complainant may be limited by resources, language, a

power imbalance relationship, or some other factor, it makes sense not to expect the complainant to be responsible for putting in their own case. As long as the ultimate adjudication is independent (and it is), it meets the threshold for fairness and under all the circumstances, I do not recommend a change in having the MHRC put in the case although I do have a suggestion about how that is done currently.

The position of Executive Director was combined with the senior legal counsel position. There are some good reasons to reconsider that combination. There is an entirely different skill set required of a general counsel position than is required of an Executive Director position. A general counsel plays the role of a lawyer, advising and advocating for the MHRC including representing the MHRC at hearings. The Executive Director position is a senior manager with responsibility for leading the organization, delivering on the statutory mandate and ensuring the services provided are delivered effectively.

There is a second reason why this combined position may not be a good idea. One very important role a lawyer fulfills in any prosecution context is to bring fresh and objective eyes to the matter. Is there a reasonable likelihood of success? Is there an opportunity for settlement? The Executive Director with her other responsibilities under the Code, is not well positioned to play that role and may be too invested in the broader objectives of the MHRC (as she should be) to shed that perspective and bring an objective legal analysis to the matter before her.

There are options that can be considered to accomplish that split. For example, there is another lawyer position at the MHRC that might be a better fit for the

'prosecution' responsibilities now being undertaken by the Executive Director. Another alternative is to contract out the prosecution work to a lawyer or lawyers in private practice. Doing that would enhance the independence, and broaden the pool of expertise available. Also if some of the other recommendations in this report are adopted (in particular those around enhanced mediation), the number of matters going to hearing will drop and so will the cost of external counsel.

**I recommend that the Executive Director position no longer be responsible for the 'prosecution' work at the MHRC.**

**g. Timeliness conclusion**

I believe that the changes I have proposed in the preceding section will have a very significant impact on timeliness and will result in a much faster investigation of complaints without in any way diminishing fairness or effectiveness. Later in the report I have some recommendations that I believe will speed up the adjudication phase as well.

**2. MANDATE OF THE MHRC**

**a. Two hats**

The statutory mandate of the MHRC has two distinct components:

- enforcing the rights and responsibilities in the Human Rights Code through a complaints process;

- promoting human rights and educating the public about the Human Rights Code.

These are both important jobs. Educating people about their rights, promoting equality and fairness and advocating for those facing systemic discrimination will go a long way to prevent discrimination and harassment, which is a far better outcome than trying to fix problems after the fact. The MHRC undertakes an impressive array of activities in those areas. They speak to the media about human rights issues. They participate in multiple human rights events in our communities throughout each year. They provide education sessions on human rights including to educators and to students. They offer online resources and publish information in brochures and pamphlets on important human rights topics. They present targeted education services to a variety of organizations and groups.

The MHRC plays a larger role in promoting human rights. In their 2017 Annual Report they say:

*As Commissioners and staff we participate as speakers and participants at human rights events, because we are human rights advocates. We are privileged to be the organization charged with promoting the fundamental principles in the Code to all Manitobans. We understand the importance of standing up for and along side groups who have been historically disadvantaged. We acknowledge how powerful rallying together as a community can be to establishing shared values and respect, but also to silencing the voices that promote prejudice.*

I agree and fully support the idea that this important work must be done. My question is whether this role is compatible with being an independent investigator of

complaints? How does a person who is the subject of a complaint feel about the person investigating their complaint being a self-proclaimed “human rights advocate”? Do they feel they get a fair and independent investigation?

I asked the people I consulted with about this issue. Some agreed that it was an issue of concern and others did not. Those that disagreed, fairly noted the difference between advocating for human rights (which is hardly a controversial position) and determining if a breach of the Human Rights Code has occurred. You can believe in human rights and not believe every human rights complaint has merit. That makes sense, but my concern is the perception of those engaged in the investigation process (particularly the respondents) and also, whether the human mind is quite that nimble. If you spend your days as a zealous advocate of human rights (a noble and important role) can you flip the switch easily and avoid trying to advance human rights by pushing the limits of a complaint investigation? More importantly, will you be perceived as a fair and neutral investigator? I have concluded not.

I recognize this is a pretty radical conclusion and I struggled mightily with it. My fear was that this might be read as in some way suggesting a diminished need for education or advocacy. I am not saying that. The need is there and it should not be diminished in any way. However, I did conclude that the two roles are a poor fit in the same organization and should be separated. I have identified two options for how that can be accomplished and have framed them as alternative recommendations. Because this is such a big step, and there is no model for it elsewhere, providing options seemed like a good idea:

**Option 1: I recommend that the role of educator, promoter and advocate for human rights be hived off to another organization with a compatible mandate.**

One concern expressed about option 1 among some of the people I consulted with was that it breaks the intertwining of education and investigation/adjudication. I am told that there are many opportunities to use the investigation as an education tool and those might be lost with this radical a split.

If option 1 is being considered there are a number of organizations in Manitoba that might be a good fit for that role. One example is the Manitoba Association for Rights and Liberties. The Manitoba Association for Rights and Liberties is a well established organization with a mandate set out on their website that reads:

*The Manitoba Association for Rights and Liberties is a non-profit, non-governmental, human rights and civil liberties organization. MARL envisions a society where diversity is valued, liberties are respected, and rights are lived. We take action in education and advocacy for human rights and civil liberties towards greater social justice in the Province.*

To me, this might be a very good fit but there are of course other organizations that could be considered as well and I did not obviously consult with any organization about their interest in this role. It might also be possible to split the advocacy and education roles among two different organizations. For example, the Community Legal Education Association has a mandate to do public legal education and already uses some of its resources to do education in the area of human rights.

To be clear, Option 1 **cannot** happen unless equivalent resources now provided to the MHRC are given as a conditional grant to the new provider (conditional on delivering an appropriate level of advocacy, promotion and education work). This is not about saving money, it is about splitting the adjudication and investigation function from the advocacy and education function to ensure there is not actual bias or a reasonable perception of bias in the investigation process.

or,

**Option 2: I recommend that the role of educator, promoter and advocate for human rights be the responsibility of the Assistant Executive Director. The actual work should be done by staff who are not engaged in the investigation or resolution of complaints.**

This option separates the people doing the advocacy from those doing the investigations and if the MHRC is attentive to emphasizing the separate roles and the operational separation in its external communications, it will help to dispel any apprehension of investigation bias.

**b. Other forums**

A provocative issue arose in a complaint that was made to the MHRC several years ago. The complaint dealt with an employment related issue. The employee, "H", whose employment was subject to a collective agreement that forbade discrimination, was terminated from her employment. She did not take advantage of the grievance process available to her under the collective agreement and instead chose to complain

to the MHRC. The complaint was ultimately referred to the Human Rights Adjudication Panel (the “HRAP”)

The respondent argued at the HRAP hearing that the proper forum was a grievance because the essential character of the complaint was an employment issue. That issue was decided by the Adjudicator in the complainant’s favour and the employer sought a judicial review in the Manitoba Court of Queen’s Bench. The reviewing judge determined that the matter indeed was within the exclusive jurisdiction of a labour arbitrator and should not properly have been before the adjudicator for that reason. The MHRC appealed that decision to the Manitoba Court of Appeal and was partly successful in that appeal (the court decided the decision was wrong in the characterization of the essential nature of the dispute but also found the Adjudicator had taken too sweeping a view of her jurisdiction). The employer has now sought leave to appeal to the Supreme Court of Canada. Ultimately we will have an answer to this jurisdiction question from the Courts. That decision will interpret the law as it is, but it will not of course decide what the law should be.

More recently another complaint came to the MHRC involving an employment matter. In that case an employee, “R”, who was the subject of a collective agreement, filed a grievance. The grievance had several stages and after being unsuccessful at the second stage, the employee elected not to move to the next step of the grievance process (an appeal of the step 2 decision) and instead filed a complaint with the MHRC related to the same matter. The complaint made its way to the HRAP and an adjudicator heard the matter, now with the benefit of the jurisprudence in the H matter. The adjudicator applied the legal principle of issue estoppel and decided that the same

issue had already been decided in another forum as a final decision (because it was not appealed), for essentially the same parties.

One of the arguments advanced by the MHRC in the R matter was that the issue that formed the subject matter of the grievance had broad application for employees in similar situation and was really a systemic issue appropriate for a human rights tribunal to weigh in on. The Adjudicator found that whether that was so or not did not overcome the fact that the same party was attempting to re-litigate the same issue and as such he concluded he had no jurisdiction to decide the complaint.

These decisions were decided on legal principles and the facts of those cases. It is reasonable to ask more generally if and when a matter that can be or actually is, fully dealt with in one forum should be adjudicated again at the MHRC. It is a tricky issue because one forum may deal with one aspect of a matter but not necessarily deal with human rights issues. My view is that there is merit in limiting the MHRC's jurisdiction to deal only with complaints that are not already being addressed or that have not already been addressed in another forum. If a matter is being or has been heard in another forum that is where it should be decided and a complainant should not be able to open multiple fronts to address the same matter. The three criteria used in the R decision to determine if issue estoppel applied to those facts are long established principles of law. It makes a lot of sense however to avoid having to investigate these matters and to add them to the list recommended earlier of complaints that the commission can decline to investigate.

I would in fact go farther. Just because another forum may not have dealt with a human rights issue does not mean that decision was inadequate for the MHRC's

purposes. If a reasonable remedy has already addressed the conduct that is the subject of a human rights complaint even without dealing with the conduct from a human rights perspective, the MHRC should be empowered to decline to investigate.

**I recommend that MHRC Director of Investigation and Policy (or designate) be given the authority to decline to investigate complaints that are being or have already been adequately addressed in another forum.**

I reflected on the slightly different issue that is currently before the Supreme Court in the H matter described above. Should the MHRC decline to investigate a complaint where another remedy is available, particularly where that other remedy seems like a more appropriate way to address it? There is a good argument for avoiding forum shopping and for having matters decided in the right place. It would make sense to wait to see if the Supreme Court agrees to hear the matter and if so what it has to say. My inclination however is that that the decision about where to advance a complaint should be left to the complainant. Because I think it is important to see what the Supreme Court has to say on that issue (if anything) I make no recommendation in regard to that specific issue.

### **3. ADJUDICATION**

#### **a. Introduction**

While the adjudication process appears to work well from a fairness and quality of decision making perspective, there are a number of administrative changes that could improve outcomes, timeliness and process efficiency.

The HRAP consists of six individuals (all lawyers at the moment) appointed by the government to adjudicate complaints referred by the MHRC. One of the adjudicators is designated as Chief Adjudicator and aside from herself sitting as an adjudicator, her primary role is to assign adjudicators to hear matters. This latter role is not particularly taxing because under the Code, matters are assigned on a pure rotation basis. The next adjudicator on the list is assigned the next referral.

While the Chief Adjudicator also has responsibility for timeliness of adjudication, she has no meaningful resources available to her to assist in performing that function effectively and pretty much has to rely on the awesome power of nagging. It worked for my mother, but has not always been successful in dealing with long delays at HRAP.

Adjudicators hold a pre-hearing conference. There is no jurisdiction for them to mediate so the conferences are primarily about housekeeping and ensuring that any special accommodation required for the hearing is addressed. The HRAP also has authority to consider the reasonableness of any settlement offer and must terminate a matter if it is determined that the settlement offer was reasonable. The hearings are open to the public and written decisions are produced.

#### **b. Rules**

There are no rules of procedure but hearings take place in a quasi-judicial format. The lack of rules of procedure mean the hearing and pre-hearing practices now vary widely among adjudicators and that is unfair to participants who should be able to know in advance what to expect when they enter the process.

**I recommend that the Chief Adjudicator, in consultation with the other adjudicators, be given the statutory authority to develop a set of rules of procedures to be followed in all HRAP hearings to ensure procedural consistency among the six adjudicators.**

**c. Adjudicator mediation**

There was a strong consensus among the people I consulted with, including the Chief Adjudicator, that there would be great value added by expanding the jurisdiction of the adjudicators to include the power to mediate at the adjudication stage. While mediation is available early on at 2 different stages the view expressed to me was that once it is clear that a hearing is about to commence, the parties may be much more amenable to resolution. Further, mediation by Independent Adjudicators might be more appealing to some, than mediation by MHRC staff. There seems to be little downside to creating this opportunity. A mediated resolution is generally seen as a better resolution than one that is imposed with a winner and a loser.

**I recommend that the jurisdiction of the Independent Adjudicators be expanded to include the power to mediate matters that have been referred to the HRAP.**

**d. Timely hearings and decisions**

Decisions must be rendered within 60 days of the hearing and, if an adjudicator can't do that, s/he must notify the Chief Adjudicator indicating the reasons for the delay and when a decision is expected. If the Chief Adjudicator determines that a

decision has not been rendered in a timely way, the Code permits her to fix a time when a decision must be rendered and if that deadline isn't met, she can revoke the designation (assignment of the matter) and appoint a different Adjudicator. While that sounds like a helpful tool to ensure timely decision making, in reality, once a hearing has taken place it would be grossly unfair to all parties to make them start over as a consequence of delay by the Adjudicator. For that reason the Chief Adjudicator is understandably very reluctant to do it.

An additional risk of delay arises because there is no requirement for when a hearing must commence after a referral from the MHRC. It is left to each Adjudicator to find the time in their schedule that can also accommodate the schedules of the parties.

**I recommend that there be an additional legislative requirement for commencement of the hearing (with some discretion given the Chief Adjudicator to extend that time) so that the hearing must commence within a set time after being referred by the Commission. In my opinion, 90 days is a reasonable time frame.**

**I recommend that the time frame for rendering a decision after the conclusion of a hearing be 60 days (as it now is) with a maximum of one additional 60 day extension from the Chief Adjudicator.**

**I also recommend that the consequence of an Adjudicator failing to meet the time frame for commencement (which the Chief Adjudicator has discretion to extend in appropriate circumstances) or for failing to deliver their**

**decision in the statutory time frame, be removal of that Adjudicator from the HRAP for all future matters.**

While this seems like strong medicine, the experience to date shows that the current tools are not effective and in some cases, adjudication and decision making takes far too long.

**e. One tribunal**

One of the challenges for HRAP Adjudicators is the lack of any support infrastructure. There is no HRAP office or any staff available to assist them. Adjudicators are responsible for all the administrative and logistical work associated with the hearing, which can prove to be quite onerous. Furthermore, it is wasteful, because *ad hoc* infrastructure often is far more expensive and less satisfactory than permanent infrastructure. Given the relatively small number of hearings each year however, it would not be sensible to build HRAP its own infrastructure, but there is an interesting alternative option.

Manitoba has a very large number of quasi-judicial tribunals all performing similar adjudicative functions in similar ways. Many of those have permanent infrastructure including hearing rooms, break-out rooms, security, administrative staff, photocopiers, coffee machines and the like. Some are heavily utilized and others have a lot of excess capacity. It would make sense to create a central tribunal office housing all of that infrastructure under one umbrella and allowing access to it by the large number of administrative tribunals who need it. Doing this would significantly reduce duplication and

waste and significantly expand capacity. This would not require any new resources and in fact would significantly reduce the existing resources which are not now fully utilized.

My mandate does not include other administrative tribunals and quasi-judicial bodies and I obviously can't speak for them, but it is clear to me that this concept would greatly improve the efficiency and effectiveness of the HRAP. **I recommend the government explore the feasibility of creating a central tribunal office to consolidate many of the existing resources, provide support infrastructure to many tribunals and maximize the efficient use of the existing pool of tribunal resource infrastructure.** I feel pretty confident it would produce very significant benefits including significant cost savings for the Province.

I understand there is active discussion about cross-appointing adjudicators from various tribunals (including the HRAP) so they can hear matters from a variety of tribunals. This makes a world of good sense and expands the base of expertise, skills, language fluency and availability of panel members. In my view however, it should go much further. Again, I acknowledge I may be looking well beyond my mandate but **I recommend that the government consolidate a number of compatible administrative tribunals and create a kind of "super tribunal" with jurisdiction to adjudicate on matters from a variety of agencies including the MHRC, with one Chief Adjudicator to coordinate its work and assign hearing panels.**

Examples of tribunals that might have a consolidated appeal body include the Residential Tenancies Commission, the Automobile Injury Compensation Commission, the Manitoba Health Appeal Board, and the Social services Appeal Board.

These are just examples and each would need to be examined in detail to see if this concept would work for them. One tribunal with considerable overlap with the MHRC is the Manitoba Labour Board because a very significant percentage of MHRC complaints involve labour and employment matters. Whether a generic super-tribunal could work for Labour Board matters requires considerable study, but it is worth thinking about because of the overlap.

If a super tribunal is created it would make sense for some adjudicators to be full time and some itinerant (paid on a case-by-case per diem basis). Here are the advantages from the HRAP perspective:

- the Chief Adjudicator could appoint the adjudicator or a panel of adjudicators best suited to a particular matter and draw from a much wider skill set, language set and knowledge base;
- If HRAP adjudicators are given the power to mediate, having super-tribunal adjudicators with mediation expertise specializing in mediation for multiple tribunals would lead to fewer hearings and better outcomes;
- in appropriate cases, the Chief Adjudicator could appoint a panel of three adjudicators instead of a single one;
- adjudicators who hear only one or two matters a year will have the opportunity to sit more often and keep their skills alive and up to date.

I recognize this is a big step but I am confident it is worth exploring. In the meantime however, **I recommend Code be amended to allow the Chief Adjudicator**

**to abandon the mandatory rota system of assigning cases and exercise her judgment in each matter as to which of the six adjudicators would be the best suited to hear the matter.** Different adjudicators have different sets of skills and availability. By giving the Chief Adjudicator the jurisdiction to choose the one best able to hear to the matter at that particular time, we would improve the timeliness and quality of the decision making.

### **SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS**

- 1. The MHRC performs two very important functions both of which deserve the funding and resources they receive.**
- 2. The MHRC staff are dedicated, hard working and skilled. The issues of timeliness relate to legislative structural issues beyond their control and the remedy is structural change not more resources.**
- 3. I recommend that MHRC Director of Investigation and Policy (or designate) be given the authority to decline to investigate a complaint if:**
  - it is frivolous;**
  - it is *prima facie* without merit;**
  - it is outside the jurisdiction of the MHRC;**

- **there is no benefit to undertaking an investigation either because a satisfactory remedy has already occurred or because the appropriate remedy in all the circumstances is a reminder letter.**
- 4. I recommend that the Director of Investigation and Policy (or designate) be given the power to dismiss complaints after an investigation or to refer complaints for adjudication directly to the Human Rights Adjudication Panel.**
  - 5. I recommend creating a review process for complainants to appeal a decision to dismiss their complaint to a single member of the Board of Commissioners (assigned on a case by case basis by the Board Chair).**
  - 6. I recommend that the review by the single Commissioner be a paper review (not a hearing) and be based on the material before the Director of Investigation and Policy (i.e. no new submissions).**
  - 7. I recommend that the power of the Complaints Review Commissioner be limited to confirming the dismissal of the complaint or referring the matter to the Board of Commissioners to determine if the matter should be referred for adjudication.**
  - 8. I recommend the MHRC introduce a 'reality check' role to the mediator's mandate and direct mediators to give their opinion on the**

merits of the complaint and the likely outcome if it were to proceed to adjudication.

9. I recommend that the Executive Director position no longer be responsible for the 'prosecution' work at the MHRC.

10. Option 1: I recommend that the role of educator, promoter and advocate for human rights be hived off to another organization with a compatible mandate.

or

Option 2: I recommend that the role of educator, promoter and advocate for human rights be the responsibility of the Assistant Executive Director. The actual work should be done by staff who are not engaged in the investigation or resolution of complaints.

11. I recommend that MHRC Director of Investigation and Policy (or designate) be given the authority to decline to investigate complaints that are being or have already been adequately addressed in another forum.

12. I recommend that the Chief Adjudicator, in consultation with the other Adjudicators, be given the statutory authority to develop a set of rules of procedures to be followed in all HRAP hearings to ensure procedural consistency among the six Adjudicators.

- 13. I recommend that the jurisdiction of the Independent Adjudicators be expanded to include the power to mediate matters that have been referred to the HRAP.**
- 14. I recommend that there be an additional legislative requirement for commencement of the hearing (with some discretion given the Chief Adjudicator to extend that time) so that the hearing must commence within a set time after being referred by the Commission. In my opinion, 90 days is a reasonable time frame.**
- 15. I recommend that the time frame for rendering a decision after the conclusion of a hearing be 60 days (as it now is) with a maximum of one additional 60 day extension from the Chief Adjudicator.**
- 16. I recommend that the consequence of an Adjudicator failing to meet the time frame for commencement (which the Chief Adjudicator has discretion to extend in appropriate circumstances) or for failing to deliver their decision in the statutory time frame be removal of that adjudicator from the HRAP for all future matters.**
- 17. I recommend the government explore the feasibility of creating a central tribunal office to consolidate many of the existing resources, provide support infrastructure to many tribunals and maximize the efficient use of the existing pool of tribunal resource infrastructure.**

**18. I recommend that the government consolidate a number of compatible administrative tribunals and create a kind of “super tribunal” with jurisdiction to adjudicate on matters from a variety of agencies including the MHRC, with one Chief Adjudicator to coordinate its work and assign hearing panels.**

**19. I recommend Code be amended to allow the Chief Adjudicator to abandon the mandatory rota system of assigning cases and exercise her judgment in each matter as to which of the six adjudicators would be the best suited to hear the matter.**