The Alberta Human Rights Act: Opportunities for Procedural and Policy Reform

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Introduction

It has been 47 years since the centrepiece of Alberta's human rights regime, the Alberta Human Rights Commission, was first formed. In this time, much has changed. While our provincial human rights legislation has been amended and re-articulated on several occasions,[1] it has not been subject to a comprehensive review since 1994.[2] The time has come to re-evaluate our human rights system to make sure it is working effectively for Albertans. The following review, which focuses on the policies and procedures underpinning Alberta's human rights system, has the goal of ensuring our anti-discrimination laws effectively respond to the public's needs, and our evolving understanding of discrimination.

We approach this project via a comparative study that looks at Canada's 14 provincial, territorial and federal anti-discrimination statutes, and their enforcement mechanisms.[3] It reveals that Canadian human rights regimes have been rapidly changing in recent years. Previously uniform practices have fractured, as lawmakers work to effectively allocate scarce resources in ways that promote a public culture of human rights, while protecting their realization for individuals. In light of these transformations, it is worthwhile for Alberta to review its practices and understand how other jurisdictions are dealing with similar issues.

While this report touches on substantive issues (e.g., legal principles), its primary focus is on procedure and the structures that shape how human rights are delivered to Albertans. It is

[1] The current legislation in the *Alberta Human Rights Act*, RSA 2000, c A-25.5 [*AHRA*]; Prior to 2010, the governing legislation in Alberta was the *Human Rights, Citizenship and Multiculturalism Act*, RSA 1980, c H-11.7. Before this legislation was in place, Alberta's human rights was governed by the *Individual Rights Protection Act,* RSA 1980, c I- 2.

[2] Alberta Human Rights Review Panel, *Equal in Dignity and Rights; A review of Human Rights in Alberta* (Edmonton: Alberta Human Rights Commission, 1994) (Chair: JS O'Neill) online: https://archive.org/stream/equalindignityri00albe/equalindignityri00albe_djvu.txt, [https://perma.cc/2YHS-YLU4] [Equal in Dignity]; Alberta Human Rights Commission, *Annual Report 2016-2017* at 2 [Commission Report 2016-2017].

[3] See online: <http://www.aclrc.com/links-to-human-rights-acts-across-canada>.

our goal that this project will complement existing efforts in other law reform bodies who are focused on substantive concerns within Alberta's human rights legislation.

The project is divided into three major parts. Part One deals with the overarching structural policy that frames Alberta's human rights legislation. These structural matters influence all other questions about policy and procedural reform. Our research outlines the considerable debate within Canadian jurisdictions on the best framework by which human rights protection and education ought to be delivered to the public. We review the traditional approach, and outline how influential jurisdictions are moving away from this model. This debate forms the backdrop upon which all questions regarding efficiency and effectiveness in human rights systems occur.

Part Two focuses on discrimination policy within human rights legislation in Canada. It considers the meaning and scope of discrimination, as well as newly emerging grounds of discrimination. This part first focuses on how Alberta has chosen to define "discrimination" and how this compares to other jurisdictions. It then considers the scope of discrimination covered by the *AHRA*, and policy arguments that have been made to extend these grounds. Part Two concludes by considering human rights legislation itself, and reforms could make our laws easier for the public to understand.

Part Three considers a number of discrete processes within Alberta's human rights laws that challenge the public. These processes—which range from time limitations, to vexatious litigants, to reporting obligations,—impact the public in different ways. This section compares Alberta's approach to other jurisdictions, and draws out some best (and worst) practices that could enhance our current regime.

The chapters below reveal that Alberta's human rights system has notable successes and offers immeasurable benefits to the public. Like other jurisdictions, however, our laws suffer from some policy and procedural pitfalls that hinder the effective delivery of human rights. These concerns range from simple to complex, but they all are fixable. To this end, after considering these issues of concern, this report offers recommendations on reform. These recommendations include specific prescriptions, as well as calls for public outreach and stakeholder engagement.

Analytical Framework: Our Perspective on Reform

This report approaches the provincial human rights system from the perspective of the public. It looks at how Alberta's current human rights system challenges the public, and how these barriers can be removed without unduly compromising other social goals.

Members of the public regularly contact Alberta Civil Liberties Research Centre (ACLRC) with questions about human rights policies and processes. They reflect on how the current system either facilitates or hinders their ability to access justice in a transparent and efficient way. Through these conversations, ACLRC has developed an understanding of public perceptions and frustrations with the human rights system. This report uses this insight to craft a way forward for our human rights system. It looks for reform opportunities that enhance public trust and access to justice in the human rights system.

We must emphasize, however, that conceptions of the public should not be static or one dimensional. Our understanding of public is not limited to potential claimants who seek formal dispute resolution. It also encompasses taxpayers, employers, landlords, and service providers who benefit from a culture of human rights in their community, and who have an interest in the just and efficient resolution of claims.

PART ONE: STRUCTURAL POLICY AND THE DELIVERY OF HUMAN RIGHTS

Every province and territory in Canada has an anti-discrimination statute, as does the federal government. (ACLRC's website contains a current list of and links to these statutes.)[4] These 14 systems differ in many ways, but share an underlying theory that human rights are a social good that underpins Canadian society, and that individuals should not be subjected to discrimination. These systems also share a philosophy that human rights are best protected and

[4] See online: <http://www.aclrc.com/links-to-human-rights-acts-across-canada>.

promoted in the community through a combination of education, discussion, and conciliation (as opposed to a punitive approach).[5]

Within that broad understanding, there are a number of different policy decisions that shape public encounters and perceptions of human rights. This section sets out Alberta's overarching human rights policy, and considers competing approaches. It focuses on a broad structural debate at the forefront of human rights reform in Canada.

CHAPTER 1: GATEKEEPING OR DIRECT ACCESS?: DELIVERING HUMAN RIGHTS TO THE PUBLIC

Canada's 14 human rights regimes are given the mandate to protect and promote human rights through a combination of educational and adjudicative powers. These powers are exercised by different human rights bodies, including commissions, adjudicative tribunals, and individual clinics. The existence of these bodies, and the role they are given, greatly impact the processes by which human rights are accessed, recognized, and enforced.[6]

This chapter outlines the two overarching human rights frameworks that exist in Canada (Gatekeeping and Direct Access) and the role given to human rights bodies within each system. It then situates Alberta within these models, and considers how our approach impacts the public. This chapter outlines the challenges and opportunities that exist within the Gatekeeping and Direct Access approaches, as well as some novel approaches. It concludes by offering recommendations for broader stakeholder engagement surrounding potential structural reform.

A. The Gatekeeping Model

The gatekeeping model is the traditional approach to human rights delivery in Canada. Eleven of Canada's 14 human rights systems, including Alberta's, utilize a gatekeeping regime.

[5] Walter Surma Tarnopolsky and William F Pentney, *Discrimination and the Law: including equality rights under the Charter* (Toronto: Thomson Reuters, 2004) at 2.2 [Tarnopolsky].
[6] Pearl Eliadis, *Speaking out on human rights: Debating Canada's human rights system* (Montreal: McGill-Queen's University Press, 2014) at 26 [Eliadis].

This system typically consists of two human rights bodies: a Human Rights Commission ("HRC") and a specialized adjudicative tribunal ("Tribunal").[7]

HRCs are the core institutions of the gatekeeping system. The HRC is given primary jurisdiction to conduct broad public education and engagement on human rights, as well as to resolve individual complaints. Individual complaints are handled by a specific branch of the HRC, which screens, dismisses, investigates, and attempts to settle individual claims. The HRC controls whether and when a complaint should be heard by an adjudicator. If the HRC decides a matter should be sent to a Tribunal, the HRC remains involved by taking carriage of the complaint. This means the HRC brings forward evidence, files and serve documents, and makes arguments in the public interest.

1. Alberta's Gatekeeping Model

Alberta human rights regime is a standard gatekeeping model. In our province, the Alberta Human Rights Commission (AHRC) has the broad mandate to promote and foster equality and reduce discrimination.[8] It is responsible for coordinating human rights programs, promoting respect and awareness of our multi-cultural heritage, conducting research, developing educational programs, and advising the Minister on matters related to human rights.[9] The AHRC fulfills its responsibility through public education and community engagement; inquiry and complaint resolution services; and Tribunal adjudication.[10]

Overall management and administration of the AHRC is the responsibility of the Chief of the Commission and Tribunals (Chief). Individual complaints are handled by a branch of the AHRC administered by the Director of the Commission (Director).[11] The Director and their staff act as gatekeepers throughout the life of a claim. The Director decides whether a complaint

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[7] Gatekeeping systems do not necessarily have these two bodies. For example, Saskatchewan's *Human Rights Code Saskatchewan Human Rights Code, 2018*, SS 2018, c S-24.2 [Saskatchewan *Human Rights Code*] does not have an adjudicative tribunal (ss 34, 35).
[8] *AHRA,* s 16(1).
[9] *Starzynski v Canada Safeway Ltd,* 2000 ABQB 897, aff'd on appeal 2003 ABCA 246, leave to appeal refused leave to appeal refused (2004) at para 70 [*Starzynski*] (this discussion occurred in relation to the mandate provided under the *AHRA*'s predecessor, the *Human Rights, Citizenship and Multiculturalism Act*, RSA 1980, c.H-11.7, s 16, but the mandate remained the same under both pieces of legislation.
[10] Annual Report 2016-2017 at 5; *AHRA,* s 16(1).
[11] *AHRA*, ss 18, 21, 22.

should be accepted,[12] sent to conciliation or investigation,[13] dismissed,[14] or sent to the Tribunal.[15] The Director can dismiss or discontinue a claim at any time if it appears to be without merit, or if the complaining party fails to accept a reasonable settlement.[16]

The Director's decision to dismiss or discontinue a complaint can be appealed to the Chief. The Chief can overrule the Director's decision.[17] Decisions of the Chief are subject to Judicial Review in the Court of Queen's Bench.

In Alberta, a claim proceeds to a Tribunal in two situations: if the Director reports to the Chief that the parties are unable to settle a dispute, or if the Chief overrules a Director's dismissal or discontinuance of a complaint.[18]

The Tribunal is quasi-judicial: it proceeds like a modified courtroom. Adjudicators hear evidence and arguments from the Director (when they have carriage),[19] the Complainant (if they choose to independently advance their case),[20] and the Respondent. Remedies are primarily focused on dignity and education.[21] Tribunal decisions can be appealed to the Court of Queen's Bench.[22]

2. Benefits and Drawbacks of the Gatekeeping Model

The gatekeeping model is premised on several societal benefits:

- It absorbs the cost and procedural complexity of moving a claim forward. By placing the HRC in charge of investigating and moving a claim forward, it ensures meritorious claims can proceed regardless of a complainant's individual circumstances,[23]
- Process is focused on conciliation and settlement. This is more flexible and offers a less intimidating forum than a court-like setting, and

[12] *AHRA,* s 22(1) and (1.1).
[13] *AHRA,* 21(1), 21(2).
[14] *AHRA,* s 22(1)
[15] *AHRA,* s 21.
[16] *AHRA*, s 22.
[17] *AHRA*, s 26(1), (3).
[18] *AHRA,* s 27.
[19] *AHRA,* s 28(a), 29(1).
[20] *AHRA*, s 28(b).
[21] *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307; Clément at 1318.
[22] *AHRA,* s 37.
[23] Clément at 1316, 1330.

- Public resources are used more effectively by saving more expensive forums (Tribunals) for cases with merit that have the potential to impact the public interest.[24]

However, critics have argued that this model does not work in practice. They argue that it:

- Prevents access to justice by screening out too many claims.[25] Claimants are forced to jump through a number of hoops before they access a decision maker.[26] Decisions to dismiss and discontinue complaints can be opaque, driven by budgetary constraints instead of merit, and difficult to successfully challenge in court,
- Disempowers complainants and subordinates their wishes to the public interest,[27]
- Enhances a perception of bias against respondents. The shifting roles played by the HRC can create the appearance that it acts on behalf of complainants. Prior to the tribunal phase, the HRC is impartial,
- Frustrates the public through slow and opaque investigations. Claims can remain in investigative or conciliation stages for months or years with little input or communication with complainants,[28] and
- Is inefficient, expensive, and time-consuming to move through the HRC processes, especially for Respondents.[29]

Like other gatekeeping systems, the Alberta human rights regime suffers from delay and an ever-increasing caseload. In 2016-2017, the average number of days it took the Director to close a complaint (meaning, number of days before being transferred to a Tribunal) was 671.[30] This was an increase over years prior. In 2017-2018, the trend continued with an increase to

[24] Clément.
[25] Eliadis, at 51
[26] Eliadis, at 51
[27] Eliadis, at 36.
[28] Michelle Flaherty "Ontario and the Direct Access Model of Human Rights" in Shelagh Day, Lucie LaMarche, & Ken Norman eds, *14 Arguments in Favour of Human Rights Institutions* (Toronto: Irwin Law, 2014) at 174 [Flaherty].
[29] Eliadis, at 52.
[30] Annual Report 2016-2017 at 11.

771.[31] For the past several years, the AHRC has been receiving and accepting a record number of complaints.[32] Fewer complaints are being closed than opened.[33]

B. Direct Access Model

Starting in 2002, Ontario, British Columbia, and Nunavut have moved away from the gatekeeping model in favour of direct access.[34]

Tribunals are the centrepiece of a direct access system. Complainants file individual complaints directly with specialized adjudicative Tribunals. These Tribunals have a vastly increased caseload compared to the gatekeeping approach.[35] As such, they implement their own filing, screening, mediation and adjudication systems. Tribunals do not advocate for either party, and they largely refrain from public education and outreach.

In direct access, complainants are in charge of pushing their own case forward. There is no administrative body that conducts investigations or takes carriage of claims. There is, however, a third branch added to the human rights system. Human rights clinics and support centres are created to provide legal information, advice, and assistance to complainants. Sometimes, these clinics provide legal representation. They are generally not available to respondents.

HRCs are not involved in screening cases, and in some cases, do not exist at all. British Columbia operated without an HRC for over 15 years, and Nunavut continues to operate without an HRC. If it exists, the HRC is focused on public outreach, education and systemic discrimination.[36] HRCs only overlap with Tribunals if the enabling legislation permits the HRC to intervene or launch public interest cases.[37]

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[31] Alberta Human Rights Commission, *Annual Report 2017-2018*, at 10 online: <https://www.albertahumanrights.ab.ca/Documents/AHRC_Annual_Report_2017_18.pdf> [perma.cc/QD95-2MXB].
[32] Annual Report 2017-2018 at 11.
[33] Annual Report 2017-2018 at 11. We note that the AHRC commenced a "Case Inventory Resolution Project" in March 2019, with the intention of moving forward complaints initiated before January 1, 2019; see: https://www.albertahumanrights.ab.ca/complaints/Pages/before_January_1_2019.aspx
[34] British Columbia moved to direct access in 2002 when it abolished the existing human rights commission. Nunavut adopted direct access in 2003. Ontario moved to direct access in 2008.
[35] Flaherty at 182
[36] Flaherty at 172, 179.
[37] *Human Rights Code*, RSO 1990, c H19, s 35 [Ontario *Human Rights Code*].

1. Benefits of the Direct Access Model

Advocates for direct access argue that it has emerged as the "gold standard" of human rights in Canada.[38] They argue that direct access model is more accessible, efficient, and transparent than gatekeeping. Direct access has reduced processing times, increased access to adjudication, and increased opportunities for claimants to orally present their case before an impartial decision maker.[39] Unmeritorious claims are weeded out early through preliminary motions before the Tribunal. Advocates also claim that user satisfaction has increased over the gatekeeping model.[40]

2. Drawbacks of the Direct Access Model

Critics argue that there are problems with direct access. They claim that this model:

- Shifts the burden of advancing human rights onto society's most vulnerable. Direct access places the cost and time associated with advancing a legal claim on persons who are least able to advance them.[41] They are required to navigate procedural steps of bringing a court-like case, without the institutional assistance of a HRC,
- Relies on legal service clinics that are overburdened and underfunded. Human rights legal centres cannot keep up with demand, and are forced to provide partial legal services while turning many parties away. More parties are unrepresented in direct access systems than in gatekeeping models.[42] Existing Canadian systems provide no assistance to respondents,
- Privatizes human rights by making the dispute a matter between individual parties, while ignoring the public interest and systemic dimension of anti-discrimination policies. This is particularly the case with direct access models that do not have an HRC to advance

[38] British Columbia, Ravi Kahlon, Parliamentary Secretary for Sport and Multiculturalism, *A Human Rights Commission for the 21st Century: British Columbians Talk about Human Rights* (2018) [perma.cc/JZL6-ERQ6] [*BC Talks about Human Rights*]
[39] Eliadis at 97: In Ontario, "the tribunal streams cases that have no reasonable prospect of success through an early "hearing" conducted via telephone conference…In short, the ability to have access to a neutral decision-maker is greater in the Ontario system."
[40] Flaherty at 184-5.
[41] Clément at 1330.
[42] Eliadis at 99.

public interest claims or educate the public on systemic or other anti-discrimination efforts,

- Amplifies procedural hurdles for self-represented litigants. As tribunals increasingly take the form of courts, interim motions and applications threaten to take the place of delays as the biggest problem in the direct access model,[43]
- Confuses access to justice with access to decision makers, and
- Is more expensive to operate than gatekeeping. Expanded Tribunals and new legal support centres demand expensive full time human resources such as registrars, assessors, case managers, lawyers, and decision-makers.

C. Modified or Novel Approaches

Gatekeeping and direct access represent the two models in existence in Canada today. There are, however, significant modifications within these systems, or alternate approaches that fall outside these two models. For example, in 2012 the Wild Rose party campaigned on a promise to remove the human rights system and replace it with a specialized branch of the provincial court.[44]

Saskatchewan and New Brunswick both operate within a gatekeeping system. However, neither jurisdiction has an administrative tribunal focused on human rights. In Saskatchewan, there is no Human Rights Tribunal: claims are sent by the Commission to the Court of Queen's Bench.[45] In New Brunswick, claims to be adjudicated are sent by the HRC to the Labour and Employment Board.[46]

Direct access models do not necessarily use all three human rights bodies. Nunavut operates without a HRC. For over 15 years, British Columbia also operated without a HRC. However, after parliamentary studies reflected on the gaps in human rights service delivery, it has recently re-constituted the HRC in late 2018.

[43] Eliadis at 99.
[44] Eliadis at 14.
[45] Saskatchewan *Human Rights Code,* ss 2(1), 35(1).
[46] *Human Rights Act*, RSNB 2011, c 171, s 23(1) [New Brunswick *Human Rights Act*].

D. Recommendations for Reform

It is often said that justice delayed is justice denied. Like other gatekeeping systems, the Alberta human rights regime suffers from mounting delay and an ever increasing caseload without an associated increase in resources. These inefficiencies negatively impact public perceptions and notions of fairness. They also frustrate respondents and the broader community, as scarce resources are tied up in complaints that can take years to resolve.

It is possible that some of these concerns could be alleviated by a structural shift to direct access. However, direct access has the potential to create as many problems as it cures. Recent mounting delays within Ontario's human rights system[47] demonstrate that direct access is not a cure all for timely resolution of claims.

With these limits in mind, we recommend that:

1. **There be a wide stakeholder engagement on human rights service delivery models in Alberta, specifically focused on the costs and benefits of a switch to direct access.**

   Without widespread stakeholder engagement, it is unclear if Alberta is ready to undertake a widespread structural reform in their human rights system, or if these mounting issues are better handled within our existing approach. Stakeholder outreach on these issues would provide clarity and expertise on the best way forward.

2. **Any discussion regarding a proposed shift to direct access should be premised on maintaining the AHRC.**

   British Columbia's experience demonstrates that Tribunals are not equipped to carry out the broad educational and systemic elements of a human rights mandate.

3. **Any discussion regarding proposed structural reforms maintain a specialized human rights decision making body.**

   Replacing a human rights regime with a purely judicial approach would amplify the weaknesses with the direct access model, and move further away from the educational and non-punitive focus of human rights promotion.

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[47] See, for example: Tribunals Ontario: Social Justice Division "Human Rights Tribunal of Ontario" (Ontario, 2015) online: Social Justice Tribunals of Ontario <http://www.sjto.gov.on.ca/hrto/> [https://perma.cc/8RFT-4ZYY]:"Important Notice: Over past months, parties have experienced service delays at the Human Rights Tribunal of Ontario (HRTO). The HRTO continues to work with the government to improve its services and recruitment is under way to fill adjudicator vacancies. On January 1, 2019, the HRTO became part of the newly created Tribunals Ontario organization. A review will be conducted of all tribunals, including the HRTO, to identify areas for improvement to make services more streamlined, cost-effective and efficient."

CHAPTER 2: ROLES WITHIN THE GATEKEEPING MODEL

Alberta's gatekeeping system operates by assigning different roles to the Chief, the Director, and the Tribunal. The way these roles are executed, and the boundaries between them, shape public accessibility and perceptions of fairness. As outlined below, there is potential for Alberta to reform how these roles interact with one another to enhance public trust and perceptions of justice.

A. Relationship between Commission, Director, and Tribunal

1. Relationship Between the Commission and Tribunal

Alberta's human rights system operates with an unusually close relationship between the AHRC and the Tribunal. Under Alberta's system, the Chief selects the Tribunal adjudicators from "members" of the Commission (individual decision makers who are appointed to the Commission by the Lieutenant Governor in Council).[48] The Chief may also appoint themselves to the panel, except in cases where they considered an appeal from a Director's dismissal of a complaint.[49]

This overlapping relationship between the Tribunal and the Commission only exists in Alberta and Prince Edward Island.[50] It is much more common to see legislated and formal separation between the members of the Commission and an adjudicative decision maker. This separation is important for institutional independence, apprehensions of bias, and procedural fairness. Bodies who investigate a complaint, and find that it does (or does not) have merit, should not then judge the same matter. The relationship between investigative and adjudicative bodies should be separate to ensure there is no real or apparent bias.

In the Direct Access provinces (British Columbia, Ontario and Nunavut), tribunals are completely independent from the Commission. The Commission is not involved in appointing, selecting, or participating in the Tribunal.[51]

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[48] Eliadis at 191; *AHRA,* ss 15(1), 27(2).
[49] *AHRA,* s 26(3).
[50] *Human Rights Act*, RSPEI 1988, c H-12, s 26(2) [Prince Edward Island *Human Rights Act*].
[51] These two entities only overlap if the Commission is given legislative authority to intervene in tribunal cases, or launch their own public interest actions. See, for example, Ontario *Human Rights Code*, s 35.

In gatekeeping provinces and territories, several jurisdictions (Nova Scotia, Manitoba, Northwest Territories, Newfoundland) legislate separation between the members of the Tribunal and members of the Commission.[52] These statutes limit the role a Commission can play in selecting the adjudicators on the Tribunal. For example:

- In Nova Scotia, the tribunal (called Board of Inquiry) is overseen by a Board Chair. The Board Chair is selected from a roster of independently selected lawyers by the Chief Judge of the Provincial Court of Nova Scotia. The nomination is then approved by the Commission.[53] If the Commission rejects the appointment, the Chief Judge selects another Board Chair.
- In Manitoba and Newfoundland, members of the HRC and a separate Tribunal (called a Human Rights Adjudication Panel) are both appointed by the Lieutenant Governor in Council. The adjudicators on the Panel cannot be members of the Commission.[54]
- In Northwest Territories, an Adjudicative Panel is appointed by the Commission on recommendation from the Legislative Assembly.[55] Members of the Panel cannot be members of the HRC.[56] A similar process is in place in the Yukon.[57] However, in the Yukon, the HRC is not involved in the appointment, and there is no statutory prohibition on members of the HRC also being appointed to the Panel.[58]

Other gatekeeping regimes do not explicitly separate the Commission and Tribunal, but they use different structures that ensure separation between the decision makers on a Tribunal and the HRC. For example, in Saskatchewan and Quebec, the Tribunal stage is handled by judges, who cannot be members of the HRC. In New Brunswick, the Labour and Employment Board hears human rights adjudications. The federal system creates separate appointment systems

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[52] *Human Rights Act*, RSNS 1989, c 214, s 32A(3) [Nova Scotia *Human Rights Act*]; *Human Rights Act,* RSNL 2010, c H-13.1, s 36(4) [Newfoundland and Labrador *Human Right Act*]; *The Human Rights Code,* CCSM c H175 s 8 [Manitoba *Human Rights Code*]; *Human Rights Act*, SNWT 2002, c 18, s 48(5) [Northwest Territories *Human Rights Act*].
[53] Boards of Inquiry Regulations, NS Reg 221/91.
[54] Manitoba *Human Rights Code,* s 8(1), 8(2); Newfoundland and Labrador *Human Rights Act*, s 36.
[55] Northwest Territories *Human Rights Act,* s 48(4).
[56] Northwest Territories *Human Rights Act,* s 48(5).
[57] Yukon Human Rights Panel of Adjudicators "About Us" online: Yukon Human Rights Panel of Adjudicators, online: <http://yhrpa.ca>.
[58] Yukon *Human Rights Act*, s 22.

for the Commission and Tribunal, and maintains that the entities are separate and independent from one another.[59]

The *AHRA* deals with concerns about fairness and impartiality by statutorily separating the various roles within the Commission.[60] Different branches of the HRC are not involved in multiple levels of the resolution process.[61] The Director and their staff are responsible for receiving, conciliating, investigating, deciding whether a complaint should proceed, and prosecuting a complaint (when they have carriage).[62] The Director is not, however, involved in adjudication and does not select adjudicators. This task is left to the Chief. If the Chief overturns a decision of the Director, they (along with any other member involved in the review) are disqualified from being on the Tribunal.[63] Likewise, if the Chief overturns the Director, the Director no longer has carriage of the case.[64]

Alberta's approach has been successfully tested in court. In *Starzynski v Canada Safeway Ltd*,[65] the Alberta court of Queen's Bench held that the separate roles performed by the Chief, Director, and Tribunal ensure that the overlap does not create a reasonable apprehension of bias.[66]

Thus, the current system is legally valid. It is not, however, ideal. The Chief, in particular, has overlapping roles in administering the HRC and forming part of the panel which can contribute to public apprehensions of unfairness.

While there have been a number of recent legislative amendments to human rights systems in Canada, none of them are adopting a regime like Alberta's. Indeed, other jurisdictions facing allegations of institutional bias have been saved by the existence of

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[59] *Canadian Human Rights Act,* RSC 1985, c H-6, s 26, s 48.1 [*Canadian Human Rights Act*]; Canadian Human Rights Tribunal, "A Guide to Understanding the Canadian Human Rights Tribunal", at 12, online (pdf): Canadian Human Rights Tribunal: https://www.chrt-tcdp.gc.ca/resources/guide-to-understanding-the-chrt-en.html#Section3-4: [perma.cc/2MZC-8L2Z]
[60] *Starzynski* at para 89.
[61] *Starzynski* at para 77.
[62] *Starzynski* at para 77.
[63] *AHRA*, 27(3); Manitoba *Human Rights Code*, s 32(3).
[64] *AHRA*, 29(1).
[65] 2000 ABQB 897.
[66] *Starzynski* at para 84, 89

safeguards that do not exist in Alberta regime. For example, in *Faro (Town) v Carpenter*[67] the Yukon Supreme Court dismissed allegations of bias against the Tribunal because "adjudicators are not appointed or accountable to the Commission."[68] In Alberta, this is not the case.

2. Relationship between Chief and Director

The relationship between the Chief and Director also challenges public perceptions. The *AHRA* creates separate roles for the Chief and the Director, but requires the Director to report to the Chief.[69] This challenges the perception that the Director operates with independence from the Chief and the adjudicative body.[70]

Reporting relationships between the Director and Chief exist in some, but not all, Canadian jurisdictions.[71] This tends to reinforce some of the weaknesses identified in the gatekeeping model. While legislated separation exits, from the perspective of respondents, the same body investigates a complaint, finds it has merit, prosecutes it, and (through appointment of AHRC members) adjudicates it.

This feeds negative perceptions that the AHRC is biased in favour of complainants. Complainants may also find there is a perception of partiality. If the Chief ruled against their appeal, complainants may apply for relief via judicial review. If the Court rules the Chief acted unfavourably, the Chief will nonetheless be asked to appoint an adjudicative panel. Complainants could perceive this selection as tainted by bias (e.g., the Chief would be perceived as being inclined to select those who may agree with him or her).

B. Recommendations for Reform

Independence and impartiality are crucial to public buy-in of administrative systems. Alberta's current relationship between the Commission and the Tribunal unnecessarily blurs the line between the investigative and adjudicative roles within complaint resolution. Other

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[67] 2008 YKSC 25.
[68] *Starzynski* at para 24.
[69] *AHRA*, s 22(1)(c).
[70] 2017—2018 Annual Report.
[71] Prince Edward Island *Human Rights Act*, s 22(4)(d); Northwest Territories *Human Rights Act, s* 27(1)(e) (Director must give Commission a written report on the status and disposition of complaints each three months or more often as the Commission directs); Nova Scotia *Human Rights Act*, s 26(3)*:* Director is reviewed by the commission. There is no reporting relationship in jurisdictions that have no director (Saskatchewan and New Brunswick). There is no reporting in Manitoba, s 28(1.1) (the Director investigates complaints, then a panel of the Commission considers what to do with the complaint).

jurisdictions provide ample suggestions on alternate approaches that accomplish legislative goals without feeding public perceptions of unfairness. In light of these experiences, this report recommends that:

1. **The *AHRA* be amended to change the relationship between the AHRC and the Tribunal. Specifically, we recommend creating a standing human rights tribunal comprised of individuals appointed in similar manner to the AHRC members, but who are not affiliated or connected to the AHRC.**

2. **The *AHRA* be amended to sever the reporting relationship between the Director and the Chief.**

3. **The HRC engage in more public education about the roles and responsibilities of the Director and the Chief.**

CHAPTER 3: REPORTING OBLIGATIONS AND PUBLIC ACCOUNTABILITY

A. Legislative vs Executive Reporting

In ten of 14 Canada jurisdictions, including Alberta, human rights bodies are accountable to the executive branch of government. This is expressed through reporting obligations to a presiding Minister. Under the *AHRA*, the Chief reports to the Minister of Justice and Solicitor General on an annual basis.[72]

There is, however, an alternate system gaining traction in Canada. British Columbia recently has advocated to join Quebec, Northwest Territories, and the Yukon in requiring human rights bodies to report directly to the legislature instead of a presiding ministry.[73] The last comprehensive review of Alberta's human rights legislation, conducted in 1994, recommended a similar change.[74]

This shift is meant to enhance the independence of human rights bodies, and eliminate political interference in fulfilling a legislative mandate. According to its advocates, reporting to the legislature instead of the executive does a better job of ensuring public accountability.[75] It permits human rights bodies to remain loyal to their mandate, without worrying about executive interference.[76] It builds trust with the public, and guarantees that HRCs are "free to speak the truth through candid commentary on the actions of government and its elected

[72] *AHRA,* s 19.
[73] Northwest Territories *Human Rights Act*, s 21(1); Quebec *Charter*, s 73; Yukon *Human Rights Act*, s 18; *BC Talks About Human Rights* at 19.
[74] Equal In Dignity.
[75] *BC Talks About Human Rights* at 19; Gwen Brodsky and Shelagh Day, *Strengthening Human Rights: Why British Columbia Needs a Human Rights Commission* (December 2014) online (pdf): <https://www.policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2014/12/ccpa-bc_StrengtheningHumanRights_web.pdf>.
[76] Equal in Dignity.

officials."[77] In addition to these arguments, there is some research that suggest reporting to the legislature leads to an increased focus on public concerns.[78]

Perceived political meddling drove the 1994 recommendations for reform to Alberta's human rights legislation. At that time, reform panel members viewed legislative reporting as a necessary mechanism to shield the AHRC from increasingly bold ministerial intervention.[79]

By contrast, advocates for executive reporting argue that it ensures a direct chain of accountability. It allows governments to evaluate efficiency and ensure that bodies are acting in accordance with government priorities.

B. Recommendations for Reform

Human rights protections are a lightning rod for political issues and motives. In order for the public to feel confident in the integrity of their human rights systems, there must be enhanced protections for their independence and accountability. While it is unclear if legislative reporting delivers on its promises, there is value in separating the human rights mandate from the politicized motives of government ministries. We recommend that:

1. **That the *AHRA* be amended to shift its reporting obligations from the Minister of Justice and Solicitor General to the Legislature. We recommend that reporting still take place on an annual basis.**

[77] *BC Talks About Human Rights* at 6.
[78] John Mayne, Stan Divorski, & Donald Lemaire, "Locating Evaluation: Anchoring Evaluation in the Executive or the Legislature, or Both or Elsewhere?" In Richard Boyle & Donald Lemaire, eds, Building *Effective Evaluation Capacity: Lessons from Practice* (Transaction Publishers: New Brunswick, NJ, 1999) 23 at 28.
[79] Equal In Dignity.

PART TWO: DISCRIMINATION POLICY

Part Two of this report considers the policy decisions that impact the scope, definition, and understanding of discrimination in Alberta's human rights legislation. It outlines the Alberta approach to defining and protecting individuals against discrimination, and how our system compares to others in Canada.

Chapter 4 focuses on the *AHRA* itself. It explains why members of the public have difficulty navigating our province's human rights legislation, and how reforms can help people identify what discrimination is, and to whom it applies. Chapters 5-7 focus on specific grounds of discrimination that are emerging as standards across Canada. This reveals that Alberta has among the most limited grounds of protection in Canada, and shows that there are important gaps in our human rights coverage worthy of filling. Chapter 8 briefly discusses the cutting edge of anti-discrimination grounds in Canada. While we do not recommend that these grounds be added to the *AHRA*, there is value for Albertans to understand the trajectory of human rights protections in our country.

CHAPTER 4: LOCATING PROHIBITED CONDUCT

A. Introduction

Alberta's human rights act (*AHRA*) is difficult to read, and it is hard for non-lawyers to identify prohibited conduct. This is the case for two reasons. First, while discrimination is the centrepiece of human rights law, the *AHRA* does not define the term. Second, the *AHRA* describes prohibited conduct, and to whom it applies, in complex, repetitive, and confusing ways. These two issues underscore a general inaccessibility of human rights legislation that impedes the public's ability to understand their human rights. This goes against the spirit of human rights in Canada, and impedes the functioning of a system that is supposed to be accessible without formal legal representation.

This section outlines the basic framework of anti-discrimination laws in Canada, and specifically Alberta. It then considers the impact of the two hurdles outlined above, and outlines how alternate approaches can improve the readably of our human rights legislation.

B. Anti-Discrimination Law and the Meaning of Discrimination

1. General Format of Anti-Discrimination Law

Canadian human rights legislation follows a similar format in its description of prohibited conduct: individuals cannot be discriminated against on certain grounds (for example, gender or race) when they are engaged in certain activities or areas (for example, employment). When a prohibited ground is a factor in adverse treatment that occurred in a protected area, *prima facie* discrimination exists.[80]

In Alberta, the protected areas are:

- statements, publications, notices, signs, symbols, emblems or other representations that are published, issued or displayed before the public;
- goods, services, accommodation or facilities customarily available to the public;
- tenancy;
- employment practices (including applications or advertisements);
- membership in trade unions, employers' organizations or occupational associations.[81]

The protected grounds are:

- race,
- colour,
- ancestry,
- place of origin,
- religious beliefs,
- gender,

[80] *Moore v British Columbia (Ministry of Education),* 2012 SCC 61 (CanLII), [2012] 3 SCR 360.
[81] *AHRA*, ss 3-5,7-9. There are also separate protections for equal pay between men and women (s 6).

- gender identity,
- gender expression,
- age,
- physical disability,
- mental disability,
- marital status,
- family status,
- source of income, and
- sexual orientation.[82]

Justifications or exceptions are set out in subsequent sections. Once *prima facie* discrimination exists, a respondent is given the opportunity to justify their actions via various defences that demonstrate their actions were reasonable and necessary in the circumstances.

In addition, regimes carve out situations where it is permissible to differentiate between people on prohibited grounds. For example, section 4 of the *AHRA* deals with discrimination in relation to services customarily available to the public. It permits differential treatment on the basis of age for seniors facilities, despite the fact that age is a prohibited ground:

> 4 No person shall
> (a) deny to any person…any…services…that are customarily available to the public …because of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or class of persons or of any other person or class of persons.
> …
> 4.2 (2) Section 4 as it relates to age and family status does not apply with respect to a minimum age for occupancy that applies to [seniors facilities]

The framework outlined above provides understanding on how to locate discrimination, but does not provide a meaningful understanding of what discrimination actually is. Unfortunately, most human rights legislation fails to fill in this gap.

[82] *AHRA,* see, for example, the grounds listed in s 7.

2. What is Discrimination?

Eleven of 14 human rights systems in Canada do not provide a comprehensive definition of discrimination. In these systems, ideas about discrimination are created by judges who can draw on purposive or preambular statements in human rights legislation, or from partial and circular attempts at a definition.

a. No Definition or Partial Definition

The *AHRA* does not define discrimination.[83] Its preamble does, however, outline that discrimination laws are guided by matters of equality, dignity, multiculturalism, and diversity. New Brunswick, Ontario and Saskatchewan legislation mirrors this approach.[84]

Some acts provide partial or circular definitions whereby discrimination "includes" but is not limited to, listed behaviours. These definitions are not particularly helpful in meaningfully understanding what discrimination means. For example:

- In British Columbia, Nunavut, Northwest Territories, and Newfoundland and Labrador, discrimination "includes" the prohibited conduct outlined in the Act;[85]
- Prince Edward Island's *Human Rights Act* defines discrimination as "discrimination in relation to [prohibited grounds]";
- The Yukon *Human Rights Act* it is "discriminatory, to treat any individual or group unfavourably" based on the listed prohibited grounds.[86]

b. Full Definition

Only Manitoba, Quebec, and Nova Scotia explicitly define discrimination in their legislation. These definitions reflect developments in case law, but also provide detailed statutory instruction in how the question of discrimination should be approached in each act.

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[83] *AHRA,* New Brunswick *Human Rights Act,* Ontario *Human Rights Code*, and Saskatchewan *Human Rights Code* fall under this approach.
[84] Ontario's *Human Rights Code* draws parallels to discrimination in various substantive sections by referring to the right to "equal treatment" in various circumstances. Section 3 of the *Saskatchewan Human Rights Code* explains that the object of the Act is to promote dignity and equal rights, as well as the elimination of discrimination.
[85] Newfoundland and Labrador *Human Rights Act*; British Columbia *Human Rights Code*; Nunavut: *Human Rights Act*; Northwest Territories: *Human Rights Act.*
[86] Yukon *Human Rights Act,* s 7.

In Manitoba, discrimination is given a lengthy definition reproduced in the Appendix to this Report. An excerpt of it states:

> (a) differential treatment of an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit; or
>
> (b) differential treatment of an individual or group on the basis of any characteristic [related to a prohibited ground]; or
>
> (c) differential treatment of an individual or group on the basis of the individual's or group's actual or presumed association with another individual or group whose identity or membership is determined by any characteristic referred to [related to a prohibited ground]; or
>
> (d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred [related to a prohibited ground] differential treatment based on actual or presumed membership with a group of persons rather than the basis of personal merit, or differential treatment on the basis of having a characteristic in the prohibited grounds.[87]

This detailed definition is further explained by a number of subsections that list prohibited grounds, and then shape the scope of the definition in different circumstances.

> **Applicable characteristics**
> 9(2)The applicable characteristics for the purposes of clauses (1)(b) to (d) are:
>
> (a) ancestry, including colour and perceived race;
>
> …
>
> (m) social disadvantage.
>
> **Discrimination on basis of social disadvantage**
> 9(2.1) It is not discrimination on the basis of social disadvantage unless the discrimination is based on a negative bias or stereotype related to that social disadvantage.

Nova Scotia adopts a slightly different approach. Its definition is comprehensive but less detailed in explaining its exceptions. It states:

> 4 For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, [related to a prohibited ground] that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon

[87] Manitoba *Human Rights Code,* s 9(1).

> others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.[88]

Quebec's definition is the least detailed. It states:

> Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap. Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.[89] (Emphasis added.)

3. Judicial Definitions of Discrimination

Without legislative guidance, judges across Canada have assumed a primary role in defining the meaning and scope of discrimination. The Supreme Court of Canada ruled in *Moore v British Columbia (Ministry of Education)*[90] that *prima facie* discrimination exists in human rights when following three step inquiry is satisfied:

1. An individual has a characteristic protected from discrimination under the [relevant Human Rights Act];
2. They experienced adverse impact with respect to [a proscribed area]; and
3. The protected characteristic was a factor in the adverse impact.[91]

Relying on a judicial definition makes it difficult for non-lawyers to access an understanding of the test.

In addition, the content of this three-part test has been blurred in recent years, to the detriment of human rights claimants.

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[88] Nova Scotia *Human Rights Act*, s 4.
[89] *Quebec Charter,* s 10.
[90] 2012 SCC 61 (CanLII), [2012] 3 SCR 360 [*Moore*].
[91] *Moore* at para 33. For more background on the development of this approach, see O*ntario Human Rights Commission and O'Malley v Simpsons-Sears*; *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights),* [1999] 3 SCR 868; *British Columbia (Public Service Employee Relations Commission) v BCGEU*, [1999] 3 SCR 3 (SCC).

4. Problems Stemming from the Judicial Definition

Judges are asked to define discrimination in both human rights legislation and the *Canadian Charter of Rights and Freedoms*.[92] Section 15 of the *Charter* protects persons from discrimination as a result of government action.[93] Thus, section 15 and human rights legislation partially overlap.

Charter tests for discrimination change quite regularly, and currently require a person to demonstrate that a legal distinction exists which "create[s] a disadvantage by perpetuating prejudice or stereotyping."[94] This test, which is more onerous than the one adopted in *Moore* for human rights acts, has been interpreted as requiring the claimant demonstrate that the respondent acted arbitrarily.[95]

In various judicial decisions, this idea of arbitrariness has migrated from *Charter* cases into the human rights sphere. In other words, the ambiguity regarding what discrimination means has resulted in importing an arbitrariness element into the three-part *prima facie* discrimination test. This has raised the bar for human rights claimants to demonstrate that discrimination exists.

In *Stewart v Elk Valley,*[96] the Supreme Court of Canada partially addressed the issue, but it did not eliminate the problem. It held that there was no stand-alone obligation on human rights claimants to prove arbitrariness or stereotyping. Instead, "[t]he goal of protecting people from arbitrary…treatment…is accomplished by ensuring that there is a link or connection between the protected ground and adverse treatment."[97] In other words, judges now treat arbitrariness as being built into the third stage of the *prima facie* test from *Moore.*

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[92] *Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 1 [*Charter*].
[93] *Charter,* s 15(1): Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
[94] *R v Kapp*, [2008] 2 SCR 483 at para 17.
[95] Jennifer Koshan, "Under the influence: Discrimination Under Human Rights Legislation and Section 15 of the Charter" (2014) 3:1 Can J Hum Rts 115; Jennifer Koshan and Jonnette Watson Hamilton, "The Continual Reinvention of Section 15 of the Charter" (2013) 64 UNB LJ 19.
[96] 2017 SCC 30 [*Stewart*].
[97] *Stewart* at para 45.

5. Systemic Discrimination

Systemic Discrimination refers to differential treatment that transcends individual encounters. It is linked to structural inequalities that form part of a larger culture, and which creates or perpetuate pervasive disadvantage. Systemic discrimination recognizes the fact that discrimination is not always a discrete, one-off event and should not be treated as such.

Many human rights acts in Canada give their HRCs the authority to combat systemic discrimination (or factors which embody systemic discrimination) through their educational or public interest investigatory mandates.[98] This institutional mandate is important, as the nature of systemic discrimination makes it unlikely to be adequately addressed through an individual complaint process alone. However, most legislation does not define the term.

Without a statutory definition, the term is defined by reference to the common law. Common law attempts to define systemic discrimination have been uneven and inconsistent in practice. In Alberta, it has tended to blur with the similar, but distinct, concept of "adverse effects" discrimination, which clarifies that discrimination need not be intentional in order to run afoul of human rights codes.[99] In general, Alberta courts have not considered systemic discrimination in detail.[100]

This gap in understanding can compromise an HRC's ability to address systemic discrimination. Without a clear understanding of what systemic discrimination is, it is difficult for an HRC to adequately combat the practice through their educational or public interest investigatory mandates.

Manitoba stands out as an example of a province that has chosen to define systemic discrimination in its legislation.[101] It defines the term as:

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[98] [legislative overview]

[99] See, for example, *Grover v Alberta (Human Rights Commission*) 1999 ABCA 240, at para 8 "[W]e are of the view that systemic discrimination, if established, is merely part of the bundle of evidence that may prove adverse impact upon the complainant." It should be noted that the leading case on systemic discrimination is *Canadian National Railway v Canada (Human Rights Commission)*, [1987] 1 SCR 1114, viewed systemic discrimination as an example of adverse effect discrimination. For more discussion of systemic discrimination in case law, see *Crockford v British Columbia (Attorney General),* 2006 BCCA 360 at para 49; *Brar v BC Veterinary Medical Association,* 2015 BCHRT 151 at paras 746-750.

[100] For an exception, see *Laidlaw Transit Ltd. v. Alberta (Human Rights & Citizenship Commission),* 2006 ABQB 874.

[101] Another exception is found in Yukon's *Human Rights Act*, which defines systemic discrimination as follows: "Any conduct that results in discrimination is discrimination" (s 12).

> 9(3) Interrelated actions, policies or procedures of a person that do not have a discriminatory effect when considered individually can constitute discrimination under this Code if the combined operation of those actions, policies or procedures results in discrimination within the meaning of subsection 1.

This definition provides clarity, which is particularly important within Manitoba's human rights regime, because it's HRC is empowered to launch its own investigations (a concept discussed in more detail in Chapter 10 below).

6. Recommendations for Reform

The arbitrary element significantly raises the bar for real or potential human rights claimants. Claimants in a human rights case have a difficult time proving the arbitrariness of someone else's conduct. The question of arbitrariness is better directed to the respondent who is alleged to have acted with discrimination.

As such, we recommend that:

1. **The *AHRA* be amended to define discrimination. A clear definition, in line with Manitoba's approach, represents the gold standard that the *AHRA* can use as a model.**

   This can eliminate the ambiguity and elevated burden placed on claimants as a result of judicially blurred definitions of discrimination. It not only provides a detailed definition of what discrimination is, it possesses subsections that explain the limits and scope of the word in different circumstances.

2. **The *AHRA* should be amended to define systemic discrimination.**

   A definition of systemic discrimination can assist stakeholders and decision makers in advancing and supporting cases that engage systemic issues. It also serves to better educate members of the public on the systemic dimensions of discriminatory conduct. Should Alberta choose to empower its Commission to launch its own investigations, a definition of systemic discrimination provides statutory footing for it to tackle conduct that otherwise would not be captured by an individualized complaint process.

C. The Meaning of Employment

1. Wide vs Narrow Interpretations

The *AHRA* prohibits discrimination in employment practices, and in advertisements regarding employment.[102] It does not, however, define employment, employee, or employer. Without a definition, interpretation of these terms falls on the common law.

The term employment has a long legal history in common law that is built upon so-called "master and servant" relationships.[103] It has rigid requirements, and would often exclude, for example, independent contracting relationships. When considered in the context of human rights legislation, however, judges have tended to relax strict requirements of what constitutes "employment". This more generous understanding focuses on the element of *control* a would-be employer had or has over a human rights complainant, or whether a would-be employer *utilized* the complainant's services (the "control" or "utilization" test). This has helped to advance the remedial goals of human rights legislation by focusing on the substance of relationships, rather than their form. In practice, this means that a relationship that may not be considered "employment" for tax purposes may nonetheless be considered employment within human rights legislation.

The following cases provide examples of this extended understanding. These cases locate an "employment" relationship for human rights purposes, based largely on the notion that the respondent exercised "control" over or utilized the services of the complainant. In non-human rights contexts, these relationships would be less likely to be considered to fall under the umbrella of employment :

- A taxi driver-owner and taxi company.[104]
- A regular customer of the complainant's employer and the complainant.[105]
- An actress auditioning for a movie role and a film production company.[106]

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[102] AHRA, ss 7, 8.
[103] *Lockerbie & Hole Industrial Inc v Alberta (Human Rights and Citizenship Commission, Director),* 2011 ABCA 3, [2011] AWLD 1159 at para 13 [*Lockerbie*].
[104] *Sharma v Yellow Cab Ltd.* (1983), 4 CHRRD/1432 (BCHRT); *Pannu v Prestige Cab Ltd.* (1986), 47 Alta LR (2d) 56 (CA).
[105] *Jalbert v Moore* (1996), 28 CHRR D/349 (BCCHR).
[106] *Fernandez v MultiSun Movies Ltd.* (1998), 35 CHRR D/43 (BCHRT).

- An applicant for volunteer training and a feminist organization sponsoring the training.[107]
- A live-in caregiver and the brother of the patient.[108]
- A police officer (considered at common law to be a public officer rather than an employee).[109]
- An army cadet and Canada's armed forces.[110]
- A cook hired by a company to cook for its only customer, and the customer.[111]

Recent influential decisions have, however, been narrowing the understanding of what constitutes an employment relationship within human rights legislation. For example, *Lockerbie & Hole Industrial Inc v Alberta (Human Rights and Citizenship Commission, Director)*[112] held that subcontracting situations do not necessarily create an employment relationship. The complainant in that case was a long-time employee of Lockerbie & Hole (Lockerbie). Lockerbie transferred the complainant to work on a Syncrude site, as part of a relationship with their general contractor (Kellogg, Brown and Root). Syncrude required contractors to do drug tests, which the complainant failed. The complainant argued that he was discriminated against on the basis of a disability, and that Syncrude was his employer. The complaint initially failed on the discrimination claim, but the case was appealed to the Court of Queen's Bench and the Court of Appeal on the question of employment.

The Court of Appeal held that Syncrude was not an employer. In the Court of Appeal's view, it is very rare to find a case where an employee had two employers.[113] While there was control and utilization of a worker's services, there was not a sufficient nexus between the parties. In place of this control or utilization test, the Court imposed a number of contextual factors that can operate to narrow the range of relationships that can be considered employment.[114] Under

[107] *Nixon v Vancouver Rape Relief* Society *(*2002), 42 CHRR D/1 (BCHRT), reversed on other grounds *Nixon v Vancouver Rape Relief Society,* 2003 BCSC 936, affirmed *Nixon v Vancouver Rape Relief Society* (No. 2) (2005), 42 CHRR D/20 (BCCA), leave to appeal to S.C.C. refused SCC No. 31633 February 1, 2007.
[108] *Milay v Athwal (No. 1)* (2004), 50 CHRR D/386 (BCHRT).
[109] *Re Prue* (1984), 33 Alta LR (2d) 169 (QB).
[110] *Canada (Attorney General) v Rosen,* [1991] 1 FC 391 (CA).
[111] F*ontaine v Canada Pacific Inc.*, [1991] 1 FC 571 (CA*).*
[112] 2011 ABCA 3, [2011] AWLD 1159.
[113] *Lockerbie* at para 21.
[114] *Lockerbie* at para 25.

these considerations, the complainant's relationship with Syncrude was too remote to be considered employment.

In *McCormick v Fasken Martineau DuMoulin LLP*,[115] the Supreme Court of Canada also adopted a narrowed vision of employment relationships. *McCormick* dealt with a partner at a law firm who argued that the mandatory retirement clause in his partnership agreement constituted age discrimination. The Supreme Court of Canada held that partnerships were not employment relationships, and thus fell outside the governing human rights legislation.

The Supreme Court agreed that employment in human rights cases is broader than other areas of law. They applied a control/dependency test,[116] but found that partnerships were not employment relationships. In reaching their decision, the Court noted that other jurisdictions that chose to include partnerships under their human rights legislation did so by expressly adding them to their remedial statutes.[117]

This narrowed approach to employment allows entities to structure their work relationships to avoid human rights legislation. As *Lockerbie* demonstrates, this is a particular concern in vertical subcontracting arrangements, where a worker is under the "control" of several entities, all of which utilize their services, but none of whom may attract human rights protections. As *McCormick* sets out, however, it is also a concern in horizontally structured relationships. Human rights and other remedial legislation is meant to redress discrimination and educate the public. It has a deliberately broad scope that is focused on substance, not form. These recent decisions threaten to undermine this purpose.

2. Recommendations for Reform

1. **We recommend that the AHRA define employment, and specify that partnership and contracting relationships fall within the purview of the Act.**

[115] 2014 SCC 39 [*McCormick*]
[116] *McCormick* at para 23.
[117] *McCormick* at para 36.

D. Structural Issues and Readability

1. Alberta's Approach to Prohibited Conduct

Under the *AHRA*, prohibited conduct is organized by the different areas where individuals are given protection. Each protected area is listed in a separate section, followed by a listing of the prohibited grounds of discrimination that apply in that case. Individual justifications, partial exceptions, or "carve outs" for each protected area are explained individually in subsequent sections. For an example of this approach, see the excerpt of s 4 of the *AHRA* earlier in this chapter.

While other jurisdictions (British Columbia and Ontario, among others), adopt this approach, it is difficult to understand and results in considerable duplication. For example, the *AHRA* re-lists the same prohibited grounds for each protected area (6 times). Exceptions and justifications are scattered throughout the legislation, rather than in a single location.

Some jurisdictions in Canada structure their human rights legislation in a way that is easier for the public to read and understand. For example, many systems provide a comprehensive listing of all prohibited grounds of discrimination either in the definition section,[118] or elsewhere at the statute's outset.[119] Subsequent sections describe the protected areas and exceptions are listed in one section.

Manitoba's *Human Rights Code* provides an exemplary example of this approach. Section 9,[120] produced above, comprehensively defines discrimination, lists the protected grounds of discrimination, and lists exemptions that apply in certain situations.

Nova Scotia provides another exceptionally clear example. Section 5 of the Nova Scotia human rights act lists all prohibited grounds and protected areas in one easy to read location. Section 6 then sets out exemptions:[121]

> 5 (1) No person shall in respect of
> (a) the provision of or access to services or facilities;
> (b) accommodation;

[118] Prince Edward Island *Human Rights Act* s 1(d); Saskatchewan *Human Rights Code*, s 2(m.01).
[119] Manitoba *Human Rights Code* 9(2); Newfoundland and Labrador *Human Rights Act*, s 9(1); Yukon *Human Rights Act*, s 7; Northwest Territories *Human Rights Act* s 5(1); Nunavut *Human Rights Act*, s 7(1); *Canadian Human Rights Ac*t s 3(1); *Quebec Charte*r, s 10; New Brunswick, s 2.1
[120] Manitoba *Human Rights Act*, s 9.
[121] Nova Scotia *Human Rights Act,* s 5:

…
(g) membership in a professional association, business or trade association, employers' organization or employees' organization,

discriminate against an individual or class of individuals on account of

(h) age;
(i) race;
(j) colour;
…
(u) political belief, affiliation or activity;
..

6 Subsection (1) of Section 5 does not apply
(a) in respect of the provision of or access to services or facilities, to the conferring of a benefit on or the providing of a protection to youth or senior citizens;
…

Manitoba and Nova Scotia's approach permits the same degree of flexibility as that required by the *AHRA*, but does so in a way that is much more accessible to the public.

2. Recommendations for Reform

We recommend that:

1. **The AHRA be reorganized to list all protected grounds, areas, and exceptions in a single, clearly delineated area. These grounds, areas, and exemptions should not be repeated on several occasions.**

   Manitoba and Nova Scotia's approach serve as exemplary examples of how to achieve this goal in a way that is readable to members of the public.

CHAPTER 5: CRIMINAL HISTORY

This section considers the policy arguments for and against adding criminal history as a protected ground of discrimination. After defining criminal history and providing a brief rationale for its inclusion in human rights legislation, this chapter compares Alberta's approach with other Canadian jurisdictions. It then considers how courts have treated this ground of discrimination, and how this should influence future reforms.

A. Why Include Criminal History as a Prohibited Ground of Discrimination?

Many Canadians face barriers in accessing employment, housing, and other services because of past criminal encounters.[122] Having a criminal history creates a paper trail that can make it more difficult for individuals to integrate and succeed in society. This exclusion, in turn, makes it more likely for further criminal encounters to pile up.

A person's criminal history includes various recorded police encounters that fall short of conviction. It is alarming that charges that did not result in convictions, regulatory offences,[123] pardons, and a variety of informal police interventions that were diverted for (among other things) mental health reasons, can also follow a person for their entire life.

For these reasons, several jurisdictions have added criminal history to their prohibited grounds of discrimination.

This concern must, however, must be balanced against other members of the public (including employers and landlords) who argue they have a valid interest in knowing who they are dealing with. To satisfy these competing interests, criminal history discrimination is more narrowly tailored than most prohibited grounds of discrimination. These tailored provisions have also been strictly construed by courts. As a result, there are multiple mechanisms that can and do limit the scope and perceived risk of adding criminal history as a ground of prohibited discrimination.

[122] Heather Rose & Glenn E. Martin, "Looking Down Civil Rights: Criminal Record-Based Discrimination" (2008) 2:1 Race/Ethnicity: Multidisciplinary Global Contexts 13 at 18.
[123] *Purewall v ICBC,* 2011 BCHRT 43 (CanLII).

B. Comparative Statutory Overview of Protection

Only five jurisdictions in Canada completely exclude criminal history as a prohibited ground of discrimination: Alberta, Saskatchewan, New Brunswick, Nova Scotia, and Prince Edward Island. Manitoba's *Human Rights Code* does not list criminal record as a protected ground, but its Human Rights Commission will accept complaints on this basis.[124]

Eight of 14 jurisdictions in Canada provide some form restrictions on discrimination based on a person's criminal conviction.[125]

The scope of coverage among the eight jurisdictions that recognize criminal history varies widely. All jurisdictions tailor their criminal history protection to a narrowed subset of situations:

- One way coverage is modified deals with the areas of protection. British Columbia, Ontario, Quebec, and Newfoundland and Labrador provide protection only in certain areas. In these jurisdictions, protection is focused on employment, and/or membership in trade unions or other employment organization.
- Coverage is also limited by the specifics of one's criminal history. Several jurisdictions only protect individuals in relation to a criminal history that has been pardoned or suspended. Others focus on whether the criminal history is unrelated to the area of coverage, or if it related to a less serious offences.

These two limitations interact in different pieces of legislation:

- The Yukon *Human Rights Act* provides the broadest level of coverage. It prohibits discrimination in all areas on the basis of "criminal charges or criminal record".[126] In employment settings, however, discrimination does not exist if it is based on reasonable

[124] Linda McKay-Panos, "Human Rights Laws and Inclusion of New Grounds- Criminal Record" (2017) *LawNow* 41(6) (5 July 2017) online: <https://www.lawnow.org/human-rights-laws-and-inclusion-of-new-grounds-criminal-record/>[McKay-Panos]; *Penner v Fort Garry Services Inc*, 2009 CarswellMan 641(Man Bd of Adj).
[125] British Columbia *Human Rights Code*, s 13, 14; Ontario *Human Rights Code* s 10; Quebec *Charter* s 18.2; Newfoundland and Labrador *Human Rights Act*, s 14; Northwest Territories *Human Rights Act*, s 5*;* Nunavut *Human Rights Act* s 7; Yukon *Human Rights Act* s 7(i), *Canadian Human Rights Act*, s 3.
[126] Yukon *Human Rights Act*, s 7(i).

requirements or qualifications for employment and a criminal record or criminal charges relevant to the employment

- The *Canadian Human Rights Act* prohibits discrimination on criminal records in all areas, but only for convictions which have been pardoned or which a record suspension has been ordered".[127] Northwest Territories and Nunavut adopt a similar approach.
- The *British Columbia Human Rights Code* only protects persons from discrimination in employment and membership in unions or trade associations. In those cases, discrimination is prohibited where a past conviction is unrelated to the employment or to the intended employment of that person.[128]
- The *Ontario Human rights Code* protects persons from discrimination based on their "record of offences" only in employment. A "record of offences" means a conviction that has either been pardoned, or which flows from a provincial enactment (meaning, not brought under the *Criminal Code* or another federal law).[129]
- The Quebec *Charter of Human Rights and Freedoms* provides protection in the area of employment, so long as the convictions not related to the employment position.[130]
  The Newfoundland and Labrador *Human Rights Act* provides that "An employer, or a person acting on behalf of an employer, shall not refuse to employ or to continue to employ or otherwise discriminate against a person in regard to employment or a term or condition of employment….because of the conviction for an offence that is unrelated to the employment of the person."[131]

C. Case Law Considerations

Case law on criminal history as a ground of discrimination almost exclusively deals with employment. All eight jurisdictions that address criminal history provide some level of protection as it relates to employment. However, the scope of this coverage is not absolute, and courts have strictly construed its protection. The case law below addresses how human

[127] *Canadian Human Rights Act*, s 3.
[128] British Columbia *Human Rights Code*, ss 13, 14.
[129] Ontario *Human Rights Code*, s 10.
[130] Quebec *Charter,* s 18.2.
[131] Newfoundland and Labrador *Human Rights Act*, s 14.

rights laws are used to balance concerns for discrimination with employer concerns. It also highlights some pitfalls that should be avoided in future reforms.

1. "Relatedness" and Bona Fide Occupational Requirements

Statutes in British Columbia, Quebec, Yukon, and Newfoundland and Labrador only prohibit criminal history discrimination where it is unrelated to the employment position. This means that differential treatment is permitted where it is related to the job that is sought. For example, if a person has been convicted of embezzlement from a bank, employers or potential employers would argue that this is related to a job that requires financial management.[132]

While this approach has a common-sense appeal, it is arguably unnecessary. Human rights law already has mechanisms to address the requirements of an employment opportunity.

In answering the question on "relatedness", many jurisdictions follow a test set out in *McCartney v Woodward Stores Ltd.*[133] In that case, an employee was fired after working for a year as a stockroom clerk when a security check was conducted prior to his promotion. The check revealed a shoplifting charge nearly a decade earlier, which the employee lied about when he had originally applied for the stockroom position.

The Board set out the following guidelines for determining whether there was a "relationship", for human rights purposes, between employment and prior criminal charge:

1. Does the behaviour for which the charge was laid, if repeated, pose any threat to the employer's ability to carry on its business safely or efficiently?
2. What were the circumstances of the charge and the particulars of the offence involved?
3. How much time has elapsed between the charge and employment decision? What has the individual done during that period of time? Has he shown any tendencies to repeat the kind of behaviour for which he was charged? Has he shown a firm intention to rehabilitate himself?[134]

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[132] McKay-Panos.
[133] *McCartney v Woodward Stores Ltd* (1982), 3 CHRR D/1113 (BC Bd Of Inquiry); 4 CHRR D/1325 (BCSC) [*McCartney*].
[134] *McCartney v Woodward Stores Ltd* (1983), 145 DLR (3d) 193; 43 BCLR 314, 1983 CanLII 444 (BC SC) at para 9.

These inquiries have been adopted and followed in many other criminal history discrimination cases, both in British Columbia and in other jurisdictions.[135] For jobs that require an element of public trust, the relatedness test is broader. Criminal histories which are not strictly relevant to the actual requirement and duties of these jobs may still be relevant.[136]

This concern about "relatedness", is, however is already addressed by limitations that are common to all human rights legislation. All human rights systems in Canada limit discrimination claims in employment based on a *bona fide* occupational requirement or qualification ("BFOR"). BFORs are job requirements that are imposed by an employer in good faith which are necessary for the safe, efficient and economical performance of the job. Part 1 of the *McCartney* test is largely a re-articulation of a BFOR. Actions that threaten the safety and efficiency of a business are essentially *bona fide* occupational requirements.

Thus, human rights law already addresses employer concerns via the BFOR analysis. Trustworthiness (as expressed by a lack of a criminal record) would also be considered a BFOR in the embezzlement example above.

Importing a relatedness element into human rights legislation is not harmful to criminal history protections, but it largely duplicates protections that already exist.

2. *Incongruence with Strict Construction*

Courts treat the parameters of criminal history discrimination very strictly. In cases where statutory protections are very narrowly defined, this has led to counterintuitive results that are contrary to common sense.

This is particularly evident in Ontario, where "record of offences" only protects persons from pardoned criminal convictions, or offences from provincial enactments. In *Best v Home Trust Company*[137] and *Bretti v Dominion New Energy Inc. o/a DNE Resources*[138] the Ontario Human Rights Tribunal dismissed cases because the complainants were never actually convicted of an offence. In *Bretti*, the complainant was charged but acquitted of an offence at

[135] *O (BA) v New Westminster (City)* (1989), 11 CHRR D/400 (B.C. Human Rights Council); *Pater v Strata Plan VIS 4136*, 2018 BCHRT 177 at para 40; *Purewall v ICBC,* 2011 BCHRT 43 (CanLII).
[136] *Griffiths v Coquitlam (District)* (1988), 10 CHRR D/5852 (BC Hum Rts Council).
[137] 2017 HRTO 305 (CanLII).
[138] 2018 HRTO 594 (CanLII).

trial. In *Best,* the complainant's background check came back "not clear" although he had never been convicted of any offence. Both alleged that they were denied employment because of these background checks.

Both cases were dismissed by the Ontario Human Rights Tribunal for lack of jurisdiction. Since neither complainant had been convicted of an offence (much less convicted and pardoned), the Tribunal could not hear the case.

The approach advanced by Ontario (and also the federal system) thus can lead to bizarre outcomes, whereby the complainants would have been in a better position (for human right purposes) had they been convicted of an offence. This is not behaviour society wants to encourage, and should be avoided by any future reforms. Indeed, it is worth noting that Ontario sought to pass a Bill in 2017 that would extend human rights protections to include "police records", but that this bill was never passed.[139]

3. Other Relevant Case Law that Protects Employers

In *Québec (Commission des droits de la personne et des droits de la jeunesse) c Maksteel Québec inc,* the Supreme Court of Canada explained that discriminatory protections (at least in Quebec), are meant to protect individuals from the unjustified social stigma and exclusion from the labour market that flows from a prior conviction. It is not meant to protect people from the consequences of a lawfully imposed sentence.[140] Thus, being fired because you are unavailable to work while serving a sentence is not discrimination.[141]

While an employer cannot fire someone because they have a criminal history, they are not required to make reasonable accommodations related to that criminal past. In addition, employers will often not be found to discriminate if they fire employees for lying about their criminal history.[142] In *Patrie v BC Transit*[143] the British Columbia Tribunal dismissed a case as having no reasonable prospect of success. Here, the complaint lied on an application form asking about a criminal history. When the results of a background check were received, the

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[139] Bill 164, *An Act to amend the Human Rights Code with respect to immigration status, genetic characteristics, police records and social conditions*, 2d Sess, 41st Legis (Ontario), 2017 [Bill 164].
[140] *Québec (Commission des droits de la personne et des droits de la jeunesse) c Maksteel Québec inc,* 2003 SCC 68 at paras 20, 27, 29 [*Maksteel*].
[141] *Maksteel* at paras 32-33, 45.
[142] D Harris, *Wrongful Dismissal* (Don Mills: Richard de Boo Publishers 1989) at 3/109-3/115.
[143] 2017 BCHRT 118; 2017 CarswellBC 1540 (BC Human Rights Trib).

employer fired the employee. The Tribunal concluded that the firing was based on the employee's lie.

D. Recommendations for Reform

Alberta's last comprehensive human rights review, conducted in 1994, recommended that criminal history be included as a prohibited ground of discrimination.[144] This recommendation has not been taken up.

In 2019, we again recommend that criminal history be added as a ground of discrimination. Eight Canadian jurisdictions have added this protection, and several courts have considered its scope. This experience demonstrates that individuals can be protected from criminal history discrimination without sacrificing broader societal concerns.

As such, we recommend that:

1. **Criminal history be added as a protected ground of discrimination. While this could apply to all protected areas, at a minimum this ground should prohibit discrimination in employment, as well as membership in unions or employment associations. It is unnecessary, although not harmful, to stipulate that discrimination on the basis of one's criminal history be limited to situations where the history is unrelated to the employment position.**
2. **Criminal history should be defined as encompassing more than just criminal convictions. This protects persons who have a criminal history that falls short of a criminal conviction.**

[144] Equal in Dignity.

CHAPTER 6: POLITICAL BELIEF

A. Introduction

Alberta's human rights legislation does not provide protection from discrimination on the basis of political belief. This chapter explores the policy reasons that are relevant to a protection on this ground. In doing so, it will first outline the legislative arguments in favour of this protection. Then, it will review how other jurisdictions have approached the issue, and explore the pros and cons of other approaches. Finally, this chapter will set out recommendations for Alberta human rights legislation.

B. Why Include Political Belief as a Ground of Discrimination?

Arguments in favour of political belief protections focus on the integral nature of these beliefs to one's personal identity, and the desire to encourage political engagement in society. This applies not only to partisan politics, but also to ideologies that are separate from the governance of society.

As Albertans and other Canadians identify with various political beliefs along an every widening spectrum, exposure to alternative ideas and viewpoints should be encouraged —not quashed. In order to protect the free expression of ideas, there is value in protecting the people that hold them. In light of this concern, legislators in some jurisdictions have protected Canadians against discrimination for their political beliefs.

C. Overview of Canadian Legislation

1. Jurisdictions that Provide Protection

Nine of 14 jurisdictions in Canada (British Columbia, Manitoba, Quebec, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Yukon, and Northwest Territories) prohibit discrimination based on one's political belief, convictions, affiliation, and/or activity. Within these eight jurisdictions, however, this protection is articulated in a variety of different ways:

- Manitoba and Yukon: political belief, political association, or political activity[145]
- Quebec: political convictions[146]
- New Brunswick: political belief or activity[147]
- Newfoundland and Labrador: political opinion[148]
- Nova Scotia: political belief, affiliation or activity[149]
- British Columbia (only in relation to employment and trade unions) and Prince Edward Island: political belief[150]
- Northwest Territories: political belief and political association [151]

This variance is indicative of a struggle within legislatures and courts to define the meaning and scope of political protection. Central to this debate is disagreement on whether political belief should be limited to organized political parties, or extend to ideological beliefs.

Prince Edward Island is the only province that defines political belief. Under its legislation, political belief is the "belief in the tenets of a political party that is at the relevant time registered under section 24 of the *Election Act*...as evidence by membership of or contribution to that party, or open and active participation in the affairs of that party."[152] This definition, therefore, restricts "political belief" to only include beliefs regarding a particular political party, and would not provide protection for an ideology separate from governance.

In contrast, Manitoba's Human Rights Commission has released guidelines stipulating that “political a belief” ought to be given a broad and purposive interpretation.[153] It views political belief as "a belief that has a focused political object", and not "any issue that affects

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[145] Yukon *Human Rights Act*, s 7(j).
[146] Quebec *Charter*, s 10.
[147] New Brunswick *Human Rights Act*, s 2.1.
[148] Newfoundland and Labrador *Human Rights Act*, s 9.
[149] Nova Scotia *Human Rights Act*, s 5(1)(u).
[150] British Columbia *Human Rights Code*, ss 13, 14; Prince Edward Island *Human Rights Act*, s 1(d), (m).
[151] Northwest Territories *Human Rights Act,* s 5.
[152] Prince Edward Island *Human Rights Act*, s 1(m).
[153] Manitoba Human Rights Commission: Board of Commissioners’ Policy, “Political Belief, Political Association or Political Activity” Policy #I-5 (14 Oct 2015) online (pdf): <http://www.manitobahumanrights.ca/v1/education-resources/resources/pubs/board-of-commisioner-policies/i-5.pdf> [https://perma.cc/777R-M94X]. [Manitoba Political Belief Policy]

the public wellbeing."[154] This allows for a broader interpretation than in Prince Edward Island, though it is not unlimited. Under the Manitoba approach, political belief does not include social issues that do not directly affect the political organization of society.

British Columbia's *Human Rights Code,* does not define "political belief", but it does restrict the scope of its protection against discrimination to employment and union membership scenarios. It is not a protected ground in regard to services available to the public, or housing.[155]

2. Statutory Exceptions to Protection

There are a variety of exceptions that carve out exceptions from political belief protections. It is not uncommon, for example, that non-profit programs put in place for the benefit of an identified group, as well as groups characterized by the membership based on a certain set of political beliefs, be exempted from the requirements of non-discrimination.

For example, section 41(c) of the *British Columbia Human Rights Code* states that a "charitable, philanthropic, educational, fraternal, religious, or social organization or corporation that is not operated for profit", that has a primary purpose of promoting the interests of an identifiable group based on political belief, will not be found in contravention of the law when it grants preference to the identifiable group.[156] Quebec and Prince Edward Island both include similar provisions in their human rights legislation.[157]

These exceptions protect political groups that are defined by their membership and designed with the purpose of promoting the interests of a particular group of people. This means, for example, that a political party is legally be able to restrict its candidacy to persons who share their set of political values or affiliation.

3. Jurisdictions that do not provide Protection

Alberta, Saskatchewan, Ontario, Nunavut, and the federal system, do not protect individuals regarding their political beliefs.

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[154] Manitoba Political Belief Policy.
[155] British Columbia *Human Rights Code*, ss 13, 14.
[156] British Columbia *Human Rights Code*, s 41(c).
[157] Prince Edward Island *Human Rights Act*, Quebec *Charter*,

Ontario and Nunavut's human rights system prohibits discrimination on the basis of creed.[158] There has been interesting academic and judicial discussion on whether "creed" ought to extend beyond its current (religiously based) interpretation to include non-secular belief such as a political opinion.[159] Advocates argue that it makes little sense that a "political belief" which originates from a religion to be protected, but not ones that originate from a secular source.

While Courts have stated that they are open, in the right context, to accepting this definition, it has not yet been outright accepted by the courts in Ontario. Any reforms to encompass political beliefs within legislation thus ought to favour specific wording to this effect.

D. Legal Treatment of Political Belief Discrimination Cases

Most of the reported cases regarding discrimination on the basis of political belief come from the British Columbia Human Rights Tribunal. As such, most reported cases focus on the meaning of the term "political belief", and, specifically what beliefs are protected under human rights legislation.

British Columbia has taken a progressively broader view of the term.

Trevana v Citizens' Assembly on Electoral Reform is an example of the traditional understanding of political belief.[6] The applicant had her offer of employment from an electoral reform body rescinded after disclosing her prior work with a political party. This constituted *prima facie* discrimination based on "political belief" that was ultimately held to be a *bona fide* occupational requirement. This case confirmed an understanding of "political belief" as being tied to partisan politics—the most literal reading of the provision.

The definition of political belief was expanded beyond political parties in *Jamieson v Victoria Native Friendship Centre.*[160] The decision-maker held that beliefs regarding indigenous

[158] Ontario *Human Rights Code*, s 1 (for example); Nunavut *Human Rights Act*, s 7.
[159] *Jazairi v OHRC* (1997), 146 DLR (4th) 297 (ON SC), aff'd on appeal (1999), 175 DLR (4th) 302 (ONCA) [*Jazairi*].
[160] *Jamieson v Victoria Native Friendship Centre,* [1994] BCCHRD No. 42 (B.C. Human Rights Council).

community organization and governance fell under the definition of "political belief." The term was expanded beyond partisan politics to include beliefs about "social cooperation".

The definition was further expanded in *Bratzer v Victoria Police Department,*[161] in which the Victoria Police Department was obligated to accommodate their employee's political beliefs regarding the legalization of drugs.[162] The tribunal held that the applicant's views constituted a political belief because it involved discourse on an issue that would involve action by the government.[163] However, according to the tribunal, this ground does not include beliefs about *how* to effect social change under its definition.

In *Pozsar v. City of Maple Ridge*[164] the Tribunal summarized the following points to be taken from British Columbia decisions on political belief:

> 34 Political belief should:
>
> a. be determined on the facts and circumstances of each case (*Potter v. College of Physicians & Surgeons (British Columbia)*, [1998] B.C.H.R.T.D. No. 3 (B.C. Human Rights Trib.); *Bratzer* at para. 270);
> b. be given a liberal definition, not confined to partisan political beliefs, yet with reasonable limitations (*Prokopetz*);
> c. have a factual foundation, such as the nature of the belief at stake (*Croxall*). In my view, such factual foundation should include a reasonable level of cogency and cohesion, to borrow language from *Grainger*, to ensure there is sufficient tangibility to the belief;
> d. be genuinely held. It must not be a passing idea nor a position taken for convenience or advantage in the circumstances in which the conflict arises. It must be broader than an individual's own personal interests; and
> e. be core to a person's concept of a system of social cooperation (*Croxall*), reaching further, generally, than matters such as operational decisions that an employer or other entity may make (*Prokopetz)*.

Outside of British Columbia, other jurisdictions have struggled to comprehend exactly what is meant by "political belief" in human rights legislation. Prince Edward Island was forced to amend its *Human Rights Act* to define political belief after a reference case successfully argued that "political belief", was too ambiguous of a term to be practically applied.[12]

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[161] 2016 BCHRT 50 [*Bratzer*].
[162] *Bratzer* at para 425.
[163] *Bratzer* at para 271.
[164] 2018 BCHRT 107

Prince Edward Island's and British Columbia's cases demonstrate how difficult it is to truly understand what legislators mean to encompass in using the term of "political belief". Ideologies can be, by their nature, political, but courts continue to be unclear whether they are protected under the ground of "political belief".

E. Political Belief Protections and Possible *Charter* Infringement

It is conceivable that a province's failure to include political belief as a protected ground of discrimination in human rights legislation violates the *Charter*. A similar argument was successfully made in relation to Alberta's lack of "sexual orientation" in its (then) existing legislation.[165] As yet, however, this argument has not been successful for "political belief".

While Prince Edward Island courts have come close, no judge has definitely ruled that political belief constitutes an analogous ground of discrimination under the *Charter*.[166] Decisions in Ontario have rejected this assertion outright.[167] While human rights legislation is infused with *Charter* values, as of yet, if a province does not include political belief as a ground for discrimination, a non-government organization will still likely be legally allowed to discriminate on this basis.

F. Recommendations

We recommend that:

1. **The *AHRA* be amended to include political belief as a prohibited ground of discrimination for all areas of activity covered under the legislation.**

   This would be consistent with the approach currently in use under human rights legislation in nine Canadian jurisdictions, and would allow the flourishing of the exchange of ideas amongst Albertans. Allowing protection across the different areas of human rights legislation, including employment, services, and tenancy, would allow for the broadest protection.

2. **The *AHRA* define political belief in a way that clearly sets out its scope. The examples in British Columbia and Prince Edward Island represent opposite ends of the spectrum, but**

[165] *Vriend v Alberta*, [1998] 1 SCR 493, 1998 CanLII 816 (SCC).
[166] For discussion, see *Condon v Prince Edward Island*, 2006 PESCAD 1 at para 43, wherein the Prince Edward Island Court of Appeal declined to rule on whether political belief was an analogous ground under s 15 of the *Charter.*
[167] *Jazairi* ONSC at paras 42-49, aff'd on appeal (1999), 175 DLR (4th) 302 (ONCA).

speak to a difficulty in defining what is encompassed by political belief. Any legislative amendment to add this ground should include a definition that outlines what the scope of the provision is intended to be.

CHAPTER 7: NATIONALITY and CITIZENSHIP

A. Introduction

Human rights regimes in Canada protect individuals on a cluster of partially overlapping characteristics that focus on one's country of origin. These grounds go by different names: place of origin, nationality, national origin, or citizenship. The lines between these grounds can be fuzzy and ill-defined. They also, however, have important differences, and a failure to include some grounds can lead to gaps in protection.

This section considers whether Alberta ought to consider amending or adding to its current protections. Like other sections, it considers how other Canadian jurisdictions have approached the issue before recommending reforms.

B. Why Give Protection?

The traditional rationale for including nationality, citizenship or national origin in human rights legislation closely overlaps with protections related to race or ancestry. The idea that people should not be treated differently based on irrelevant immutable characteristics forms the very heart of human rights law. Fostering the variety of our backgrounds forms the heart of Canadian identity, and it is a fundamental value that lies squarely within the protections that human rights laws are meant to provide.

These protections are particularly relevant in modern times. As of 2016, more than one-fifth (21.9%) of the Canadian population is foreign-born.[168] Despite this, over the past few years, Canada has seen a spike in discrimination against immigrants and individuals with foreign nationalities.[169] Not only does this severely impact the lives of those who are discriminated against, but it also damages Canada's reputation of being a welcoming multi-cultural society.

Reluctance to add new grounds within Alberta's human rights legislation generally falls into one of two camps. First, the *AHRA* has existing protections for place of origin and ancestry, which could render the addition of citizenship or nationality redundant. Second, there are

[168] Ontario Human Rights Commission, News Release, "Terror Abroad has Revealed Troubling Hate Here at Home" (23 November 2015), online: OHRC <http://www.ohrc.on.ca>.
[169] Statistics Canada, *Immigration and Ethnocultural Diversity: Key Results from the 2016 Census, C*atalogue No 11-001-X (Ottawa: Statistics Canada, 2017), at 1 online: <https://www150.statcan.gc.ca/>.

arguments that some privileges are properly reserved for citizens, and these privileges should not be eliminated.

The following discussion addresses these concerns. It demonstrates that there exists a gap in existing protections, and that these gaps can be filled without compromising core privileges of citizenship.

C. Human Rights Legislation

Alberta, along with five other jurisdictions (British Columbia, Saskatchewan, New Brunswick, Ontario, Northwest Territories), protect people from discrimination based on their "place of origin". The term is not defined in any legislation. Provincial guides describe the ground as relating to the fact of being born in a particular country or group of countries or region of Canada or the world.[170] It is not necessarily limited to those who are born outside Canada.[171]

Place of origin discrimination can be inferred by reference to educational, experience or language restrictions, although none of these factors on their own embody one's place of origin. For example, in *Assn. of Professional Engineers and Geoscientists of Alberta v Mihaly*[172] the Alberta Court of Queen's Bench held that the practice of requiring some foreign trained engineers to undergo additional testing was so closely linked to their place of origin that it constituted *prima facie* discrimination on that basis.[173] Similarly, in *Liu v Everlink Payment Services Inc.,* the Ontario Human Rights Commission held that treating someone differently based on their foreign language can be so closely related to a person's place of origin to fall under the Act.[174]

Alberta does not protect individuals on the other related grounds of nationality, national origin or citizenship. Eleven of Canada's 14 jurisdictions prohibit discrimination on one of these bases. Notably, of the five jurisdictions other than Alberta that prohibit discrimination based on

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[170] BC Human Rights Tribunal, "Personal Characteristics Protected in the BC *Human Rights Code",* online: BCHRT <http://www.bchrt.bc.ca/human-rights-duties/characteristics.htm>

[171] Ontario Human Rights Commission, "Grounds of discrimination: definitions and scope of protection" online: OHRC <http://www.ohrc.on.ca/en/iii-principles-and-concepts/3-grounds-discrimination-definitions-and-scope-protection>.

[172] *Assn. of Professional Engineers and Geoscientists of Alberta v Mihaly,* 2016 ABQB 61 at para 103 [*Mihaly*].

[173] *Mihaly* at paras 100, 103 (claim was dismissed on other grounds).

[174] *Liu v Everlink Payment Services Inc. (No 2)*, 2014 HRTO 202 (Ont H Rt Trib) at paras 87-90.

place of origin, four of them include protections on these related grounds: Citizenship (Ontario); Nationality (Saskatchewan and Northwest Territories); National Origin (New Brunswick). British Columbia, like Alberta, does not prohibit discrimination on these grounds.

Case law has struggled to define the contours of these partially overlapping concepts. Nonetheless, some distinctions have emerged.

1. Citizenship

Citizenship is the most well-defined ground. According to the Ontario *Human Rights Commission*, citizenship connotes the legal status of an individual.[175] It is illegal, under the ground of citizenship, for individuals to make a distinction between Canadian citizens, citizens from other countries, persons with dual citizenship, landed immigrants or permanent residents, refugees and non-permanent residents. In Alberta, decision makers have ruled that place of origin is not be equated with citizenship, because Canadian citizens may have a non-Canadian place of origin.[176]

The Ontario *Human Rights Code* carves out exceptions to citizenship protections. Differential treatment based on citizenship is permitted when: Canadian citizenship is a requirement, qualification or consideration imposed or authorized by law; a requirement for Canadian citizenship or permanent residence in Canada has been adopted to foster and develop participation in cultural, educational, trade union or athletic activities by Canadian citizens or permanent residents; or an employer imposes a preference that the chief or senior executive is, or intends to become, a Canadian citizen.[177]

2. Nationality

Nationality is a prohibited ground of discrimination in four jurisdictions (Saskatchewan, Manitoba, Northwest Territories, and Newfoundland). It is used interchangeably with

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[175] Ontario Human Rights Commission, *Grounds of Discrimination: Definitions and Scope of Protection* (Toronto: Ontario Human Rights Commission), online: <http://www.ohrc.on.ca/en/iii-principles-and-concepts>.
[176] *Dickenson v Law Society (Alberta)* (1978), 84 DLR (3d) 189, 5 Alta LR (2d) 136 (Alta TD) at para 18 [*Dickenson*].
[177] Ontario *Human Rights Code* 16(2).

citizenship by the Saskatchewan Human Rights Commission, and in older Ontario decisions.[178] Nationality has also, however, been viewed as the "functional equivalent" as place of origin.

Experts in human rights law have argued that nationality is broader than citizenship. Tarnopolsky reasons that:

> [W]hereas 'citizenship' describes a status which can be conferred, 'nationality' more accurately describes a person's connection, or state of 'belonging', to a 'nation'. In addition to the political connotations of "citizenship" the term 'nationality' has ethnic and sociological dimensions, and not infrequently a spiritual sense as well.[179]

Under Tarnopolsky's conception, nationality would encompass discrimination experienced by persons in relation to their "nation" as a distinct from their "state". This would include, for example, indigenous groups, or other ethnic groups that exist within a state.

3. National Origin

Discrimination based on National origin is prohibited a federal level, by all the Maritime Provinces, Québec, and the Yukon. It is often used synonymously with ethnic origin (which is also not listed in the *AHRA*) and in connection with ancestry (which is included in the *AHRA*). National origin encompass individuals who share a common heritage, often characterized by a mutual language or culture and is not determined based on citizenship status.[180] Under this term discrimination can occur to both immigrants and Canadian citizens.[181]

D. The Potential For Reform in Alberta

These overlapping definitions reveal considerable ambiguity, but also some notable gaps in Alberta's coverage. Alberta's "place of origin" specifically does not protect persons from discrimination based on their citizenship (nor, by extension, the elements of nationality that have been treated as synonymous with citizenship).

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[178] Saskatchewan Human Rights Commission, *Discrimination in Employment on the Basis of Nationality of Place of Origin* (Saskatoon: Saskatchewan Human Rights Commission, 2016), online: <http://saskatchewanhumanrights.ca/learn/fact-sheets>; *Blake v Loconte* (1980) BOI 110 (Ont Bd of Inquiry).
[179] Tarnopolsky at 5.2.2.
[180] PEI Human Rights Commission, *They're Your Rights to Know: A Guide to the PEI Human Rights Act* (Charlottetown: PEI Human Rights Commission, 2012), online: <http://www.gov.pe.ca/photos/original/YRTK.pdf>.
[181] Quebec Human Rights Commission, *Ethnic or National Origin* (Montreal: Quebec Human Rights Commission), online: <http://www.cdpdj.qc.ca/en/droits-de-la-personne/motifs/Pages/origine.aspx>.

Ontario's experience with citizenship demonstrates that it is possible to carve out policy-based exceptions to the discriminatory prohibition.

As the world becomes more interconnected and Canada continues to increase the immigrant population, there exists the possibility of discrimination. Alberta should follow the lead of many of other provinces and close gaps in coverage that form the heart of anti-discrimination statutes.

In light of this experience, we recommend the following that:

1. **The *AHRA* be amended to include either "nationality" or "citizenship" as a prohibited ground of discrimination. If "nationality" is chosen, provide a specific definition for the term.**

CHAPTER 8: OTHER GROUNDS OF DISCRIMINATION

The last chapter in this part briefly explores emerging grounds of discrimination in Canada. While we fall short of recommending these sections be adopted in Canada, there is value in understanding the cutting edge of discrimination policies in our country, and the developments that are happening across Canada.

A. Social Disadvantage

One of the more recent trends in human rights law provides coverage to individuals based on their social condition or disadvantage. The ground is meant to provide protection regarding a broad array social and economic disadvantages. In practice, however, it has been almost exclusively invoked in relation to one's source of income. Thus, while social disadvantage has the potential reach beyond one's source of income, present usage has interpreted these grounds as largely duplicative.

Alberta protects individuals on the basis of their (lawful)[182] source of income. Income that does not attract a social stigma is not included.[183] Six additional jurisdictions also protect against source of income discrimination: British Columbia (tenancy only); Manitoba, Nova Scotia, Nunavut; Prince Edward Island, Newfoundland and Labrador, and Yukon.[184]

Two jurisdictions provide similar (but arguably narrower) protection for "receipt of public assistance": Saskatchewan; and Ontario (only applies in area of occupancy).[185]

Only four jurisdictions (Quebec, Manitoba, New Brunswick and Northwest Territories) prohibit discrimination on social disadvantage or condition.[186] Each of these four jurisdictions

[182] Alberta Human Rights Commission, *Source of Income* (AHCR: 2012) online (pdf): https://www.albertahumanrights.ab.ca/Documents/SourceOfIncome.pdf [https://perma.cc/RZH7-TAXB] [AHRC Source of Income].
[183] AHRC Source of Income.
[184] Newfoundland and Labrador *Human Rights Act*, s 9(1); British Columbia *Human Rights Code*, s 10(1); Manitoba *Human Rights Code*, s 9(1); Nova Scotia *Human Rights Act*, s 5(1); Yukon *Human Rights Act*, s 7(l); Nunavut *Human Rights Act*, s 7(1).
[185] Saskatchewan *Human Rights Code*, s 2(1); Ontario *Human Rights Code*, s 2(1).
[186] Interestingly, Manitoba prohibits discrimination on both source of income and social disadvantage (Manitoba *Human Rights Code*, s 9(2)(j), (m).

adopt varying approaches to the scope and definition of social condition/disadvantage. In each province, however, case law has been thus far confined to one's source of income.

Quebec has the most developed history and case law on the topic. While the definition of social has emphasized a purposive approach, courts have "tended to confine social condition almost exclusively to the receipt of social assistance."[187] While there have been suggestions that one's status as a student or a worker in precarious financial situations could qualify as social condition, this has not yet translated into substantive decisions.

In Northwest Territories, adjudicators have ruled, on at least two occasions, that discrimination on the basis of social condition existed. In both cases, however, the issue was linked to the receipt of social assistance.[188]

Manitoba is the most recent addition. It has no case law under the issue, but does have a statutory limit specific to the ground: "It is not discrimination on the basis of social disadvantage unless the discrimination is based on a negative bias or stereotype related to that social disadvantage"[189]

In New Brunswick, there have been no reported decisions dealing with social condition.

This breadth and potential scope of adding "social condition" has proven problematic for some law makers. The Canadian Human Rights Commission declined to add this ground in prior reforms raising concerns about its given ambiguity, transitory nature, and potential to apply to every member of society.[190]

B. Genetic Characteristics

The Canadian *Human Rights A*ct has recently amended the act to protect individuals on the basis of their genetic characteristics. The Act stipulates that discrimination on "genetic characteristics" occurs when **"**where the ground of discrimination is refusal of a request to

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[187] Wayne MacKay and Natasha Kim, "Adding Social Condition to the *Canadian Human Rights Act*" (Canadian Human Rights Commission, 2009).
[188] *Portman v Yellowknife (City)*, 2016 CarswellNWT 79, [2017] AWLD 960, additional reasons at *Portman and Yellowknife (City), Re* 2017 CarswellNWT 50, [2017] AWLD 3897; *Northwest Territories and Nunavut (Workers' Compensation Board) v Mercer* 2014 NWTCA 1 at para 31
[189] Manitoba *Human Rights Code*, s 2.1.
[190] Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Canadian Human Rights Act Review Panel, 2000) online: <http://publications.gc.ca/collections/Collection/J2-168-2000E.pdf> (Chair: G La Forest) Ch 17.

undergo a genetic test or to disclose, or authorize the disclosure of, the results of a genetic test."[191]

Genetic tests can be used indicate if a person has a higher likelihood of having certain medical issues or health concerns. The addition of this ground of protection is aimed at prohibiting the use and/or disclosure of genetic tests to employers and/or insurance companies.[192]

Ontario proposed to add "genetic characteristics" in 2017 amendments to their Human Rights Code. However, the Bill was never passed.[193]

[191] *Canadian Human Rights Act*, s 3(1),(3).
[192] Christina Catenacci, "Genetic discrimination provisions in human rights legislation: Will Ontario be the first Canadian jurisdiction?" (8 March 2017) online (blog): >http://blog.firstreference.com/ontario-genetic-discrimination-human-rights/>.
[193] Bill 164.

PART 3: PROCEDURAL REFORM

The concluding Part of this report explores discrete procedural issues within the *AHRA* that challenge the public. After flagging three procedural hurdles that create barriers to the public, this part concludes by offering recommendations for reform.

CHAPTER 8: TIME LIMITATIONS

All Canadian human rights regimes have limitation periods that restrict the length of time a complainant has to file a complaint. Alberta's time limitation is arguably the most rigid in Canada. The following paragraphs situate Alberta's limitations among other jurisdictions, and considers how judges have interpreted these provisions in case law.

A. Underpinning Rationales

The rationale for time limitations on claims are meant to save three purposes. First, limitation statutes are meant to provide certainty. Potential defendants/respondents should be able to rest certain in the knowledge that they will not be pursued for ancient wrongs. The second rationale addresses evidentiary concerns. It ensures that claims are pursued before the quality of evidence depletes over time. Parties should not be obligated to preserve evidence that could be relevant to a long passed claim. Finally, limitation periods require diligence. Claimants are expected to act diligently and not "sleep on their rights".[194]

In human rights regimes, these rationales must be combined with the purposive and quasi-constitutional goals of anti-discrimination legislation.[195]

As outlined below, this combination has typically resulted in relatively short timelines for filing a claim, coupled with discretionary powers to extend time limits in certain cases.

[194] *M(K) v M(H)*, [1992] 3 SCR 6 Discussed in *Rivard v Alberta (Human Rights Commission),* 2014 ABQB 392 at para 34.
[195] Clément at 1318.

B. Review of Human rights Legislation:

The *AHRA* gives complainants one year from the date of an alleged violation to file a claim with the AHRC.[196] It states:

> 20 (2) A complaint made pursuant to subsection (1) must
> …
> (b) be made within one year after the alleged contravention of the Act occurs.

Nine other jurisdictions also impose a one year time limit, including Ontario and British Columbia.[197] Three jurisdictions have a two year limitation,[198] while one has an 18 month cut-off.[199]

However, only Alberta, Newfoundland and Labrador, and Prince Edward Island do not create a discretionary power for decision makers to extend this time frame. All other jurisdictions give discretion to decision makers to accept cases outside an elapsed time period. For example, the Ontario *Human Rights Code* states:

> 34 (2) A person may apply under subsection (1) after the expiry of the time limit … if the Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.

In addition, most jurisdictions set out mechanisms for decision-makers to account for continuing contraventions of their Act. British Columbia's *Human Rights Cod*e contains both types of extension. It states:

> 22 (1) A complaint must be filed within one year of the alleged contravention.
>
> (2) <u>If a continuing contravention is alleged in a complaint, the complaint must be filed within one year of the last alleged instance of the contravention</u>.

[196] *AHRA,* s 20(2).
[197] British Columbia *Human Rights Code*, s 22(1) (in December 2018, British Columbia extended its time limit from 6 months to 1 year); Ontario *Human Rights Code* s 34; Saskatchewan *Human Rights Act*, s 29(5); Manitoba *Human Rights Code*, s 23(1); New Brunswick *Human Rights Act*, s 18(1); Nova Scotia, Newfoundland and Labrador *Human Rights Act*, s 25(2); *Canadian Human Rights Act*, 41(1)(b).
[198] Quebec *Charter*, s 77; Northwest Territories *Human Rights Act*, s 29(2); Nunavut *Human Rights Act*, s 23.
[199] Yukon *Human Rights Act*, s 20(2).

> (3) If a complaint is filed after the expiration of the time limit referred to in subsection (1) or (2), a member or panel may accept all or part of the complaint if the member or panel determines that
>
> (a) it is in the public interest to accept the complaint, and
>
> (b) no substantial prejudice will result to any person because of the delay.

Alberta's time limit does not account for either situation.

C. Relevant Case Law

Without this legislative guidance, Alberta courts have interpreted the *AHRA*'s limitation period as strict and absolute. *St Albert and Area Student Health Initiative Partnership v Polczer,*[200] was a judicial review case that dealt with a School Board's denial of speech and language therapy to a student. An additional party was added to the complaint one year and eight days after the denial of services was communicated to the complainant.

The Court of Queen's Bench held that the Chief of the Commission was wrong to add the additional party. The one-year time limit in the legislation was an absolute bar, regardless of any other factors.[201]

The Court also refused to treat each day that the student was denied services as a continuing contravention. It distinguished between the act of discrimination (the denial decision) from the effects of discrimination (each day he failed to receive services).[202] Therefore, the Court concluded that the complaint was out of time.

More recent decisions have reiterated this stance. The Court of Queen's Bench has held that the principle of discoverability does not apply to the *AHRA*. In *Rivard v Alberta (Human Rights Commission),*[203] the complainant was denied an extension of her employment contract. Several months later, she received a medical diagnosis that was previously unknown, and which was relevant to her dismissal. A complaint was filed with the Commission within one year of the diagnosis, but outside the end of her contract. The Court of Queen's Bench dismissed her

[200] *St Albert and Area Student Health Initiative Partnership v Polczer,* 2007 ABQB 692 at para 84 [*Polczer*].
[201] *Polczer* at para 84.
[202] *Polczer* at para 86.
[203] *Rivard v Alberta (Human Rights Commission)*, 2014 ABQB 392 [*Rivard*].

application for judicial review. It cited with approval a letter from the Director of the Commission that stated:

> ..the Act is very clear in s. 20(2)(b) that a complaint must be made within one year after the alleged contravention of the Act occurred. The Act does not give either the Director or the Chief of the Commission and Tribunals any discretion to alter or extend this one year limitation … When human rights legislation was reviewed in 1992, it was agreed to extend the six month limitation period to one year. The option of giving the Director discretion to extend this one-year limitation period was discussed but rejected, as that was clearly not the intent of the Legislature. …[204]

The Court agreed that "The AHRC has no "discretion" to alter the limitation period in section 20(2)(b) of the *AHRA.*"[205]

This approach contrasts with those in other jurisdictions, whose legislation permits Courts to consider whether complaints filed out of time should be accepted based on considerations surrounding good faith,[206] public interest[207] and prejudice to other parties.[208]

D. Recommendations for Reform

Alberta's approach to time limitations creates unnecessary and undue hurdles for the public. Its absolutist stance is diametrically opposed to the broad, purposive, quasi-constitutional purpose of human rights legislation. It inserts a narrow and legalistic approach into what is meant to be an educational and non-adversarial dispute resolution mechanism.

Through inserting discretion to decision-makers, other Canadian jurisdictions have managed to locate a better balance between the competing needs for certainty and flexibility in human rights claims.

In light of this, we recommend that:

1. **The limitation period in the *AHRA* remain at one year, but that decision-makers be given the discretion to extend this time period where the extension was incurred in good faith, and no substantial prejudice results from its inclusion.**

[204] *Rivard* at paras 9, 33, 34.
[205] *Rivard* at para 34.
[206] *Zhang v Human Rights Tribunal*, 2018 ONSC 3987 at para 27, discussing s 34(2) of the Ontario *Human Rights Code.*
[207] *Bradley v Onni Group of Companies,* 2018 BCHRT 250 at para 10 [*Bradley*].
[208] *Bradley*.

CHAPTER 9: FRIVOLOUS AND VEXATIOUS CLAIMS

In its 2016-2017 Annual Report, the Chief of the AHRC drew attention to the drain frivolous or vexatious litigants are taking on Alberta's human rights system. He asked for reforms to deal with this growing problem.[209] This section considers that request directly. It outlines the legislative mechanisms that exist in Canadian human rights jurisdictions to handle vexatious litigants. It then considers how courts have treated the issue in Alberta, and then offers recommendations for reform.

A. Rationale for Limits on Frivolous and Vexatious Litigants

Frivolous and vexatious claims drain scarce resources. While human rights proceedings ought to be open to everyone, frivolous and vexatious litigants can exploit the human rights system and use it to advance claims motivated by bad faith. These claims challenge the public by squandering scarce time, staff and taxpayer money, and by forcing respondents to respond to unmeritorious claims, sometimes repeatedly.

While this concern is pressing for the entire justice system, it is especially relevant for the AHRC, which is chronically underfunded and overburdened with an increasing caseload.

B. Overview of Canadian Legislation

Canadian human rights legislation has three general mechanisms to address frivolous or vexatious claims: individually dismissing frivolous complaints, declaring complainants to be frivolous or vexatious, and/or ordering costs against frivolous or vexatious parties.

1. Gatekeeping Provinces

In Alberta, frivolous and vexatious claims are dealt with on an individual basis. The AHRC is given the power to refuse frivolous and vexatious claims through its general gatekeeping function:

[209] Annual Report 2016-2017 at 2: "the Commission has only a few frivolous and vexatious complainants, but they take up a disproportionate amount of staff time. The Chief or Director should have the ability under the legislation to declare certain parties frivolous and vexatious… so that the Chief or Director or a tribunal member can have the legislated ability to review and determine if the complaint has threshold merit."

> 10(2) No person shall, with malicious intent, make a complaint under this Act that is frivolous or vexatious.[210]

In addition, frivolous or vexatious complaints can be dismissed through the Director's powers:

> 22(1) Notwithstanding section 21, the director may at any time
> (a) dismiss a complaint
> if the director considers that the complaint is without merit…[211]

Other gatekeeping regimes adopt similar approaches. Under the federal system, Commissioners can decline to accept a claim on the basis that it is frivolous or vexatious.[212] In seven other gatekeeping jurisdictions,[213] these complaints can be dismissed at any time. Yukon, like Alberta, does not specifically grant a power to dismiss a claim because it is frivolous or vexatious. It does, however, set out that such claims should not be filed. Prince Edward Island has no provision specifically dealing with frivolous claims, but has a general provision allowing the Commission to dismiss a claim where it lacks merit.[214]

The *AHRA*'s requirement that frivolous or vexatious claims be launched with malicious intent is unique in Canada. While there are no reported decisions discuss the issue, requiring proof that a claim was launched with malicious intent imports a higher burden on the party seeking to dismiss a claim on this basis.

Thus, Alberta has similar powers to most gatekeeping jurisdictions. This authority is, however, quite modest and is addressed on an individual basis.

2. Direct Access Regimes

Direct access jurisdictions have more comprehensive mechanisms to deal with frivolous or vexatious litigants. Their tribunal-centred system can implement summary dismissal powers similar to a Court.

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[210] *AHRA*, s 10(2).
[211] *AHRA*, s 22(1).
[212] Canada *Human Rights Act,* s 41(1)(d).
[213] Saskatchewan *Human Rights* Code, s 30(2)(e)(ii); Manitoba *Human Rights Code*, s 29(1)(a); New Brunswick *Human Rights Act*, s 19(2)(b); Nova Scotia *Human Rights Act,* s 29(4)(e); Newfoundland and Labrador *Human Rights Act*, s 32(1)(b); Northwest Territories *Human Rights Act*, s 44(1)(c); Quebec *Charter,* s 77(3).
[214] Prince Edward Island *Human Rights Act*, s 22(4).

The leading jurisdiction on frivolous and vexatious claims is Ontario. Pursuant to the Ontario's "Social Justice Tribunal Ontario (SJTO) Common Rules of Procedure," tribunals may "make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes."[215] This includes the power to dismiss vexatious claims and declare parties to be vexatious litigants:

> A8.2 Where the tribunal finds that a person has persistently instituted vexatious proceedings or conducted a proceeding in a vexatious manner, the tribunal may find that person to be a vexatious litigant and dismiss the proceeding as an abuse of process for that reason. It may also require a person found to be a vexatious litigant to obtain permission from the tribunal to commence further proceedings or take further steps in a proceeding.[216]

The Ontario model is unique in Canada because permits the tribunal to declare a person to be a vexatious litigant. This not only dismisses their existing claim, but imposes an obligation that they obtain leave from the Tribunal before filing or pursuing other claims.

Neither British Columbia nor Nunavut possess an analogous rule to Ontario. However, they have a summary application procedure[217] that allows the tribunal to dismiss a claim without a full hearing. Under this approach, parties exchange arguments and are given the opportunity to make oral submissions, either in person or over the telephone.[218]

British Columbia's legislation stipulates that tribunals can dismiss complaints with or without a hearing on the basis that it was filed for an improper motives or made in bad faith.[219] The test has a high bar, which is rarely met.[220] Parties must show that the complainant was motivated by an "ulterior, deceitful, vindictive, or improper motive."[221]

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[215] Ontario, Social Justice Tribunal Ontario (SJTO) Common Rules of Procedure, A8 online: <http://www.sjto.gov.on.ca/documents/sjto/Common%20Rules%20of%20Procedure.html#A8> [SJTO Common Rules].
[216] SJTO Common Rules, A8.
[217] BC Human Rights Tribunal Rules of Practice and Procedure (15 January 2016), Rule 19; Human Rights Tribunal of Ontario Rules of Procedure, Rule 19A.
[218] See, for example, *Hiamey v Conseil scolaire de district Catholique Centre-Sud*, 2012 HRTO 1331 (CanLII) at para 6, which references a summary procedure conference call.
[219] British Columbia *Human Rights Code*, s 27(1)(e).
[220] *Mikhailytcheva v Bonvita Health*, 2018 BCHRT 216 at para 41.
[221] *Stopps v Just Ladies Fitness (Metrotown) Ltd.*, 2005 BCHRT 359 (B.C. Human Rights Trib.) at para. 13; *Weihs v Great Clips*, 2018 BCHRT 217 at para 35.

In Nunavut, the Tribunal can dismiss a notification where, in its opinion, it is trivial, frivolous or vexatious.[222] Enforcement of this rule typically takes place within a summary hearing application.

Several jurisdictions in both direct access and gatekeepers models permit adjudicative bodies to order costs against frivolous or vexatious parties.[223] [224] Alberta does not have this included in their legislation.

C. Relevant Case Law in Alberta

Caselaw out of Alberta suggests that adjudicators are not adequately equipped to deal with vexatious litigants. Unlike tribunal members, judges in Alberta have inherent and statutory powers to declare litigants frivolous or vexatious.[225] Judges are being asked to use these powers to control abuse of administrative bodies by frivolous and vexatious litigants.[226]

In *Makis v Alberta Health Services*,[227] the Court of Queen's bench was asked to "manage" a complainant's access to courts and administrative decision makers after he had launched several court and administrative actions. After reviewing the record, the Court used its inherent jurisdiction to take the "unusual" and "new" step of restricting a complainant from "(a) commencing, attempting to commence or continuing any complaints, investigations, proceedings and appeals with any non-judicial body."[228]

The decision in *Makis* is notable in several respects. First, it canvassed the Ontario tribunal system with approval, and remarked that there was a comparative "gap" in Alberta's administrative system.[229] Second, it was preventative, and imposed its screening function into the future. Third, it applied to all non-judicial bodies, even those that were not yet involved in any proceeding (including the AHRC).

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[222] Nunavut *Human Rights Act,* s 24(3)(a).
[223] Nunavut *Human Rights Act*, s 36.
[224] Northwest Territories *Human Rights Act,* s 63(a); Manitoba *Human Rights Act*, s 45(2).
[225] *Judicature Act*, RSA 2000, c J-2, ss 23-23.1; *Makis v Alberta Health Services* at para 44.
[226] Jonnette Watson Hamilton, "Court of Queen's Bench Requires Vexatious Litigant to Seek Court's Permission Before Accessing Any Non-Judicial Body" (2 December 2018), online (blog): *Ablawg* <https://ablawg.ca/2018/12/21/court-of-queens-bench-requires-vexatious-litigant-to-seek-courts-permission-before-accessing-any-non-judicial-body/>.
[227] 2018 ABQB 976, aff'd on appeal 2019 ABCA 23 [*Makis*].
[228] *Makis* at para 89.
[229] *Makis* at paras 47, 50.

The result in *Makis* is sweeping and should be considered (at this stage of jurisprudence) to be an outlier. It cannot be relied on to fill ongoing concerns about frivolous and vexatious claims in the human rights system.

D. Recommendations for Reform

Ontario's *Human Rights Code* is the clear Canadian leader at handling frivolous or vexatious litigants. By attaching the ruling to a particular claimant, the Ontario Human Rights Tribunal has an added screening mechanism to make sure that the system is not abused.

It is difficult, however, to simply insert the Ontario approach into Alberta. This flows out of the different models (gatekeeping and direct access) which steer each provincial human rights system.

The Ontario process takes place in a summary procedure that where written and oral submissions can be directly made to a decision maker. There is no similar opportunity in Alberta until (of if) the Tribunal stage is reached. Thus, a straight translation from Ontario to Alberta systems could lack adequate safeguards of natural justice.

Without affording similar opportunities to be heard by a decision maker, it is difficult to successfully transplant the Ontario approach directly into Alberta. Simply designating the Chief or Director with the power to declare litigants frivolous or vexatious would likely face court challenges based on weaknesses in procedural justice.

There are, however, two alternatives to adapt the Ontario model for Alberta.

- First, the Tribunal could be given the authority to make a declaration that a party is frivolous or vexatious for future cases. While this approach meets procedural justice concerns, it is limited because most human rights claims do not reach the tribunal stage. This solution will not reach the majority of cases dismissed or settled before going to a tribunal. It would, however, limit further access and resource draining from repeated vexatious litigants, and could act as an incentive to settlement prior to reaching a tribunal.
- Second, the *AHRA* could give the Director the power to make a court application to have a litigant declared vexatious or frivolous.

In light of these concerns, we recommend that:

1. **If Alberta maintains the gatekeeping model for human rights complaints, it should consider amending the legislation so as to follow the federal model for dealing with frivolous and vexatious complaints (complainants).**

Chapter 10: Other Possible Amendments

This concluding chapter outlines two features of Alberta's human rights regime that have been brought to our attention. Based on our review, we make two law reform recommendations. In addition, there is value in understanding how Alberta's approach compares to other jurisdictions, and in monitoring the development human rights law in Canada.

A. HRC Public Interest Actions

1. Overview of Canadian Legislation

Seven Canadian jurisdictions permit their HRC to launch investigations or complaints on its own initiative.[230] Six jurisdictions, including Alberta, do not. British Columbia permits its newly established Commission to intervene in existing matters, but it does not have the authority to file cases on its own initiative.[231]

This authority, when designated, takes two forms. In direct access provinces such as Ontario, the Commission is empowered to bring a case before the Tribunal if it is in the public interest, and an appropriate remedy exists.[232]

Gatekeeping provinces permit their HRC to either file a complaint or commence an investigation on its own initiative. For example, Manitoba's *Human Rights Code* states:

> 22(3) Where the Commission or the executive director believes on reasonable grounds that any person has contravened this Code, the Commission or the executive director may file a complaint against the person, and the provisions of this Code apply with such modifications as the circumstances require to the complaint [emphasis added]

Originally, Alberta's *Individual's Rights Protection Act*[233] allowed either members of the public or the commission itself to launch human rights complaints:

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[230] Ontario *Human Rights Code*, s 35; Saskatchewan *Human Rights Code*, 29(3), Quebec *Charter* s 71; Nova Scotia *Human Rights Act*, 29(1)(b); Northwest Territories *Human Rights Act*, s 29; Manitoba *Human Rights Code*, 22(3); *Canadian Human Rights Act*, s 40(3).
[231] British Columbia *Human Rights Code*, s 22.1, 47.12(2).
[232] Ontario *Human Rights Code*, s 35.
[233] SA 1972 c 2.

> 17. (1) The Commission shall as soon as is reasonably possible cause an investigation to be made into and shall endeavor to effect a settlement of any complaint of an alleged contravention of this Act where
> (a) a person who believes he has been discriminated against contrary to this Act makes a complaint in writing to the Commission, or
> (b) the Commission has reasonable grounds for believing that a complaint exists.

This was amended in 1980 to prevent the Commission from launching human rights complaints.

Currently, Alberta is the only jurisdiction in Canada that expressly prohibits the Commission from launching a complaint. Our province is unique in not only preventing the AHRC from launching a claim, but also statutorily barring any of the AHRC's members or employees from launching a complaint:[234]

> **20(1)** Any person, except the Commission, a member of the Commission and [the Director and his or her employees], who has reasonable grounds for believing that a person has contravened this Act may make a complaint to the Commission [emphasis added]

Members of the Commission, as well as their employees, are not given an alternate avenue to pursue their human rights grievances.

2. Potential for Reform

There is great potential for an HRC to satisfy its public interest mandate by launching claims on its own initiative. This is especially relevant for cases of systemic discrimination, which are less likely to be advanced or succeed from an individual complaint perspective. Our review of case law, however, reveals that this power is rarely (if ever) exercised in other jurisdictions.[235] While Courts reiterate the value of the HRC's statutory power, this power is not invoked very often in practice. While we can only speculate on the reasons for this silence, it is likely that the mounting delays and budgetary constraints placed on human rights systems across Canada act as a disincentive in launching additional cases.

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[234] Tarnopolsky at 14.5(a)
[235] See, for example: *Konesavarathan v. Her Majesty the Queen*, 2018 ONSC 3593, 2018 CarswellOnt 9113; *Exxon Mobil Canada Ltd v Carpenter*, 2011 NSSC 445; *Pollock v Human Rights Commission (Manitoba)*,2018 MBQB 170 at para 60; Saskatchewan (not considered); Quebec (not considered); British Columbia (not considered); Northwest Territories (not considered).

Notwithstanding the infrequency with which it is invoked, we are persuaded that the Commission's ability to address situations of systemic discrimination are reason enough to empower it with a self-referential investigative power. While the power may not be invoked by the Commission, we believe it is in the interests of the public to leave the option open to the Commission should it be confronted with facts that would merit the use of this authority.

We recommend that:

1. **The AHRA be amended to allow the Commission to have its own power to refer cases or situations for investigation.**

2. **The *AHRA* remove the statutory bar from AHRC members and employees from launching human rights complaints. Alternatively, we recommend that the AHRA offer an alternate forum for members and employees of the AHRC to have human rights grievances heard.**

B. Settlement Mechanisms

Settlement is a central priority in all Canadian human rights systems. Every regime in Canada has one or more processes designed to assist parties to settle their dispute without a formal hearing.

Alberta's system has two points of settlement: conciliation and Tribunal Dispute Resolution (TDR):

- Conciliation occurs after a claim is accepted, before it is investigated.[236] If the parties agree to conciliation, a conciliator works to settle the claim before proceeding to an investigation. While there is no obligation to settle, the Director may dismiss a claim at any time if, in their opinion, a reasonable settlement offer was not accepted.[237] Nearly half of all complaints filed with the AHRC are resolved via conciliation.[238]

[236] Conciliation s 4/5 of AHRC bylaws.
[237] *AHRA* s 20.
[238] Annual Report 2017-2018 at 19.

- TDR only occurs if a claim advances to the tribunal stage. The parties to a complaint present their case to a Commission member, who gives their opinion on the case and attempts to reach a settlement. If the case does not settle, the Commission member who conducted the TDR will not adjudicate the hearing. Most (88%) claims which proceed to TDR are resolved through this method.[239]

Both of Alberta's settlement processes are voluntary, confidential, and separated from formal decision making.[240] While settlement terms go by different names, Alberta's approach is similar to those adopted in several other jurisdictions.[241]

Other provinces adopt roughly similar models.[242] There are, however, two notable differences from Alberta's approach that merit further consideration.

1. Voluntary Element

Some jurisdictions, such as Saskatchewan and Nova Scotia, make participation in settlement meetings mandatory.[243] Others, like the federal process, make participation voluntary at earlier stages, but mandatory if the matter proceeds to the tribunal phase.[244]

Advocates of mandatory settlement emphasize the role it plays in advancing the educational and non-punitive elements of human rights mandate. It is not clear, however, that making conciliation or mediation mandatory actually leads to higher rates of settlement. According to Saskatchewan's annual report, 26% (95) of the claims that were resolved in 2017-2018 year were done so through settlement. Nova Scotia's percentage was similar (24%). These rates are lower than Alberta.[245]

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[239] Annual Report 2017-2018 at 18.
[240] https://www.albertahumanrights.ab.ca/tribunal_process/Pages/tribunal_dispute_resolution.aspx https://www.albertahumanrights.ab.ca/Documents/Handout_director_carr.pdf
[241] http://www.bchrt.bc.ca/law-library/guides-info-sheets/guides/settlement-meeting.htm
[242] British Columbia *Human Rights Code*, s 28; Newfoundland and Labrador *Human Rights Act,* s 26; Newfoundland and Labrador *Human Rights Act* Annual Report 2015-2016 at 3 online (pdf):<https://www.justice.gov.nl.ca/just/publications/2015-2016/HRC_Annual_Report_2015_16.pdf>
[243] Saskatchewan *Human Rights Code,* s 33(1), 31(1); Nova Scotia *Human Rights Act*, 29(1), Resolution conferences: are not optional: Nova Scotia Human Rights Commission, "Resolution Conferences" online:<https://humanrights.novascotia.ca/resolving-disputes/about-process/resolution-conferences>.
[244] *Canadian Human Rights Act*, s 47(1)
[245] However, these systems have different resolution process. Saskatchewan has a broad catch-all ground to dismiss complaints with no reasonable grounds which Alberta does not possess.

It is also questionable whether mandatory settlement is appropriate in light of the Director's ability to dismiss a complaint if the complainant does not accept a reasonable settlement offer. This authority, on its own, places the complainant at a significant strategic disadvantage - the respondent loses nothing by making a low settlement offer, while the complainant risks losing their case if they do not accept it. This imbalance is amplified when settlement negotiations are mandatory. It reiterates the power imbalance that may exist between parties, and forces interactions that may be counterproductive to the goals of human rights legislation.

2. Distinction between Settlement and Adjudication

In most jurisdictions, there is a sharp dividing line between settlement and adjudication. In Alberta, for example, conciliators and mediators are not permitted to adjudicate or decide issues should settlement fail.

The Ontario *Human Rights Code* gives the tribunal the broad authority to develop and adopt alternate adjudication models.[246] Ontario uses this power to offer traditional mediation services,[247] but also a hybrid mediation-adjudication system[248] that melds elements of settlement and adjudication into the same process.

This melded mediation-adjudication has become increasingly popular in human rights proceedings because it significantly reduces cost and time, creates leverage for the mediator/decision maker, and promotes settlement.[249] On the other hand, this model raises a number of questions about fairness, confidentiality, and impartiality.[250] These concerns are particularly pressing in the human rights context, given the public interest mandate of human rights legislation and issues and the overwhelming number of unrepresented parties before Tribunals.[251] Despite these pitfalls, the melded model offers attractive practical efficiencies that

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[246] Ontario *Human Rights Code*, ss 40, 41.
[247] [http://www.sjto.gov.on.ca/hrto/application-and-hearing-process/#step4]
[248] Michelle Flaherty & Leslie Reaume, "Mediation-Arbitration in Ontario: Labour Relations, Human Rights, and Beyond?" (2017) 30 CJALP 351 [Flaherty & Reaume].
[249] Flaherty & Reaume at 359.
[250] Flaherty & Reaume at 355.
[251] Flaherty & Reaume at 355.

underpin its popularity. Advocates argue that it is has successfully resolved between 50-80% of the Ontario Human Rights Tribunal's cases.[252]

3. Recommendations for Reform

This report does not advocate that Alberta amend its human rights settlement processes at this time. We are of the opinion that Alberta's current two-phased approach to settlement balances competing interests, and works well to settle claims. In particular:

- Alberta's voluntary settlement processes have a high success rate. Mandatory conciliation and mediation has not appeared to increase the percentage of settled claims.
- Ontario's novel mediation-adjudication model has the potential to increase efficiencies in Alberta, but it also raises a number of questions about fairness that are not easily answerable. In addition, the Ontario model was developed for the direct access system. It's unclear if it would create the same efficiencies in a gatekeeping model that conciliates and settles many complaints before they reach the tribunal phase.

For these reasons, we do not advocate for Alberta to amend its current settlement approach. We note that Alberta has launched a special project to streamline complaints made before January 1, 2019, in order to ensure that those in the queue for conciliation are heard in an efficient manner. A similar process has been implemented for those complaints that were in the queue for investigations.[253] It appears, however, that this project has not changed the voluntary element of the process.

[252] Flaherty & Reaume at 368.
[253] See: Case Inventory Resolution Project: online: https://www.albertahumanrights.ab.ca/complaints/Pages/before_January_1_2019.aspx.

Summary of Recommendations

This report has sought to highlight areas of Alberta's Human Rights regime that could be amended to better serve the public. Below, we summarize our recommendations, that:

1. There be a wide stakeholder engagement on human rights service delivery models in Alberta, specifically focused on the costs and benefits of a switch to direct access.

2. Any discussion regarding a proposed shift to direct access should be premised on maintaining the AHRC.

3. Any discussion regarding proposed structural reforms maintain a specialized human rights decision-making body.

4. The *AHRA* be amended to change the relationship between the AHRC and the Tribunal. Specifically, we recommend creating a standing human rights tribunal comprised of individuals appointed in similar manner to the AHRC members, but who are not affiliated or connected to the AHRC.

5. The *AHRA* be amended to sever the reporting relationship between the Director and the Chief.

6. The HRC engage in more public education about the roles and responsibilities of the Director and the Chief.

7. The *AHRA* be amended to shift its reporting obligations from the Minister of Justice and Solicitor General to the Legislature. We recommend that reporting still take place on an annual basis.

8. The *AHRA* be amended to define discrimination. A clear definition, in line with Manitoba's approach, represents the gold standard that the *AHRA* can use as a model.

9. The *AHRA* should be amended to define systemic discrimination.

10. We recommend that the AHRA define employment, and specify that partnership and contracting relationships fall within the purview of the Act.

11. The *AHRA* be reorganized to list all protected grounds, areas, and exceptions in a single, clearly delineated area. These grounds, areas, and exemptions should not be repeated on several occasions.

12. Criminal history be added as a protected ground of discrimination. While this could apply to all protected areas, at a minimum this ground should prohibit discrimination in employment, as well as membership in unions or employment associations. It is unnecessary, although not harmful, to stipulate that discrimination on the basis of one's criminal history be limited to situations where the history is unrelated to the employment position.

13. Criminal history be defined as encompassing more than just criminal convictions.

14. The *AHRA* be amended to include political belief as a prohibited ground of discrimination for all areas of activity covered under the legislation.

15. The *AHRA* define political belief in a way that clearly sets out its scope. Any legislative amendment to add this ground should include a definition that outlines what the scope of the provision is intended to be.

16. The *AHRA* be amended to include either "nationality" or "citizenship" as a prohibited ground of discrimination. If "nationality" is chosen, provide a specific definition for the term.

17. The limitation period in the *AHRA* remain at one year, but decision makers must be given the discretion to extend this time period where it was incurred in good faith, and no substantial prejudice results from its inclusion.

18. If Alberta maintains the gatekeeping model for human rights complaints, it should consider amending the legislation so as to follow the federal model for dealing with frivolous and vexatious complaints (complainants).

19. The AHRA be amended to allow the Commission to have its own power to refer cases or situations for investigation.

20. The *AHRA* remove the statutory bar from AHRC members and employees from launching human rights complaints. Alternatively, we recommend that the AHRA offer an alternate forum for members and employees of the AHRC to have human rights grievances heard.

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