GNWT RESPONSE TO THE STANDING COMMITTEE ON GOVERNMENT OPERATIONS REPORT 3-16(6) ON THE REVIEW OF THE 2009-2010 ANNUAL REPORT OF THE HUMAN RIGHTS COMMISSION

The NWT *Human Rights Act* [1] ("the Act") came into force in 2004. It provides authority to the Director of Human Rights to investigate complaints and refer them on to an Adjudication Panel for determination. The Adjudication Panel may issue orders to address discrimination in a particular complaint. The Human Rights Commission and the Director and Deputy Director of Human Rights, all appointed under the Act, report to the Speaker of the Legislative Assembly. There is no reporting relationship with any member of the Executive Council.

The following is the GNWT's response to the recommendation contained in *Committee Report 3-16(6): Standing Committee on Government Operations Report on the Review of the 2009-2010 Annual Report of the Human Rights Commission.*

Standing Committee Recommendation

The Standing Committee on Government Operations recommends that the Department of Justice review and assess the advisability of prohibiting discrimination based on "unrelated" criminal convictions or a criminal record.

GNWT Response

The Department of Justice has assessed the legal and practical implications of expanding the list of prohibited forms of discrimination to offer protection for unrelated, unpardoned criminal convictions. For a number of reasons, Justice considers this highly inadvisable.

The Northwest Territories *Human Rights Act* protects individuals from discrimination on the basis of a criminal record for which a pardon has been granted. Pardons may be granted by the National Parole Board to individuals who have served their sentence and who have demonstrated that they are law-abiding citizens. The National Parole Board conducts its own investigation to determine whether the pardon should be granted. It can deny a pardon in the event it determines that the applicant has not displayed good or responsible conduct.

In the Northwest Territories, many employers, including the GNWT, have a practice of requiring disclosure of an applicant's criminal record for certain positions. If the applicant has a record, then the employer may assess it and determine whether or not the criminal record should disqualify the applicant from further consideration, or continued employment, as the case may be. In doing so, the employer, presumably, takes into account their intimate and extensive knowledge of their particular business or industry.

[1] S.N.W.T. 2002, c. 18

Arguably, for the reasons just noted, the employer is in the best position to do this. Creating an explicit protection for unpardoned, unrelated criminal offences removes the decision of what is "unrelated" from the employer, however, and places it into the hands of a third party, namely the Human Rights Adjudication Panel. This would have significant legal, practical and financial consequences to employers and businesses in the Northwest Territories. These consequences stem not only from the results of any such decision, but also from the process that would be used in the event that an applicant disagrees with an employer's decision.

Under the *Human Rights Act,* complaints are submitted to the Director of Human Rights, who causes them to be investigated. The GNWT's own experience has been that investigations can take up to a year to complete. Thereafter, parties are invited to make submissions to the investigator's findings and ultimately, the Director of Human Rights will determine whether the matter should proceed to a hearing of the Adjudication Panel. There is a very low threshold for determining whether something should proceed to a hearing, and most cases do. Hearings are complex, typically require the submission of documentary and oral evidence, and it is often necessary to retain a lawyer. It is quite possible that by the end of the process, two years or more will have elapsed. In the meantime, there will have been a profound effect on the employer's ability to staff a position and carry on with its business. The employer will have paid money to lawyers and have taken time away from his or her business to attend to the complaint. These proceedings are difficult for any business to absorb and can take up enormous resources.[2]

Much of the case law on what constitutes an "unrelated" criminal conviction comes from British Columbia. Whether something is "unrelated" depends on all of the circumstances of the case, and at least one of the following:

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 and efficiently?*
2. *What were the circumstances of the charge and the particulars of the offence involved? e.g. How old was the individual when the events in question occurred? Were there any extenuating circumstances?*

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[2] For example, *Molloy and Yukon Human Rights Commission v. Yukon Government* 2011, Yukon Human Rights Board of Adjudication. The applicant claimed he was an employee and claimed discrimination on the basis of unrelated criminal record. Ultimately, the Yukon Government was successful, but the case was started in May of 2005, went through a 12-day hearing in 2008, was reviewed in 2009 by the Yukon Supreme Court and remitted back for a rehearing. It was dismissed in May of 2011.

Also, *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Québec Inc.* [2003] S.C.J. No. 68. The employer dismissed an employee who did not return to work after a period of approved leave because he was incarcerated. Although the employer was ultimately successful in proving this was not discrimination, the case took over six years to resolve, starting at the human rights adjudication panel level, through the court of appeal and, ultimately, to the Supreme Court of Canada.

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 behavior for which he was charged? Has he shown a firm intention to rehabilitate himself?* [3]

Even where an employer has considered all of these factors and come to a conclusion, it would be open to an applicant to make a complaint under the *Human Rights Act* and, it would, potentially, be open to the Adjudication Panel to substitute its own conclusions for those of the employer. These circumstances would lead to uncertainty and, in some cases, undesirable results.

Even with legal factors being articulated to guide decisions, whether or not a criminal conviction is "unrelated" to a particular job or detrimental in a particular business is never certain. It is for the employer, who has all of the facts and knows their business and industry, to determine whether a particular criminal conviction makes an applicant or an employee, as the case may be, unsuitable. The current provision – which prohibits discrimination based on criminal conviction only where the person has been granted a pardon from the National Parole Board – offers certainty and finality that cannot be achieved by substituting the term "unrelated".

[3] As cited in *Dunphy v. B.C. (Ministry of Public Safety and Solicitor General)*, 2005 BCHRT 3