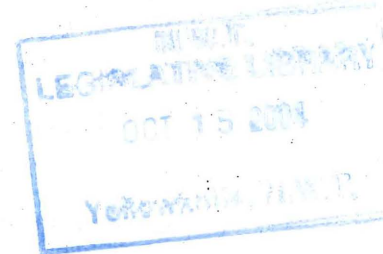




# FAIR PRACTICES OFFICE

## ANNUAL REPORT

January 1 to December 31, 2003



### BACKGROUND

#### THE FAIR PRACTICES ACT

The *Fair Practices Act* of the Northwest Territories is the current "human rights" legislation in the Northwest Territories. It prohibits certain discriminatory behaviour in our work, in the provision of services and in access to accommodations. It sets out society's norms for how we should treat one another, despite our differences.

Respect for diversity is especially important in a country like Canada, where the population is so diverse, made up of so many different nationalities, religions, languages and customs. The cultural diversity of the Northwest Territories is perhaps even more pronounced than in other parts of the country. It is our diversity and our acceptance of that diversity that makes Canada such a rich and inviting country.

This will be the last annual report to be made to the Government of the Northwest Territories under the *Fair Practices Act*. The new *Human Rights Act* has been passed and is expected to come into effect and replace the *Fair Practices Act* in July of 2004. This is a positive step which will enhance the profile of human rights and the duty to respect those rights in the Northwest Territories. It is in some ways unique and groundbreaking, covering new grounds of discrimination not yet acknowledged in other Canadian jurisdictions and it therefore puts the Northwest Territories at the forefront of human rights protection in Canada.

It is by now trite to say that the world has changed in many ways since September 11<sup>th</sup>, 2001. People and governments are less trusting and more cautious. Security and protection have become a paramount concern of governments. There is a very fine balancing act to be done, however, to balance security and respect for human dignity. It is even more important, in this changed world, that we continue to support legislation that promotes and protects human rights. We are, therefore, looking forward to the

new legislation which expands the prohibited grounds of discrimination and sets new precedent in Canada.

The *Fair Practices Act*, the act currently in force, prohibits discrimination based on the grounds of race, creed, colour, sex, marital status, nationality, ancestry, place of origin, disability, age, family status, or because of conviction for which a pardon has been granted. The Act further provides for an independent forum for the investigation and adjudication of complaints from individuals who feel that they have been discriminated against in their employment, in seeking and maintaining accommodations, in obtaining services or in the using facilities generally open to the public.

The new act will expand the prohibited grounds of discrimination to include, for example, discrimination on the basis of sexual orientation, gender identity, social condition or political belief. The expansion of grounds of discrimination is in keeping with recent court decisions and changing social norms within our society.

One of the strongest features of the new Act is that it provides for an educational function to be undertaken by the Human Rights Commission. This is something that is missing from the *Fair Practices Act*. Protecting human rights is about changing mind sets and it is difficult to change attitudes without a good public education component which starts in the school system.

The new act also provides for a new process for dealing with complaints of human rights abuses and establishes a Human Rights Commission and a Human Rights Tribunal. It creates a more formal and detailed outline of the complaint process and more layers of checks and balances to ensure fairness. The complaint process is likely to take somewhat longer to complete, but the process is more in keeping with the tribunal system which we find in most other Canadian jurisdictions.

#### ROLE OF THE FAIR PRACTICES OFFICER

Under the *Fair Practices Act*, Fair Practices Officers are appointed to receive, investigate, mediate and adjudicate complaints of human rights abuses and discrimination. In 2003, there were three Fair Practices Officers - Elaine Keenan Bengts, James Posynick and Shannon Gullberg.

Complaints received by the Fair Practices Office are assigned to one of the Officers who will generally have conduct of the file from the receipt of the complaint to the finalization of the matter.

It is the responsibility of the Fair Practices Officers to investigate all written complaints received. The process provided for in the Act emphasizes mediation and negotiation and gives the Fair Practices Officer the authority to assist the parties to resolve misunderstandings and disputes without a formal hearing. If no resolution can be achieved, however, the Fair Practices Officer is empowered to conduct a hearing and make an order.

In practice, the current Fair Practices Officers have developed a general policy that the officer to whom a file is assigned will do an initial investigation and, if a *prima facie* case is made out by the Complainant, will refer the matter to another of the Officers for mediation. If the mediation is unsuccessful, it is then referred back to the investigating officer to hold a hearing.

A finding of discrimination at a hearing can result in any Order which the Fair Practices Officer considers is appropriate to the circumstances. An order of a Fair Practices Officer can be filed in the Territorial Court of the Northwest Territories and enforced as an Order of that Court.

## THE COMPLAINT PROCESS

The Northwest Territories *Fair Practices Act* provides the mechanism by which individuals who feel that they have been discriminated against can have their concerns heard. Complaints to the Fair Practices Office must be in writing and be signed by the person making the complaint. If a Complainant has a problem in reducing his or her complaint to writing, assistance will be provided by our staff to put the complaint in writing.

Once received, the complaint is assigned to a Fair Practices Officer who begins an investigation of the complaint. The Fair Practices Officer first determines whether there is jurisdiction under the Act to deal with the complaint. If it does not fall under one of the prohibited grounds, or there is some other reason that the complaint is not covered by the Act, the complaint will be dismissed. Provided that the matter complained of is within the Fair Practice Officer's jurisdiction, the Officer begins by obtaining information in writing from both parties to the dispute.

If a *prima facie* case and jurisdiction has been established, the investigation will continue. This is a fairly low threshold. The complainant merely has to establish that, if the facts set out in the complaint were true, the actions complained of would be prohibited under the Act. As a result, unless there is a jurisdictional issue (i.e. the complaint does not fall under one of the prohibited grounds of discrimination, or the matter is one within federal jurisdiction) most complaints made will proceed to either mediation or a hearing. Before a hearing, the Fair Practices Officer will make efforts to assist the parties in resolving the concerns raised through negotiation and/or mediation. In an effort to encourage the parties to discuss their concerns and attempt to resolve their disputes without the need for a full hearing, the Office has developed a general policy to refer all matters to mediation prior to setting a hearing date. The Fair Practices Officers have also developed a policy that the Officer who participates with the parties in a mediation will not generally sit as the hearing officer.

There may be cases in which, because of the circumstances, the Fair Practices Officer does not feel that mediation will be of any benefit or would be inappropriate. In these cases, the matter will proceed directly to a hearing once a *prima facie* case has been established.

Where no resolution can be achieved through mediation or otherwise, a hearing is set at which all parties are invited to present their case, under oath. Based on the evidence presented, the Fair Practices Officer will make a finding as to whether or not discrimination has been shown to have occurred and, if so, an order will be made to that effect. The Fair Practices Office can also impose penalties and award compensation for discriminatory actions. If no discriminatory action is found to have taken place, the complaint will be dismissed.

This system has worked very well over the last few years. It allows both complainants and respondents the opportunity, in mediation, to take a second look at the situation from a different point of view and to discuss the incident or incidents in question before the hearing begins. In almost every case in which the parties agree to mediation, the mediation results in a resolution to the matter.

Most complaints received by the Fair Practices Office are completely resolved within 6 months from the date the complaint is submitted.

One of the weaknesses of this system, however, is that, in most cases there is a significant disparity in the ability of the parties to retain counsel to assist them at the hearing stage. The majority of complaints made arise from an employment situation. Employers inevitably have more resources to hire lawyers than do the complainants. Because the onus rests firstly on the complainant to show that the behaviour complained of was discriminatory, the absence of counsel for the complainant often puts them at a disadvantage. It does not appear that this problem has been addressed under the new Human Rights Act, as it appears that the individual who makes the complaint will still bear the onus of proving his or her case before a Tribunal. Because the tribunal system is far more formal than the current system, this may create even more difficulties for complainants.

## PUBLIC EDUCATION AND OTHER ACTIVITIES

The Fair Practices Act does not currently mandate the Fair Practices Officers to provide public information about human rights issues in general. There has, however, been an attempt by the incumbent Fair Practices Officers to provide information to the public about the Act. Over the last year, the Fair Practices Officers have continued to take on this role and have been assisted greatly in this function by Kim Powless, the Office Administrator. Ms. Powless is the front line contact person who takes calls and helps individuals to file their complaints. Often, the Fair Practices Office is not the appropriate forum for the complaint being made, in which case Ms. Powless attempts to direct the individual to the appropriate government or non-government agency who can deal with their concerns.

The majority of complaints received in the Fair Practices Office arise out of employment situations but in many cases, the complaints do not fall under one of the prohibited grounds of discrimination as defined in the Act. These complaints are often directed to unions, to Labour Services or some other agency which may be of assistance.

In March 2003, Ms. Keenan Bengts was asked to participate as a speaker at a conference in Yellowknife called "NeXplore - The Next Generation of Northern Business Leaders Strategic Direction". She spoke about the *Fair Practices Act* and its application in the workplace.

Ms. Keenan Bengts also attended the annual CASHRA (Canadian Association of Statutory Human Rights Agencies) conference and business meeting which was held, this year, in Winnipeg.

In addition, Ms. Keenan Bengts continued to work with "Public Education Partners" which is an informal group of people in all jurisdictions across Canada, all of whom are employed by their respective Human Rights Commissions with the mandate to provide public education on Human Rights issues. This group continued to work to compile a list of educational materials and tools available through the various Human Rights Commissions throughout the country. This list will, no doubt, be a significant tool for the new Human Rights Commission in their ongoing role as educators under the new Act.

Also on a national level, the Fair Practices Office has been active in ongoing discussions with our counterparts on emerging and ongoing issues. Several jurisdictions are currently working on amendments to their Human Rights Legislation, including the Northwest Territories and Nunavut. Several southern jurisdictions appear to be moving away from the current model whereby the Commission investigates complaints and sends unresolved ones to a Tribunal, to a much more streamlined process which allows more flexibility. The general feeling seems to be that the current tribunal system is time consuming, intimidating, expensive and cumbersome and does not serve the interests of either the complainants or the respondents well.

Several other jurisdictions are also investigating the inclusion of "social condition" as a prohibited ground of discrimination under the Act. This is a controversial matter, however, and is not universally embraced even among the various Human Rights agencies. It is encouraging to see that the Northwest Territories will be at the forefront by including social condition as a prohibited ground under the new legislation.

## COMPLAINTS AND INQUIRIES

The Fair Practices Office receives many telephone inquiries. Most of these are simple inquiries for which an immediate response can be given, and these are handled by the office administrator. We have attempted to keep track of the calls received and this year there were approximately 67 general inquiry calls made to the Office, approximately 19 e-mail requests for information, and approximately 16 office visits from individuals seeking information, for a total of approximately 102 general inquiries. As a result of these inquiries, 11 packages regarding the Act were faxed out and 46 packages were mailed.

In addition to these general inquiries, the Office also received a number of other inquiries. For example, other Human Rights Commissions called from time to time seeking information on policies and/or procedures in our office. Several other jurisdictions also did surveys over the past year which we were asked to participate in. This year there were also several requests for information regarding the new *Human Rights Act*.

One of the inquiries was from the Canadian Human Rights Reporter seeking copies of orders made under the *Fair Practices Act*. After consulting between themselves, the Fair Practices Officers agreed to provide the Orders to any member of the public who requested them, but on an anonymized basis so as to protect the identities of both complainants and respondent.

Surprisingly, there were no consultations between the consultants hired to produce an implementation plan or the group formed by the government to implement the new *Human Rights Act* and the Fair Practices Office. We invited first the consultants and then those charged with the implementation to meet with us so that we could pass on any relevant information and assist the transition by drawing on our years working in the human rights field. We understand from our contact with other Human Rights Commissions throughout the country that many, if not all, of them were consulted during the implementation process. It is curious that our own local resources were not tapped as well. Perhaps most importantly, Ms. Powless's experience on the front line would have proven invaluable to ensure a full understanding of the nature of the inquiries received over the years and to help to devise ways to streamline and improve the new system.



## FORMAL COMPLAINTS

Eighteen (18) new files were opened in 2003, down from last year's 26 but still more than in previous years. Of the complaints filed, eight (8) were made under section 3 of the Act (discrimination in the course of employment). Seven (7) of the complaints filed did not specify a section of the Act or could not be categorized. Most of these latter complaints resulted in dismissals on a jurisdictional basis, as the matters complained of did not fall under any of the prohibited grounds of discrimination.

Of the new files opened, the issue raised in the most instances was discrimination on the basis of race, ancestry or place of origin (4 files), followed by sex (3), and family status (2). One complaint was received of discrimination on the basis of a disability and one complainant felt that he had been discriminated against because of a previous conviction. The others either did not fall within one of the prohibited grounds or the basis of the complaint could not be ascertained.

During the course of the year, twenty four (24) files were closed for various reasons.

- ten (10) complaints were either withdrawn by the complainant, or were dismissed without a hearing because the complainant failed to respond to a request from the Fair Practices Officer for further information about the specific grounds of discrimination being claimed;
- one (1) was dismissed by the Fair Practices Officer without a hearing because, in the Officer's opinion, no *prima facie* case of discrimination was made out;
- one (1) was filed in the wrong jurisdiction and the complainant was directed to the correct jurisdiction;
- two (2) resulted in preliminary Orders by the Fair Practices Officers
- four (4) final Orders were made with a finding of discrimination
- four (4) final Orders were made with a finding that there had been no discrimination
- two (2) were successfully mediated

Three (3) cases went to hearing, all of them in Yellowknife. Two of the three hearings were completed. As of December 31, 2003, one remained outstanding and was scheduled to recommence in February, 2004.

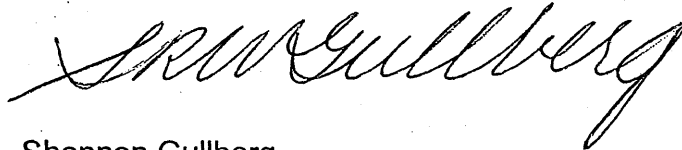
## RECOMMENDATIONS FOR CHANGE

In light of the imminent coming into force of the *Human Rights Act*, we decline to make any comment with respect to either implementation or suggestions for change. The current Fair Practices Officers, however, collectively commend to those who assume the role of the Commissioners and Director under the new act the need for educational materials and opportunities, particularly for small employers who often do not know of the extent of their obligations in avoiding discriminatory practices.

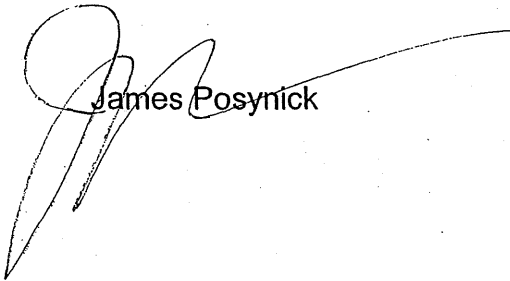
Respectfully Submitted



Elaine Keenan Bengts



Shannon Gullberg



James Posynick

