

## ACCESS TO JUSTICE FOR WOMEN: PROPOSED UNIFORM WORKPLACE TRIBUNAL

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Ontario's Ministry of Labour has proposed unifying six tribunals and restructuring four agencies that handle matters relating to workplaces. The Ministry has issued a consultation paper, entitled, "*Looking Forward: A New Tribunal for Ontario's Workplaces*", dated February 2001 (the "Consultation Paper"). The deadline to comment is April 16, 2001.

Under this proposal, the Ministry intends to merge the Ontario Labour Relations Board ("OLRB"), the Workplace Safety and Insurance Appeals Tribunal ("WSIAT"), the Pay Equity Hearings Tribunal ("PEHT"), the Education Relations Commission ("ERC"), the College Relations Commission ("CRC"), and the Board of Inquiry ("BOI") under the *Human Rights Code*. The Ministry also intends to review and restructure the Office of the Employer Adviser ("OEA"), the Office of the Worker Adviser ("OWA"), and the Pay Equity Office ("PEO") of the Pay Equity Commission. The Grievance Settlement Board will also have its Crown Agency status reviewed.

There is on question that regulatory structures can become outdated and lead to unintended outcomes, and that periodic reviews are necessary and should be welcomed. Nevertheless, certain aspects of this proposal compel us to consider their broad impact on access to justice.

### Grappling with the Principle of Efficacy

- ! The need to adjudicate human rights complaints in a timely fashion is a recurring theme in the jurisprudence - - *Large v Stratford (City)*, [1995] 3 S.C.R. 733 - - "the aim of human rights legislation [is] to provide a prompt and relatively inexpensive method of resolving complaints". Can the creation of the proposed single tribunal expedite things? If so, at what cost?
- ! The Consultation Paper contemplates the use of mandatory mediation, Issue III-12, as a means of reducing "costs and disposition time without compromising the fairness of the process". The Consultation Paper goes on to suggest that, "The proposed tribunal could be given the power to mediate at any stage of the proceedings with the consent of the parties, while retaining the power to adjudicate issues remaining in dispute". In such circumstances, mandatory medication could have a very detrimental impact on the overall bargaining position of workers against management. How and when this could be applied to sexual harassment cases is particularly problematic.
- ! The Consultation Paper asks, in Issue III-7, if the single tribunal should "have the power to charge user fees, and if so, in what circumstances"? This is a clear access to justice issue for women, and other traditionally economically disadvantaged groups.
- ! Any delays resulting from a single tribunal's overwhelming caseload have a greater adverse impact on women, because delay is particularly problematic in pay equity complaints - - *Bell Canada v Communications, Energy and Paperworks Unions of Canada* (No. 3) (1997), 127 F.T.R. 44, in which some employees had required, accepted buy-outs or died during the six

years that elapsed in this pay equity matter.

- ! Delay increases evidentiary problems, and is therefore detrimental to the interests of all parties, but is most problematic for complainants.

### Duplication of Adjudicative Forums

- ! The Consultation Paper makes frequent reference to the duplication of adjudicative forums under the present system. This issue deserves in-depth academic study, since the key policy recommendations contained in the Consultation Paper, including the need for a single tribunal, are based on this conclusion, yet the Consultation Paper offers no such statistical support for this hypothesis. Detailed statistical research and analysis of such duplicative proceedings are highly recommended and the results should be made public during the consultation process.
- ! One example given in the Consultation Paper refers to the multiplicity of forums available to a sexual harassment complainant. However, the Supreme Court of Canada was unequivocal in *Seneca College v Bhadauria* [1981] 2 S.C.R. 181, that there is no separate common law tort of discrimination by way of a repeated denial of any employment opportunity on the alleged ground of racial origin, where *The Ontario Human Rights Code* also provided for an administrative inquiry and remedial relief. The plaintiff's failure to invoke the *Code* did not entitle her to sue at common law, or to found a right of action on an alleged breach of the *Code*. Accordingly, the *Code* foreclosed any civil action based directly upon its breach and also excluded any common law action based on the public policy principles expressed in the *Code*.
- ! Similarly, in *Blainey v Ontario Hockey Association and the Ontario Human Rights Commission* (1986) C.H.R.R., Vol.8, D/3529, the Ontario Court of Appeal found that where section 15(1) of the *Charter*, which guaranteed equal protection and equal benefit of the law, overrode section 19(2) of *The Ontario Human Rights Code*, section 19(2) was of no force and effect, and the plaintiff was directed to have her complaint addressed through the ordinary procedures set out in the *Code*.
- ! Only about 25% of Canada's workforce are subject to a collective agreement. In cases of sexual harassment complaints by unionized workers, they must take their complaints to their union representatives, and cannot forum shop. While the Ontario Labour Relations Board has the discretion to direct such complaints for review under *The Human Rights Code*, this type of direction does not result in duplicative proceedings of the same issue.

### Independence and Impartiality

- ! Section 11(d) of the *Charter* guarantees a person "charged with an offence the right to be tried "by an independent and impartial tribunal". "These are fundamental traits of any process that respects the principles of natural justice" and so the case law found under the *Charter* is now extended to administrative and adjudicative bodies in general - - *P.S.A.C. v Northwest Territories (No. 1)* (1988), 36 C.H.R.R., Vol. 36, D/164 (Can. Trib.).
- ! "How well the tribunal operations in actual practice" (the late Sopinka, J.) must be considered along with the legislative framework surrounding such issues as security of

tenure, financial security, and administrative control - - *Canadian Pacific Ltd. v Matsqui Indian Band*, [1995] 1 S.C.R. 3.

- ! The Consultation Proposal also suggests that the single tribunal would benefit from a privative clause, thus precluding the right of appeal, in some unspecified instances. This is a matter of due process, and should be of concern to lawyers all across Ontario.
- ! The day-to-day concerns of the proposed single tribunal need to be weighed, as well. As the late Sopinka, J. concluded in *Matsqui*, *supra*:

Case law has thus tended to consider the institutional bias question after the tribunal has been appointed and/or actually rendered judgment. That institutional independence must be considered “objectively” does not preclude considering the operation of a legislative scheme which creates an administrative tribunal, but only vaguely or partly sets out the three *Valente* elements, as in this appeal, where the taxation by-laws in issue are silent with regard to details relating to tenure and remuneration. It is not safe to form final conclusions as to the workings of this institution on the wording of the by-laws alone. Knowledge of the operational reality of these missing elements may very well provide a significantly richer context for objective consideration of the institution and its relationships. Otherwise, the administrative law hypothetical “right-minded person” is right-minded, but uninformed.

## Conclusion

- ! Administrative tribunals have specialized expertise in their areas of law, and in their ability to deal with complex fact situations. The vast amount of knowledge required of such a single tribunal will be daunting, and tribunal members may be worked too hard and spread too thin. Adding a privative clause to the tribunal’s authority, combined with broadly expanding its area of responsibility, may result in unnecessary delays and more arbitrary decision-making, without a right of review.

*\*This article is intended to provide general information and is not specific legal advice. If you have a legal problem, you should not rely on this article alone but should speak to a lawyer. James Morton is certified as a specialist in civil litigation by the Law Society of Upper Canada and is a partner with Steinberg Morton Frymer LLP, a full service law firm in Toronto. You can reach James by telephone at 416-225-2777.*