



**ONTARIO
BAR ASSOCIATION**
A Branch of the CANADIAN BAR ASSOCIATION

SUBMISSION OF THE

ONTARIO BAR ASSOCIATION

**TO THE STANDING COMMITTEE ON
JUSTICE POLICY**

REGARDING

***BILL 107, An Act to Amend the Human
Rights Code***

I. INTRODUCTION AND OVERVIEW

The Ontario Bar Association (OBA) supports the general direction of Bill 107, the provincial government's legislation to overhaul Ontario's human rights enforcement system. In particular, the OBA supports Bill 107's concept of direct filing of complaints with the Human Rights Tribunal of Ontario and strengthening the role of the Human Rights Commission in preventing discrimination and protecting the public interest. However, the OBA believes that Bill 107 would be strengthened by amendments in certain critical areas in order to better promote fairness, efficiency and justice in a reformed human rights system.

The OBA (formerly the Canadian Bar Association - Ontario) represents 17,000 lawyers, justices, law professors, and law students. The OBA is a member-driven association. As "the voice of the legal profession", the OBA is the largest legal association in Ontario, representing lawyers through its 35 sections whose membership is based on areas of expertise.

Following the provincial government's April 2006 introduction of Bill 107, *An Act to Amend the Human Rights Code*, the OBA established a Task Force, co-chaired by Andrew Pinto and David Wright, to provide a response to the Bill. The Task Force, consisting of OBA section representatives, particularly those with expertise and experience in human rights law, met between May and September 2006. Key Task Force participants included representatives from the following sections:

- Administrative Law
- Alternative Dispute Resolution
- Civil Litigation
- Constitutional, Civil Liberties and Human Rights
- Feminist Legal Analysis
- Immigration Law
- Labour Relations
- Official Languages
- Public Sector Lawyers

The Task Force reviewed numerous studies, reports, position papers and commentaries concerning the human rights system in Ontario and other provinces. The Task Force also examined federal and provincial laws, and court and tribunal decisions that would govern the new human rights system.

The Task Force's findings and recommendations were reviewed and approved by the OBA Executive and Council, representing lawyers from across the province and from all practice areas, and the OBA makes the following submissions with regard to the Bill.

Proposal I.1: The OBA supports the general direction of the Bill, notably the direct filing of complaints with the Human Rights Tribunal of Ontario and strengthening the role of the Human Rights Commission in preventing discrimination and protecting the public interest.

The fundamental change contemplated by Bill 107 is that individuals would no longer file their human rights complaints (called applications in Bill 107) with the Ontario Human Rights Commission. Instead, they would file directly with the Human Rights Tribunal of Ontario. The Commission would no longer be involved in the intake, mediation, and investigation of all complaints and their referral to the Human Rights Tribunal. However, the Commission would continue its role of promoting and advancing respect for human rights and promoting the elimination of systemic discrimination and its powers in this regard would be strengthened.

The Task Force's discussions reflected some of the debates around Bill 107 occurring in the media and wider community, albeit with a legal focus. The discussions were characterized by recognition that the status quo is unacceptable, but that the reformed human rights system should still achieve an appropriate balance between efficiency and justice, including access to justice for Ontario's most vulnerable individuals and groups.

The OBA believes that participants in the human rights system should have the opportunity to be heard in a timely manner through an open process. Bill 107 proposes fast access to the Tribunal, albeit without a full prior investigation conducted by a third party, such as the Commission.

The OBA understands concerns that the lack of a full prior investigation may pose challenges to applicants in mounting their cases before the Tribunal. However, while prior investigations can be useful, their value is diminished where cases turn on findings of credibility. Also, in practice, there is a tradeoff between the time and resources spent on an investigation and having the parties provide their evidence directly at the Tribunal. The OBA believes that the Tribunal's more wide ranging and flexible powers under Bill 107, including the power to examine documents and make inquiries as it considers necessary, can be utilized to address this concern.

II. THE ONTARIO HUMAN RIGHTS COMMISSION

Proposal II.1: The OBA believes that the Bill should be amended to give the Ontario Human Rights Commission notice of all applications filed with the Tribunal, the power to request and obtain documents filed in any application, and the power to intervene as of right as a party in any proceeding before the Tribunal. The Tribunal may impose conditions on the exercise of such intervention rights through its rules.

Since individual applications under Bill 107 are to be filed at the Tribunal, the OBA is concerned about how the Commission would be able to determine which applications may raise systemic issues and warrant Commission involvement, up to and including intervention in Tribunal proceedings. Bill 107 does not have any provisions that address these concerns.

The OBA believes that the Commission should have the ability to determine the nature and status of applications being filed with the Tribunal. While we understand that the logistics and costs remain to be worked out, we believe that the Bill should provide the Commission with this ability so that it can fulfill its mandate of dealing with systemic discrimination issues.

The Commission should also be able to intervene in any application, including individual applications, in furtherance of its public interest functions. However, the Commission's intervention should not unduly delay the hearing process and the Tribunal should be able to control its process to ensure that this does not occur.

The Commission, Tribunal and Courts should also interpret the word "systemic" in section 36 of Bill 107 in a broad, liberal and purposive manner that does not unduly fetter the Commission's discretion, particularly since "systemic" is not defined in the Bill.

Proposal II.2: The OBA believes that the Bill should be amended to maintain the Commission's existing investigative powers. The powers should be adapted to the new scheme by allowing the Commission to investigate any potential violation of the Code, and to apply to a Justice of the Peace for a search warrant where there are reasonable grounds to believe a search will provide evidence relevant to a violation of the Code.

The OBA believes that Bill 107 must give the Commission sufficient tools to carry out its revised functions of promoting respect for human rights and eliminating

discrimination. However, the OBA is concerned that the proposed legislation goes too far in restricting powers that the Commission has exercised to date, particularly those currently contained in s. 33 of the *Code*.

For instance, section 29 of Bill 107, describing the new functions of the Commission, does not appear to allow the Commission to investigate allegations of discrimination. Instead the Commission may “initiate reviews into problems”. The OBA believes that explicit investigatory powers, along the lines of those now in s. 33, are necessary for the Commission to perform one of its core functions. Indeed, the power to compel documents, enter into premises or affect a search warrant may be of paramount importance in uncovering and eliminating systemic discrimination. Although the full extent of the Commission’s powers is not typically used in every investigation, the delineation of such powers in legislation is necessary and advisable to promote compliance with the *Code*. Furthermore, these investigative powers could be exercised before, during or after the time that a particular application is before the Human Rights Tribunal. The Commission’s work is not necessarily related to an application before the Tribunal.

Proposal II.3: Bill 107 should be amended to allow the Tribunal to order the same remedies, regardless of whether the Applicant in the proceeding is the Human Rights Commission or an individual. The OBA believes that section 43 should be removed and section 42 should be amended to read:

42. (1) On an application under section 35 or section 36, the Tribunal may make one or more of the following orders...

Currently in Bill 107, when the Commission is the Applicant, section 42 of the Bill restricts the Tribunal to directing a party to “do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act *in respect of future practices*.” The OBA does not believe that limiting the Tribunal’s remedial authority in this regard is advisable. Such restrictions could hinder the Tribunal from ordering compensation for past infringements when it has been necessary for the Commission to bring a systemic application. The Tribunal should have the same wide remedial authority in all cases.

III. THE HUMAN RIGHTS TRIBUNAL OF ONTARIO

The Task Force developed four proposals that, in our view, would strengthen the provisions of the Bill that relate to the functioning of the Tribunal.

***Proposal III.1:* The OBA believes that the Bill should be amended to require that written reasons be given for any final decision of the Tribunal in relation to an application.**

The OBA supports the philosophy of the Bill that the Tribunal should determine its own procedures and may use practices and procedures that are alternatives to traditional adjudicative practices and procedures. The OBA believes, however, that written reasons are essential in the final disposition of any application. Written reasons provide the parties with a clear explanation of why the decision in their case was made. They let parties know that their concerns have been heard and are necessary to ensure confidence in the system. They also lead to better decisions, since the process of writing assists decision makers in developing and clarifying their thought process.

***Proposal III.2:* The OBA believes that the Bill should be amended to provide that the Tribunal must:**

(a) make and interpret its rules to secure the just determination of the real matters in dispute in each application

(b) consider the appropriateness of public interest remedies in each application.

While the Tribunal properly has broad discretion to make and interpret its rules, the OBA submits that there should be general statutory direction governing how it does so, to emphasize that decisions should be made on substantive issues and not on a technical basis. The language chosen for proposal (a) is an adaptation of Rule 2.01(1)(a) of the *Rules of Civil Procedure* which has been judicially considered.

The OBA also submits that the Tribunal be directed to consider public interest remedies in each case, whether or not the parties to the dispute have raised them. This will ensure that broader systemic issues and the public interest are considered in each case, even those that are primarily private disputes.

Proposal III.3: The OBA believes that the Bill should be amended to ensure that the Tribunal has the discretion to decide not to determine an issue under the Code that is before or has been finally determined by another administrative tribunal that has the jurisdiction to order remedies under the Code. It is the general position of the OBA that all individuals should have access to the Human Rights Tribunal. However, in the unique circumstances of unionized workers, it is the OBA's submission, based upon the unanimous view of the members of the OBA's Labour Relations section, consisting of union-side lawyers, management-side lawyers, and neutrals, that the Tribunal should not have the jurisdiction to determine an issue under the Code that has been or could be the subject matter of a grievance pursuant to a collective agreement or application to the Ontario Labour Relations Board, including settlements that are entered into therefrom or human rights complaints and grievances of unionized employees that have been settled or otherwise resolved under an Act other than the Code.

The OBA is concerned with the present language in s. 41(g), which provides that the Tribunal may dismiss a proceeding "if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of an application." The word "appropriately" is ambiguous and may be interpreted as inviting the Tribunal to essentially sit on appeal from the decisions of other administrative tribunals. This does not promote the finality of administrative proceedings and may burden the Tribunal with the task of considering large numbers of cases that have already been determined by other bodies. The OBA strongly recommends that the word "appropriately" be removed and that s. 41(g) refer both to issues currently before and already determined by other administrative tribunals. The Tribunal should be given a general discretion not to hear such cases so long as the other decision maker can award remedies under the *Human Rights Code*. In the area of labour relations, arbitrators and the Ontario Labour Relations Board have considerable expertise in human rights, and based on the view of its Labour Relations section, it is the submission of the OBA that issues under the Code that have been or could be the subject matter of a grievance or application to the OLRB be excluded from the Tribunal's jurisdiction.

Proposal III.4: The OBA believes that the Bill should be amended to provide for judicial review of Tribunal decisions but not solely on a patently unreasonableness standard. We recommend that section 45 of the Bill be amended to provide for two standards of review: A patent unreasonableness standard, and in decisions where a question of law of significant public importance is raised, or the case involves the determination of a new legal principle of significant public importance, a correctness standard.

The OBA applauds the Bill's direction in signaling deference to the Tribunal, to ensure that Tribunal cases are not reviewed by courts, at high cost to the parties. We believe that the Tribunal has considerable expertise in human rights and that this expertise should be recognized through a privative clause that states that in most cases, courts may only review the Tribunal's decisions on a patent unreasonableness standard.

However, the OBA believes that in limited circumstances, where the Tribunal is dealing with issues or legal principles of significant public importance, the standard should be correctness. The first reason is to ensure a consistent application of the *Code* by the various decision makers who interpret and apply it. Unlike most other statutes where the standard is patent unreasonableness, the *Code* is also applied by the courts, and following the decision of the Supreme Court of Canada in *Tranchemontagne*, by most administrative tribunals. Second, we are also concerned that a standard of patent unreasonableness for all Tribunal decisions, including questions of law of general or precedential importance, would prevent courts from guiding the development of human rights law in critical cases. This may lead to Ontario's human rights law developing in a manner inconsistent with that of other provinces. Third, we believe that in relation to human rights, which have been held to be quasi-constitutional, there must be a mechanism for clarifying inconsistent decisions between different Tribunal members. The proposed amendment, in our view, strikes an appropriate balance between deference and accountability, providing for review on a correctness standard only in exceptional cases involving principles of significant public importance.

IV. LEGAL SUPPORT

Proposal IV.1: Bill 107 should be specific with regard to which persons or entities are to provide legal or other services in relation to a proceeding before the Tribunal. Currently, the government has announced a new Human Rights Support Centre but has failed to identify who will provide the information, support, advice, assistance and legal representation which will apparently be available through the Centre.

Similarly, it is not clear whether or how the proposed Human Rights Support Centre will be integrated or work with existing legal services providers, including Legal Aid Ontario, community legal clinics, lawyers who accept legal aid certificates, lawyers employed by the government and other providers. The OBA believes that it is fundamental that all participants in the proposed new Human Rights system who reasonably require it have access to legal representation and that lawyers must have a clear and significant role in whatever service delivery

model is selected. The OBA also believes that those who require assistance to obtain legal representation be provided with such assistance. The OBA also feels strongly that the provision for access to legal representation be included in the legislation and not be relegated to a regulation, which could be changed without recourse to the Legislative Assembly.

V. FUNDING FOR THE SYSTEM AND INDEPENDENCE

Proposal V.1: The provision of adequate resources is essential for the success of the proposed new Human Rights system as envisioned in this Bill. The OBA would be very concerned if permanent additional funding allocations were not part of the transition to the new system as any additional pressure on the current Legal Aid regime would only exacerbate the very difficult challenges with which that system is currently dealing. The new model requires a significant increase in funding, both to assist in the transition and on an ongoing basis. The OBA urges the government to increase funding to the three pillars of the system to a greater extent than has been proposed by the Attorney General.

The OBA also believes that the success of the system depends on an appointment and renewal process that ensures independence from the government and complete impartiality of Tribunal and Commission members. The OBA strongly urges that there be administrative and legislative safeguards to protect this independence and impartiality, so that these essential actors in the system may carry out their duties in ensuring quasi-constitutional rights without political influence or interference.

In the OBA's submission, the most important factors that will ensure the success of the new system are outside the text of the Bill itself. Quite simply, without sufficient funding – for the Commission to carry out its public interest functions, for the Tribunal to adjudicate cases in a timely way, and for litigants to have access to legal support – the new system will suffer from many of the problems of the previous one. The OBA strongly urges the government to increase funding to a greater degree than previously announced, particularly for the transition period.

Similarly, the OBA is of the view that guarantees of independence and impartiality for Commission and Tribunal members, if possible in statute, are also critical. The Tribunal decides, among other applications, challenges to provincial government policy and statutes and the Commission decides whether to bring such challenges. It is essential that members be free to carry out their functions with complete independence through guarantees of security of tenure, financial

security, and administrative independence. No government, present or future, must attempt to influence these bodies through the appointments or renewals process.

CONCLUSION

The OBA is of the view that the proposed changes in this submission will strengthen the system proposed in Bill 107, which is an important change that will ensure strong and effective human rights protection in Ontario. The OBA urges all members of the committee to support this important legislation and to work to ensure that all participants in the new system have the resources they need to carry out their mandates.