The Voice of the Legal Profession

Ontario Human Rights Review 2011-2012

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Submitted to: **Andrew Pinto, Chair, Ontario Human Rights Review**

Submitted by: **The Ontario Bar Association**

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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The Ontario Bar Association ("OBA") appreciates the opportunity to provide input on the Ontario Human Rights Review 2011-12 (the "Review"). We commend you on the decision to consult broadly on the critical issues being examined.

The OBA

As the largest voluntary legal organization in the province, the OBA represents approximately 18,000 lawyers, judges, law professors and students in Ontario. OBA members are on the frontlines of our justice system in no fewer than 37 different sectors. In addition to providing legal education for its members, the OBA has assisted government and other decision-makers with several policy initiatives each year - both in the interest of the profession and in the interest of the public.

This submission was formulated by several OBA practice sections, including our: Labour and Employment; Constitution, Civil Liberties and Human Rights; Feminist Legal Analysis; Administrative Law and Public Sector Lawyers Sections as well as our Young Lawyers Division, Equality Committee and Accessibility Committee. The members of these sections have represented applicants, respondents and interveners in hundreds of cases and would count among their clients a wide variety of stakeholders in the Human Rights System, including corporations, individuals, landlords, tenants, employers, employees, governments and public interest groups. The submission has had the benefit of review from all 37 of our practice sections.

Introduction

Fundamentally, the 2006 reforms introduced a direct-access model in which applicants bring their cases directly to the Ontario Human Rights Tribunal (the "Tribunal") and the Ontario Human Rights Commission (the "Commission) no longer plays an automatic, front-end role in investigating, screening and carrying claims through the adjudicative process. This direct-access model has undeniably achieved some of its principal intended benefits. There is little question that more people are able to access the system's adjudicative and alternative dispute resolution services and applicants and respondents generally have their human rights disputes dealt with sooner and more quickly. Public confidence in the system has been enhanced by this delay reduction and also by the fact that unsuccessful claims are at least dealt with transparently by the Tribunal in accordance with a defined process rather than being screened out by the Commission on grounds that may not have been well publicized or understood. The OBA congratulates those involved in achieving these crucial goals.

On the other hand, some of the anticipated negative consequences of the 2006 reforms have also, to a limited extent, come to fruition. There was concern at the time that applicants, particularly those who could not afford legal representation, would be disadvantaged by the loss of the Commission's investigation and carriage functions. As a fundamental element of the reforms, The Human Rights Legal Support Centre ("HRLSC") was designed to mitigate this disadvantage. By providing advice and advocacy for individual applicants, the HRLSC was to help ensure access to justice and assist in the achievement of the Human Rights Code's fundamental intent – to ensure a vindication of human rights in a manner that does not depend on victims having resources, does not further threaten their financial security and allows them to be placed, to the extent possible, in the position they would have been in had their rights never been violated. These goals have not been completely achieved. While the rate of self-represented respondents remains relatively low, the rate of unrepresented applicants is an overwhelming 53%. Individual applicants, who have not been able to obtain legal representation from HRLSC or a legal clinic and cannot afford to retain a lawyer from the private bar are disadvantaged by the fact that the Commission does not have carriage of their complaint. The HRLSC and other aspects of the new system have not completely compensated for the elimination of the Commission's role in this regard.

On the other side of that same coin, some respondents who face either frivolous claims or the challenges inherent in having an unrepresented applicant with limited understanding of proper procedure are disadvantaged by the absence of the Commission's screening and carriage function.

Some solutions to these challenges are, however, available within the new system and require adjustments to resourcing and approaches rather than a fundamental overhaul or a return to the old system. The OBA has made suggestions for this necessary rebalancing to achieve:

I - The provision of necessary assistance to parties; and

II - Effective elimination of duplication and deterrence of inappropriate steps and positions taken in the conduct of a case.

I - The Provision of Necessary Assistance to Parties

The new system was intended to employ user-friendly procedures for the lay user and be sufficiently simple to allow unrepresented parties to navigate it. However, the fact remains that human rights concepts are often complex and there is no doubt that representation by a lawyer makes the parties feel more comfortable as they navigate the system, reduces the effects of power imbalances and produces more fair and expeditious outcomes. Counsel who represent

applicants and respondents find matters to be more efficient and effective for their clients and for the system when both parties are represented. The solution does not lie in reducing the cost of private counsel. Many counsel who routinely act in human-rights matters, particularly for applicants, already provide a level of *pro bono* work and cost write-downs that threaten or nearly threaten the sustainability of their practices. There is no capacity to give more without jeopardizing the very existence of this sector of the bar, thus reducing access to justice still further. With the majority of applicants remaining unrepresented, an increase in the level of representation by the HRLSC would seem to be crucial to the fulfillment of the goals of the *Human Rights Code* and to the overall efficiency of the system, as outlined above. However, given current fiscal realities, it may prove impossible in the immediate term to secure the necessary resources to expand the scope of HRLSC representation. While we should not lose track of this as an ultimate goal, it is necessary to find realistic cost-effective solutions now. Assuming the HRLSC will, at least temporarily, remain unable to fill the gap, improving access to justice and making representation more affordable and thus more accessible to parties will involve making ***the system itself*** more efficient and affordable, finding creative solutions to assist unrepresented parties and focusing the assistance of the Tribunal and the Commission where it is most needed.

In order to provide the necessary assistance to parties in navigating the system and protecting their rights, we suggest the following:

(a) Information about the Commission's inquiry power and ability to intervene in appropriate cases should be more readily available and the Commission should be more active in intervening at the Tribunal where appropriate;
(b) Thought should be given to a role for the Commission in assisting in the retention and funding of expert witnesses, particularly where this is necessary for an unrepresented, impecunious applicant to bring his or her application;
(c) Legal Clinics with connections to equity-seeking communities should be encouraged to identify systemic barriers affecting these communities and bring joint applications;
(d) Access to, and affordability of, legal services should be improved by giving the Tribunal power to impose costs to deter inappropriate conduct;
(e) higher compensatory awards should be encouraged**;** and
(f) a clearer delineation of what role the adjudicators will play in the conduct of the hearing and a more selective use of the adjudicator's extensive power to control the proceeding.

Each of these solutions is available within the confines of the current system.

(a) Intervention by the Commission

The elimination of the Commission's upfront role in investigating and screening cases has overall yielded positive results in terms of access to justice. Individual applicants have generally been advantaged by the ability to control the course of their claims and both parties are advantaged by a much faster resolution of issues. On the other hand, as was anticipated during the debate around the 2006 legislative amendments, the elimination of the Commission's investigatory and carriage roles is a particular disadvantage in cases where an individual is litigating a claim that involves large, systemic, public-policy issues that may involve proving an extensive pattern of behavior. A very cursory review of the number of cases over the last five years that explicitly dealt with a "systemic remedy" or a "public-interest-remedy", suggests that there may be issues around the capacity of the new system to address systemic discrimination. The complex concepts, extensive investigation needs and enforcement challenges inherent in systemic issues generally go beyond the means of the average litigant. If the tools of the current system are used effectively, it is possible to achieve the best of both worlds - a fast and efficient direct-access system that allows litigants the dignity of controlling their own claims in most cases and Commission assistance where claims go beyond the effects on one individual. The solution is for the Commission to make better use of its explicitly-legislated power to intervene at the Tribunal where appropriate and for the Tribunal to use its discretion to involve the Commission where necessary.

Section 37 of the *Human Rights Code* provides the Commission with the ability to intervene in an application in two circumstances:

> **37.** (1) The Commission may intervene in an application under section 34 on such terms as the Tribunal may determine having regard to the role and mandate of the Commission under this Act; [and]
>
> (2) The Commission may intervene as a party to an application under section 34 if the person or organization who made the application consents to the intervention as a party.

It has been the experience of counsel and other frequent users of the system that few applicants know about the option to ask the Commission to intervene and the Commission is too rarely proactive in intervening. The Commission should be playing a larger role at least in cases where individual applicants would otherwise bear the burden of investigating and proving a wide-scale, systemic deprivation of rights. While this is particularly challenging for unrepresented parties, it yields unfairness even for represented parties who will bear the costs of proving a systemic claim that has societal implications well beyond that individual.

It is necessary that the Commission more actively monitor cases before the Tribunal to identify cases that may be appropriate for intervention. The HRLSC could also play a significant role in

identifying appropriate cases and providing information to the Commission (with the necessary client approval). Perhaps more importantly, however, information needs to be provided to applicants about the potential for Commission intervention. Applicants should understand:

(a) what intervention by the Commission (as an *amicus*-type intervener or an intervening party) would mean;
(b) how the party can bring its claim to the attention of the Commission;
(c) the kinds of cases likely to justify the Commission's intervention and, generally, what factors the Commission would consider in making intervention decisions; and
(d) what assistance the Commission could provide in enforcing a public-interest remedy ordered by the Tribunal or agreed to by the parties to a settlement.

This information could be proliferated through, for example:

(a) advice and material provided by the HRLSC;
(b) publication on the Commission and Tribunal websites; and
(c) material available at the Tribunal counters or other locations at which people pick up or access the Tribunal's Application and other forms.[1]

Once a structure exists for parties to be advised of, and informed about, the Commission's potential role, Application and Response forms should be amended to allow parties to easily indicate that they want to have their matter reviewed by the Commission with a view to its potential involvement. The forms could require parties to briefly outline their justification for Commission intervention. Matters in which this option has been indicated could be automatically forwarded to the Commission.

Further, a simple process should exist for parties to receive assistance from the Commission in enforcing a public-interest remedy. This could involve an automatic referral of the matter to the Commission by the Tribunal awarding such a remedy or by the mediator presiding over a settlement that includes such a remedy.

In addition to party-initiated Commission involvement, the Tribunal could play a greater role in optimizing Commission participation. A role for the Tribunal in this regard is specifically contemplated by section 45.4 of the *Human Rights Code*, which provides:

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[1] This suggestion that more information be provided to parties and potential parties is designed to help the Commission more effectively exercise its ability to intervene where it is justified. It is not suggested that a separate, judicially-reviewable administrative process be developed around the Commission's decisions regarding when intervention is appropriate.

> **45.4** (1) The Tribunal may refer any matters arising out of a proceeding before it to the Commission if, in the Tribunal's opinion, they are matters of public interest or are otherwise of interest to the Commission.

Policies should be developed to elaborate on the scope of this power, including: what factors would be considered in deciding whether to make a referral; the timing of a referral (eg. could a referral be made mid-hearing if a systemic or public-interest issue was revealed as the matter proceeded); and whether referrals could allow for investigation or carriage of the matter before the Tribunal or simply allow the Commission to perform its other functions enumerated in section 29 of the *Code*.

(b) Costs of Case Preparation

The elimination of the Commission's carriage function has left a particularly glaring gap in the ability of parties to get the necessary expert advice and evidence. There may be cases in which full intervention and investigation by the Commission is not justified but expert evidence on an issue is necessary. It is not realistic to expect most unrepresented parties to be able to source an expert and it is not realistic to expect financially vulnerable parties to be able to pay one. While the OBA recognizes that resources are scarce, the proper expert testimony contributes to the efficiency of proceedings and is crucial to fair results and, therefore, we recommend that the Commission dedicate resources to a program that assists unrepresented and underfunded parties in finding and retaining expert witnesses where the case demands it. Such a program could operate in partnership with the HRLSC and, to reduce the costs of this program, the Commission could explore the possibility of working with professional and trade associations that may be able to arrange *pro bono* or inexpensive experts.

(c) Role of Specialized Legal Clinics

In order to secure greater cost-effective representation, increased use must also be made of subsections 34(4) and 34(5), which allow, respectively, for joint applications and for organizations to bring applications on behalf of others, with their consent. Specialized clinics with significant connections to equity-seeking communities could make greater use of these rules to bring cost-effective applications on behalf of several members of a community where the issues were sufficiently similar. Information about the availability and role of these clinics and how to access them could be provided on the Tribunal, Commission and HRLSC websites. Advertising the existence and role of the specialized clinics may lead to a need for increased resources for those clinics that are willing to accept this work. However, the efficiency of having one aggregated case with expert counsel involved (rather than a series of cases with unrepresented parties) should lead to system savings that can then be redeployed to the clinics if necessary. Achieving optimal efficiency and effectiveness may involve looking at the human rights system in a more holistic way that goes beyond its three constituent bodies.

(d) Cost Awards

The OBA understands the important access to justice policy behind the Tribunal's decision not to make costs awards against an unsuccessful party automatic. It is important for people to be able to vindicate their rights in a dignified manner without fear of being punished by having to pay costs. This principle needs to be sedulously protected and we, therefore, urge the utmost care in designing a cost rule. However, failing to deter or otherwise check dishonest and inappropriate behavior that protracts proceedings is equally a threat to true access to justice. It makes the system more intimidating and less affordable for individuals, wastes system resources and causes the very delays in the system as a whole that the 2006 reforms were designed to remedy. Again though, it may be possible to have the best of both worlds by carefully drafting a cost rule that would avoid the automatic imposition of costs against an unsuccessful party while at the same time deterring and compensating for inappropriate behavior that has increased the costs of a proceeding.

While the precise details of the appropriate costs rule would have to be the subject of specific consultation among stakeholders and policy makers, the starting point is, of course, the factors outlined in section 17 of the *Statutory Powers Procedure Act*, which allows for the awarding of costs only where a tribunal has a specific cost rule and where:

> the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith.

In order to ensure that the discretion to award costs is limited to very specific circumstances and draws the appropriate line between discouraging improper conduct and chilling legitimate actions, the section 17 factors would have to be explicitly fleshed out in the Tribunal's cost rule. We are not recommending that costs be routinely or even commonly ordered. We are recommending a rule that would allow a limited discretion to award costs to address narrow and well defined conduct.

In addition, it must be understood that the human rights context demands that, when outlining the circumstances in which costs may or may not be justified, a rule should explicitly take into account certain party-specific circumstances. Poverty (especially where it results from systemic issues) is, for example, a factor that might prohibit a cost award against the affected party. Similarly, when assessing what could, in some circumstances, be seen as "unreasonable" or "frivolous" conduct designed to protract proceedings, the adjudicators should be specifically required to consider mental health and other issues that would cast the conduct in a different light and render a cost award inappropriate.

There should also be some consideration given to the effects on the case of a party having rejected a settlement offer that the Tribunal determines, in all the circumstances of the case, should have been accepted and the cost and time associated with continuing the proceeding should have been avoided. A rule that included this factor would provide an incentive for parties to seriously consider a reasonable offer and would be a useful tool for mediators appointed to deal with Tribunal applications. Indicating the existence of such a rule to a party that was not prepared to consider a reasonable offer would, in appropriate cases, provide some incentive to reconsider his or her position. As things stand, a party with virtually no legitimate application or response can force an unnecessary hearing with impunity and extract offers that are based more on the desire to avoid a hearing than on the merits.

A cost rule that allows the factoring in of settlement offers must be carefully tailored to ensure it benefits applicants and respondents equally and that, in assessing offers, adjudicators consider and ascribe appropriate value to the non-monetary aspects of awards that are often crucial in the human rights context.

Allowing for awards of costs based on inappropriate conduct is not a direct solution to the issue of unrepresented parties in the system. Rather, such a rule would more indirectly improve access to justice. The efficiency and effectiveness of the system will be improved by deterring inappropriate behavior that lengthens and adds to the costs of proceedings. Shorter, less expensive proceedings will, in turn, improve the affordability of representation and allow more people to retain counsel. Similarly, more efficient proceedings will save system resources which could then be redeployed to the HRLSC and other system initiatives that more directly reduce the level of unrepresented parties. Efficient use and deployment of resources are especially critical in the current fiscal environment.

There are some more direct benefits of a conduct-based cost rule as well. It allows for the compensation of parties whose experiences and expenses were affected by inappropriate or even abusive behavior. Where the behaviour was a continuation of power imbalances that lead to the original complaint, this compensation is especially critical in a human rights context. The credibility of the system is also improved – faster proceedings reduce overall system delay and the reduction in abusive steps leads to a closer focus on the merits and makes the system more just and appear more just.

While there are many advantages to this cost rule, caution in its drafting and implementation are urged. Any cost rule must make it clear to parties that they will not risk an order of costs merely by virtue of losing on the merits. Rather, a cost award would only be a risk where a party engages in well-defined inappropriate behavior.

Finally, in the context of a the current system, a cost rule is unlikely to be fair and to fulfill its intended purpose of deterring and compensating for bad behavior unless there is a method of assessing costs in favour of unrepresented parties in addition to the more traditional form of "legal costs".

(e) Increase in the Value of Awards

While it is difficult to suggest how one might remedy this as a matter of general policy, many experienced counsel believe that Tribunal awards, particularly general damage awards, are routinely too low. This creates a number of problems, including:

(i) sending a message that human rights, the fundamental denial of dignity occasioned by their breach and the emotional effects thereof, are of limited importance, particularly when compared to damages awarded for more tangible, physical injuries;

(ii) given overlapping jurisdictions with other tribunals and courts, such as human rights claims that may be attached to civil employment cases, applicants may migrate from the efficient and expert Human Rights Tribunal to courts, where general damage awards for breach of human rights are higher. This would undermine one of the essential reasons for the existence of the human-rights system – to provide a more efficient, cheaper process for resolving human-rights claims; and

(iii) access to justice is increasingly denied as it is becoming less and less economically feasible or emotionally worthwhile to vindicate one's rights through the system. It is trite to say that the system is fundamentally undermined if people do not turn to it for this purpose.

(f) The Assistance of the Tribunal

In order to mitigate the potential negative impact of eliminating the Commission's carriage function, the 2006 amendments to the *Human Rights Code* were designed to allow the Tribunal to have more latitude in controlling the conduct of cases before it. The results of this have been generally very positive. Cases are conducted more efficiently and thus the system as a whole resolves more claims for more people in a more timely manner.

This tool could, however, be improved to better achieve its access to justice goal. There is currently no policy or information that outlines what role adjudicators will take on in the tribunal room during the conduct of a case. In addition, there appears to be no consistency in this regard. Some adjudicators take a very active inquisitorial role, while others take a completely hands-off

role more akin to a traditional judge. It is not clear what factors are considered in making the determination of which is more appropriate in a given case. The negative impact of the failure to provide information on the tribunal's conduct of a proceeding is two-fold:

(a) an unrepresented applicant or potential applicant will not have the benefit of knowing what level of support he can expect from the tribunal; and

(b) where parties are represented, counsel have no idea how to most appropriately prepare the case. In some cases, the tribunal has gone as far as to conduct examinations and cross-examinations even in the presence of counsel. Resources may be wasted in preparing examinations and other material without knowing how the chair or vice-chair will conduct the proceeding.

It is suggested that:

(a) policies and procedures be established to outline factors that will be considered by an adjudicator in his/her determination of how active or interventionist his/her role will be. Of course, the conduct of a hearing and the adjudicator's role cannot be precisely scripted nor can his or her discretion in this regard be completely fettered. However, all should understand, to the extent possible, what is likely to happen in a hearing room;

(b) a pre-hearing process should exist whereby the parties and counsel can be provided with some indication of how the hearing will be conducted, so that he or she can prepare accordingly. The case management process could be employed to allow for a pre-hearing discussion about the conduct of the hearing and the roles to be performed there by counsel and the adjudicator; and

(c) more consideration should be given to the involvement of counsel. The Tribunal wastes resources if adjudicators prepare for intense involvement (eg. preparing their own examinations or cross-examinations) when experienced counsel is involved. Given that counsel has had carriage of the case for longer, we believe he or she is likely to conduct the case in a more efficient way. The time and resources necessary to prepare for more intense involvement by an adjudicator might be more effectively spent in cases where the parties are unrepresented. We are not suggesting that adjudicators will play no role in controlling proceedings where counsel is involved but, if the role of counsel was better leveraged, more Tribunal resources could be focused on providing the necessary level of support and guidance to unrepresented parties.

Given the current limit on the resources and mandate of the HRLSC, it is imperative that the system is itself designed to support the parties and enhance access to justice. These suggestions are intended to assist in achieving that.

II- Duplication and Inappropriate Steps and Positions

Particularly in the current fiscal climate, maintaining the service levels necessary to truly protect and vindicate human rights, will depend to some extent on leveraging and encouraging every possible efficiency. In order to do so, the Tribunal should:

(a) continue the current trend toward more efficiently dealing with issues of concurrent jurisdiction and matters in which other adjudicative bodies are engaged;
(b) as outlined above, deter unnecessary steps by allowing for costs to be awarded in appropriate cases; and
(c) focus on the provision of earlier mediation and provide a pre-hearing conference for further settlement opportunities.

(a) Issues of Concurrent Jurisdiction and Review of Other Decision-Making Bodies

It is clear that optimizing the resources of individual parties, Ontario's administrative law system in general and of tribunals and tribunal clusters in particular requires:

(i) that duplicative proceedings be eliminated to the extent possible; and
(ii) matters follow a clear appeal and review route rather than allowing for the development of an intricate web of tribunals and boards reviewing the decisions of tribunals and boards.

In the context of the Human Rights system, achieving these goals will involve:

(i) Continued application by the Tribunal of the principles in *British Columbia (Workers' Compensation Board)* v. *Figliola*, 2011 SCC 52 ("Figliola") and codification of these principles so that they are well understood and transparent to potential users of the system; and
(ii) Further consideration of the Tribunal's ability to review the statutory decisions of other administrative bodies to ensure that the Ontario's administrative law system as a whole is being used in an optimally efficient way, while still recognizing the primacy

of the Tribunal in determining human rights and the quasi-constitutional nature of the *Human Rights Code*.

(i) Codification of the Concurrent Jurisdiction Principles

The necessary Tribunal Rule would further elaborate on, and give effect to, Section 45.1 of the Human Rights Code, which provides:

> **45.1** The Tribunal may dismiss an application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application. 2006, c. 30, s. 5.

Rule 22 provides for a method of summary dismissal where the matter has been appropriately dealt with by another body. For additional clarity, this rule could be particularized to outline the factors that are to be considered in determining when a matter has been appropriately dealt with. This list of factors would include the following, as outlined by the Supreme Court of Canada in *British Columbia (Workers' Compensation Board)* v. *Figliola*, 2011 SCC 52 ("*Figliola*"):

(a) whether there was concurrent jurisdiction to decide human rights issues;

(b) whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and

(c) whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it (*Figliola* at paragraph 37).

As the Supreme Court held, the determination of whether the Tribunal should re-hear a matter dealt with by another adjudicative body should not necessarily depend on "how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself."

In order to protect the primacy of respect for human rights, it may be necessary for further consultation to ensure this rule takes into account, to the extent possible, all of the scenarios in which "justice demands fresh litigation" (*Figliola*, at paragraph 1).

(ii) Review of the Decisions of other Statutory Decision Makers

It is necessary for policy makers, system players and stakeholders to take a more detailed look at whether the exercise of the statutory discretion by other administrative decision makers

constitutes a "service" for the purpose of section 1 of the *Human Rights Code*. Recently, this has become a litigious issue on which there appears to have been conflicting decisions. While the matter has been recently become more settled at the Tribunal level with the principles outlined in *Seberras* v. *Workplace Safety and Insurance Board*, 2012 HRTO 115 (CanLII), at para. 5, it is not clear that the law has ceased to evolve and there does not appear to be broad consensus on whether or not the principles outlined in *Seberras* constitute the best possible policy in all cases. Thus, it is necessary to consider and further discuss the appropriate policy.

On one side lies a concern that allowing the Tribunal to review the decision making of boards and other tribunals in this way could constitute an end-run around the appeals process and cause duplication in proceedings. On the other side of the issue, it is understood that other decision-making bodies must comply with the *Human Rights Code*, that the Tribunal plays a unique role in enforcing rights and that the quasi-constitutional nature of the *Code* allows for scrutiny of the appropriateness of a statutory provisions and the decisions made under it. There are certainly complexities to the matter. So, in order to avoid continued litigation on the subject and to ensure the optimal balance between efficiency and the protection of rights, further policy work is necessary, with a view to developing cluster policy or any necessary amendments to the constituting legislation of other administrative bodies (to clarify, for example, whether or not the exercise of their statutory decision-making power is a "service" for the purposes of section 1 of the *Code*).

(b) Costs for vexatious steps in a proceeding

As outlined above, a failure to deter a party from taking steps in bad faith and a corresponding failure to compensate the party affected by those steps, has a significant negative impact on access to justice. The costs rules referred to above would assist in deterring behavior that clogs the system and threatens timely access for both those parties directly affected and all parties using the system.

(c) Earlier Mediation and Pre-hearing Conference

The mediation process plays a critical role in a system designed to be user friendly for unrepresented parties, to provide quick remedies on time-sensitive issues such as accommodation and to resolve matters in a way that minimizes costs and avoids causing further trauma to victims of human rights abuses. The *Human Rights Code* and the Rules make it clear that mediation is intended to be conducted early in the proceedings. However, in reality, it is not unusual for parties to wait 9-12 months for a mediation date. This is much less than optimal in all cases and simply unworkable in cases that require relatively instant resolution, such as employment cases where accommodations are required for return to work. While there is a process for requesting early mediation, it does not appear that sufficiently early dates are being provided in most cases.

It has been the experience of some counsel that unrepresented parties are unable to properly assess either the strength of their claim or a settlement offer. Thus, without early mediation, applications continue for an unnecessarily long period. In addition to its many other benefits in resolving claims, the mediation process provided by the Tribunal is helpful in allowing parties to assess their claim and settlement offers. The longer parties wait for mediation, the more time and expense is wasted in the face of what, when properly analyzed, turns out to be an acceptable offer. The importance and considerable successes of the Tribunal's mediation process justify a refocusing of resources to reduce creeping wait times and allow for earlier mediation.

It should also be noted that the advantages of early mediation in cases with unrepresented parties can only be fully realized if the HRLSC's advice is proximate, convenient and instantly available to parties in the process of mediation. Effective settlement of the matter becomes less likely if the parties are required to wait for a summary assessment of the offer.

Where early mediation has failed, parties often find a dispute resolution process closer to the hearing date is effective. A pre-trial conference could allow for continued settlement discussions as well as performing the other functions of allowing the parties, particularly counsel, to discuss the most effective conduct of the hearing. We would expect the addition of a pre-trial conference to be essentially revenue neutral as it will allow for a narrowing of the issues and increase the rate of settlement.

III – Additional Issues

(a) Increased Transparency - Publication of Tribunal-Facilitated and Indexation of Unreported Decisions

Other adjudicative bodies publish anonymized versions of settlements concluded. Given the crucial role that mediation plays in the human rights process, a publication of Tribunal-facilitated settlements would give a more full and accurate picture, to parties, potential parties and the public in general, of the true remedial capacity of the system. Transparency in this regard is crucial to allowing the parties to know what to expect in terms of possible remedies and to allowing the public to know whether the system is adequately vindicating and protecting human rights.

There are, of course, cases in which the ability to reach a settlement may depend on the preservation of confidentiality. While anonymity should preserve the possibility of concluding settlements where confidentiality is one of the crucial issues, parties would also have the option of moving outside the Tribunal-facilitated process to conclude a settlement that would not be subject to publication. What is crucial is not that the parties, would-be parties and the public

know the details of every settlement but, rather, that they have a full sense of what is being achieved by the system, including remedies effected by the Tribunal's ADR intervention.

In order for the HRTO to provide this information, it first needs to amend its practice and Form 25 (Settlement) to require the filing of a copy of the settlement agreement. Currently, the HRTO specifically and only requests in its Form 25 that the parties confirm that a settlement agreement has been entered into. It does not require the parties to file a copy of the agreement.

In the same vein, greater transparency, a full appreciation of possible remedies, clarity in the development of human rights law and more effective and efficient case preparation requires parties to have greater access to the many unreported decisions of the Tribunal. Although Tribunal decisions are now much more accessible to the public through the free CanLII services, unreported decisions are not summarized or appropriately indexed with key words. As a result, users cannot feasibly access relevant decisions. It is suggested that these decisions are summarized and indexed with relevant key words to make the decisions more accessible to lawyers, the parties and the broader public.

(b) Training and Quality Issues

It is suggested that adjudicators and mediators working at the Tribunal have continual training that will ensure they are sensitized to the nuances of various kinds of discrimination. Race-based discrimination, for example, is one area in which manifestations of discrimination have constantly evolving subtleties.

The Tribunal's mediation services are another area in which additional training is necessary. While it is not universal, some mediators require additional training in effecting settlements in the human-rights context, including sensitization to the non-legal factors that will be brought to bear on issues as personal as a violation of rights. Even more specifically, there appears to be a failure on the part of some mediators to recognize, and decline involvement in, cases in which the mediator's bias or perceived bias will negatively affect the credibility of the process and "buy-in" by the parties. It is imperative that mediators are well-trained and qualified neutrals. The conflicts and bias issue may have to be dealt with as a matter of explicit Tribunal policy as well.

(c) Establishment of the Anti-Racism and Disability Secretariats

While it is not a practitioner-focused issue, based on feedback OBA members have received from other groups, it would appear that the credibility of the 2006 reforms is suffering as a result of the failure to establish the Anti-racism and Disability Secretariats specifically contemplated as part of the reform package.

(d) Enforcement of Existing Rules

The Rules requiring that pleadings are fully and properly completed before the matter proceeds are not being enforced by the Tribunal. Many counsel have indicated that applications and responses lack sufficient particulars to allow the claim to proceed efficiently. This places parties in the position of not being aware of the case they have to meet and therefore often requires additional preliminary proceedings and interim orders. Unnecessary costs to all parties and the Tribunal result.

(e) Case Processing and Hearing Dates

Efficiencies could also be found in some new case processing steps. The assignment of hearing dates to all parties once pleadings close would be productive (assuming early mediation opportunities that would allow dates to be vacated by the parties early enough to reassign them). Currently, no immediate hearing date is set if the parties decided to mediate. The parties are more likely to move more quickly and ensure more productive use of mediation if they have a hearing date looming.

In addition, the current case management process assigns cases to adjudicators and mediators very late in the process. Earlier assignment of a case for mediation and case-management by one vice-chair would eliminate the duplication of efforts occasioned by multiple vice-chairs handling the file and ensure early identification of conflicts and other issues (as discussed above).

Conclusion

Once again, the OBA congratulates those who have worked to ensure the successes of the new system, which has provided more timely access and increased the number of human rights claims that are adjudicated on their substantive merits. The suggestions made in this submission are designed to preserve and enhance these accomplishments. Clearly, it is crucial that the system is sufficiently well-funded to accomplish its goals but we have tried to suggest efficiencies as well. We look forward to a continued consultation process as your review continues and, given that the system will continue to evolve, we suggest that there be another review in 3 years' time. Please do not hesitate to contact us if you have any questions or we can be of further assistance.