

### ***XIII.            FILING HUMAN RIGHTS CLAIMS***

#### ***Who Can File Human Rights Claims***

Presently the *Code* limits the filing of equality claims to individuals who are filing on behalf of themselves and to the Commission who can make a claim on anyone's behalf. In practice, almost all the claims filed are by individuals. The Commission has rarely used its right to initiate claims.

The Task Force believes a well thought out, strategic approach to achieving equality rights is essential. While dealing with individual cases as they happen to come along is important to the individual, such a limited approach is not likely to make significant advances in changing major patterns of discrimination in society. It is to everyone's advantage to overcome discrimination in a planned, strategic manner so as to avoid the need for a costly and unending stream of individual claims that are stressful for all involved.

The Task Force believes that amending the *Code* to allow equality seeking groups to file third party claims will provide an important new strategic focus. Equality seeking groups and the Human Rights Ontario can, and should, play a leadership role in addressing major, serious issues of discrimination so as to bring about significant, widespread change for all members of the disadvantaged groups.

The experience in the courts with equality rights cases under Section 15 of the *Charter* vividly demonstrates the importance and effectiveness of allowing equality seeking groups to take forward cases on their own behalf.

Groups like the Women's Legal Education and Action Fund and the Canadian Disability Rights Council are able to think through the implications of a particular case, or a particular argument, or a particular remedy, in the context of an overall strategy to advance equality rights for all members of the disadvantaged group. People with equality claims often approach such groups for assistance.

It is essential that equality seeking groups play a key role in the fight for equality. Courts at every level, up to the Supreme Court of Canada, now regularly look to such groups as intervenors to provide their expertise, authenticity, and unique perspective to the court.

The possibility of filing a third-party claim should also be available to individuals. In some circumstances, for various reasons, a person experiencing discrimination may not be able to file a claim and may wish a trusted person to do so. For example, the Task Force was told of a situation where persons of colour were receiving racially discriminatory treatment. The individuals were vulnerable, elderly people in an institutional setting and it was impossible

for them to file a human rights claim. In such a circumstance, it is essential that another person be able to file a third party claim. The *Pay Equity Act* has such a provision, allowing another person to bring forward the claim on behalf of persons who wish to remain anonymous.<sup>38</sup>

It is also important to provide a process to allow for the claims of persons or groups against the same respondent, or which raise the same issues of fact, or law, to be joined or heard together. This will help to provide for a more efficient and focused hearing process and use available resources to their best advantage.

#### **RECOMMENDATION (12):**

**The *Code* should be amended as follows:**

- **Where a person believes that her right to equality under the *Code* has been infringed, the person may file a claim.**
- **A group of individuals may file a joint claim where their claims are against the same respondent or have questions of fact or law in common.**
- **An individual or group or the Commission may file a claim where they believe the *Code* has been infringed.**

#### ***Investigation of Claims***

At present, the Commission is required to investigate all claims. This investigation has a number of aims: to assist in the process of trying to settle the case, to assist the Commissioners in deciding whether to dismiss or recommend the appointment of a Board of Inquiry and to prepare the case for a possible hearing.

Most claims are not, in fact, investigated or investigated fully by the Commission. Over half (55 per cent) are dealt with through an early settlement process where no formal investigation is done. Other claims are refused by the Commission for various reasons before any substantial investigation. Some are withdrawn during the long wait for an investigation.

The Task Force believes the role of the investigating human rights officer is confusing; the system is extremely centralized and lengthy with each case going through many different layers of officials and often including changes of officers at the Commission.

The Task Force heard great dissatisfaction expressed by both claimant and respondent groups with the way claims are investigated. Many were waiting months or years for an investigation

to begin. Simple cases that did not require extensive investigation were held up behind more complicated cases.

Neither claimants nor respondents seem well informed as to what is happening to the case or why; many felt that the investigation that was done was not done properly and did not focus on the issues and evidence that they believed important to their case; neither claimants nor respondents have direct access to those who are making decisions about the case, nor do claimants and respondents have direct access with one another.

In the view of the Task Force, the current system of investigation must be changed. It is confusing, slow, costly, frustrating, and inefficient.

The Task Force believes that a more focused approach to investigation should be adopted. The *Code* should no longer require that every claim be investigated by a human rights officer. Investigation is really just the process of inquiring into the circumstances of the case to see what happened; to assist in determining whether any solution can be found short of a hearing; and to prepare for bringing the necessary evidence required for a hearing.

The Task Force believes that a more efficient and effective investigation would be carried out if the responsibility for it were given to the person or group who filed the claim or their advocate. Such advocates would be able to work with the claimant to determine what the facts are and what evidence is needed.

Respondents and their advocates would also be able to best determine the facts and evidence needed for an initial response.

Many people suggested to the Task Force that a system of discovery would be an improvement. Both claimants and respondents voiced support for a requirement that the parties to a claim be required to exchange information with each other about the nature of their case and the evidence to be called. This process is dealt with further in Section XVI on the Tribunal.

Some cases will require extensive and thorough investigation: for example, a case alleging systemic discrimination by a major service provider or a broad based claim against a particular industry. In the system proposed by the Task Force, resources have been provided for crucial, major claims of this kind. Human Rights Ontario will have resources and a mandate to initiate significant cases of this nature. Equality seeking groups will also be able to bring forward major systemic cases, using the resources of the organizations with special expertise in the area to carry out the research and investigation or requesting special funding for a significant case from the Significant Case Fund of the Equality Services Board.

Human Rights Ontario, equality seeking groups, individuals, or a respondent will also be able to ask a human rights adjudicator to order any necessary investigation to be carried out by a Tribunal Officer.

In the new system proposed by the Task Force, the following provisions will ensure claims are investigated properly:

- the role of the Tribunal Officer in monitoring whether the parties have lived up to their responsibility to exchange information,
- the power of the human rights adjudicator to order further disclosure where necessary,
- the power of the Tribunal Officer to order an investigation by the Tribunal Officer where the disclosure process has not been sufficient, and
- the overall statutory requirement for the adjudicator to ensure that the case is heard on its merits and the real substance of the case is brought forward.

### ***Providing Assistance to Claimants***

The system the Task Force is recommending will provide accessible supportive assistance to people with rights claims. The way this assistance will be provided is outlined in Section XI, Providing Support for Claimants.

The Task Force believes that the proposed community-based Centres with trained lay advocates, the funding of special centres of expertise, the requirement for discovery and disclosure, the investigation powers of Tribunal Officers, will help make sure that rights claims receive the attention and support they deserve.

### ***Processing Rights Claims More Effectively***

It is important that rights claims be processed in a timely and effective manner. Claims that are outside the *Code*, or that lack any merit, should be screened out in a way that is fair, but that is also practical and cost-effective.

The Task Force believes that much time and money are wasted by the way claims lacking any merit are handled under the present human rights system. The Commission does not currently have a lot of credibility in the eyes of many claimants. Consequently, when Commission staff tell a claimant that her or his claim lacks merit under the *Code*, claimants are less likely to trust their advice. The claimant may continue to insist on pursuing the claim or go away disillusioned with the system. Claimants are less likely to trust their advice.

The Commission is also a complex and, often, closed system. The Task Force found that people were confused and frustrated because they had great difficulty getting clear information about the status of their claim or the Commission's policies and procedures on a given point.

With the current highly centralized Commission system, it often takes months or years, with a claim passing through numerous hands, before a final decision is given rejecting a claim as lacking merit. The claimant never gets to see the decision makers face to face or to hear directly their reasons for rejecting the claim.

As pointed out by many equality seekers and respondents, this makes for a very costly, slow and unsatisfactory way of screening out claims without merit.

Community advocacy organizations that now deal with human rights claims, even though having no official mandate to do so, handle thousands of claims and enquiries to do with human rights. Organizations such as the Centre for Equality Rights in Accommodation, the Canadian Jewish Congress, and the Urban Alliance on Race Relations regularly and effectively screen out claims that lack merit, settle many claims, and assist other claims to go forward.

Of the 800 claims of discrimination received by Centre for Equality Rights in Accommodation (CERA) in 1991/92, 37 per cent resolved through referrals or the provision of summary advice, 53 per cent resolved through CERA-initiated mediation, 6 per cent pursued as formal claims. The Task Force heard frequent praise around the province for the effective assistance CERA provided to people, particularly single parent mothers, in pursuing housing discrimination claims.

Of 215 cases handled by the London Urban Alliance on Race Relations over the past five years, 87 per cent were resolved through amicable settlements.

The Canadian Jewish Congress (CJC) dealt with 23 human rights claims over the past years. After receiving information and advice from the CJC, the individuals in 11 of these cases dropped the claim. Seven of the cases were resolved by mediation efforts of the CJC, two were referred to hearings, and three are ongoing.

The Task Force believes that advocacy services, based in the community and accountable to those they serve, will be better able to discourage claims that lack merit and bring about settlements of claims. Furthermore, the new Tribunal will have the power, if a claim that clearly lacks any merit is filed, to dismiss the case without a hearing and then to provide an appeal from that decision to an initial hearing if the claimant so requests.

### *Use of the Officer Order Approach*

One method recommended to the Task Force, to get quicker decisions on claims lacking any merit was to give human rights officers the power to dismiss such claims. This is an

approach favoured by the Ontario Public Service Employees Union (OPSEU), which represents the Commission staff. It is a system currently used under the *Pay Equity Act*, where review officers make the initial order. Apart from the Pay Equity Commission, no one else favoured this approach.

Under this system, it was suggested, an officer could also make decisions to uphold claims and order remedies. The officer, for example, could go out to a workplace, examine the situation, speak to both parties, and make an order. Thus in an urgent situation, such as a case of sexual harassment, or in a case of a dismissal, the officer could make an immediate order for certain actions to be taken or not taken. The officer's decision could then be appealed to a full hearing by another body.

At first glance, this approach seems to offer speed and low cost. However, on examining the idea more closely, the Task Force came to the conclusion that it was, in fact, more likely to cause delay and additional costs and further would not be seen as a sufficiently credible solution.

The single, strongest point made to the Task Force in the presentations it received was that claimants should have options and access to a hearing, if necessary. People criticized in no uncertain terms what they saw as the arbitrary, decision-making power of the Commission.

If human rights officers were given the power to make orders, the Task Force believes that in the great majority of cases, claimants and respondents would appeal those orders to the expert adjudication hearing body, necessitating a second hearing. The system used under the *Pay Equity Act* has been criticized because of this duplication of process and subsequent backlog of cases.

In addition, if human rights officers became involved in deciding individual human rights claims, the Commission would no longer be able to play the leadership role, advancing equality rights in significant, broad-based cases that it should be filling.

For these reasons, the Task Force did not adopt the idea of an officer order approach to deciding human rights claims.

### ***Quick Dismissal of Claims without Merit***

If a claim is, in the view of the Equality Rights Centre, outside the jurisdiction of the *Code* or completely lacking substance, the Centre could refuse to provide support, but the claimant still has the right to take his or her claim to the Tribunal.

*... claims outside the Code ...*

The Tribunal Registrar would advise the person promptly if the claim was not accepted and did not come under the jurisdiction of the *Code*, for example, if it was filed against a bank that is under federal jurisdiction. If the claimant did not accept this view, the Registrar would submit the claim to the Associate Chair responsible for the Adjudication Section.

If this Associate Chair found that the claim was outside the *Code's* jurisdiction, but the claimant did not accept this decision, the claimant could appeal the decision at a hearing before a human rights adjudicator.

This hearing would, in many cases, be quite brief. The adjudicator would have the power to either make a final decision refusing the claim, or to rule that the claim should be accepted.

*... claims without merit ...*

If a claimant has been advised by an advocate at an Equality Rights Centre or by the Registrar that his or her claim lacks merit, but does not accept that advice, the person would have access to an initial hearing before a human rights adjudicator who could either dismiss the claim or order investigation, representation by an advocate and a full hearing.

The Task Force believes that the vast majority of persons will accept a decision that their claim is not covered by the *Code*, or lacks merit, when this decision is made by independent Centres whose only role is human rights advocacy and whose track record shows that. However, some individuals will be determined to pursue their claim. And they may, in fact, be right.

Quick access to an expert hearing body for a final decision is, in the Task Force's view, the fairest, most practical and most cost-effective way to make decisions rejecting claims. The present system of making such decisions behind closed doors just doesn't work.

**RECOMMENDATION (13):**

- **If the Tribunal Registrar considers a claim to be outside the jurisdiction of the *Code*, or without any merit, the Registrar should so advise the claimant promptly and no later than five days after filing the claim. If the claimant does not accept this view, the Registrar should submit the claim to the Associate Chair responsible for the Adjudication Section for a decision as to whether the claim should be accepted or not. If the Associate Chair decides that the claim is outside the jurisdiction of the *Code*, the claimant should be advised within 15**

**days of filing the claim and have the right to appeal this decision at a hearing before a human rights adjudicator. The decision of this adjudicator is final.**

***"Trivial, Frivolous, Vexatious, and Made in Bad Faith" Claims***

Presently, the Human Rights Commission has the power to refuse a claim it considers to be trivial, frivolous, vexatious, or made in bad faith.

The Task Force believes that the wording "trivial, frivolous, vexatious, or made in bad faith" should be removed from the *Code*. What is important is to deal promptly and efficiently with claims that lack merit; giving claims derogatory labels does not help anyone.

Making a human rights claim takes time and energy. The subject matter of a claim may not constitute a potential contravention of the *Code*, but this does not mean it is trivial, frivolous, vexatious, or made in bad faith.

An Aboriginal woman working in a women's shelter in the north of the province told the Task Force how insulted she felt when the Commission, quoting Section 34 of the *Code* that speaks of frivolous complaints, rejected a claim she filed on behalf of a homeless Aboriginal woman who was denied housing and did not speak English.

According to a representative of the Human Rights Commission, most of the claims refused by the Commission are ones the Commission considers to be outside the jurisdiction of the *Code*.

Of a sample 99 claims refused by the Commission during a four-month period in 1991, almost half (48 claims) were refused as being outside the jurisdiction of the *Code*. The claims alleged disability discrimination, but were refused by the Commission as being temporary illnesses that, in the Commission's view, did not constitute a disability under the *Code*.<sup>39</sup> Another major group of claims (35 claims) challenged mandatory retirement at age 65 and were refused by the Commission as outside the *Code*'s jurisdiction. (The large number of cases in this sample refused as not constituting a disability or dealing with mandatory retirement was, no doubt, due to the fact that rulings had recently been handed down on these issues.)

Another four claims were refused as alleging grounds not covered by the *Code*, such as political belief or discrimination in occupancy for a person under 16 years of age. Six cases were refused as out of time and three as having been dealt with under other legislation. Only three of the 99 cases rejected fell under the category "bad faith" or "frivolous" in the *Code*.

Changing the wording in the *Code* to provide that only claims outside of the jurisdiction of the *Code* may not be accepted will ensure that claims are treated with more respect.

The Task Force considers that the present language is derogatory and unnecessary and promotes a stereotype and prejudice against people who make human rights claims. It should be removed. The Human Rights Commission made a similar recommendation to the Task Force.

**RECOMMENDATION (14):**

- **The wording "the subject-matter of the claim is trivial, frivolous, vexatious, or made in bad faith" should be removed from the *Code*.**

***Dismissing Claims That Are Untimely***

Presently there is a six month time limit for filing a claim under the *Code*. Claims older than six months can, however, be accepted if the Commission is satisfied the delay happened in good faith and no substantial prejudice will happen to any person affected by the delay.

A recent study on different time limits in Ontario laws criticised the short time limits in many laws and recommended that, in most cases, the limitation period should be two years.<sup>40</sup>

The Task Force believes that the time limit for filing claims under the *Code* should be two years. However, discretion should be retained to accept a claim made outside the normal time limit - for example, in a situation where the claimant may not realize that he or she has been the victim of discrimination until well after the act occurred. In such a situation, the Tribunal should be able to "postpone" the limitation period so that it starts to run only from the time that the claimant actually found out about the discrimination. This is consistent with the way that courts have looked at time limits.<sup>41</sup> It is also consistent with the proposals for a new *Limitations Act* that support the principle that limitations periods should not start to run until people are actually aware of the injury or loss they have suffered.

**RECOMMENDATION (3):**

- **The six-month time limit for filing claims under the *Code* should be changed to the two-year limit to be consistent with the proposals for a new *Limitations Act*, with discretion for the Tribunal to accept claims beyond two years, if the Tribunal is satisfied that the delay was in good faith and no substantial prejudice will result to any person affected by the delay.**

### ***Protecting Rights Claimants from Retaliation***

A law that protects people from discrimination must also protect them from retaliation and intimidation.

Most human rights claims deal with situations of imbalance in power. For example, a woman, a person of colour, a person with a disability often feels vulnerable and fearful of unpleasant consequences if they file a human rights claim against their employer, landlord or service provider. Their claim may be against persons who provide essential services to them. They may be the only woman, person of colour, or person with a disability working at a particular place or arguing for equality of services.

It takes courage to file a human rights claim challenging discrimination and harassment, yet the person may find that, after filing the claim, the discrimination and harassment are increased.

It is a telling commentary on the inadequacy of protection that many persons who file human rights claims have left their job by the time the case gets settled or heard by a board of inquiry. For example, in most decisions on sexual harassment, the woman who made the claim has had to leave her job. While the board of inquiry usually rules that the sexual harassment that forced the woman to quit her job constituted discriminatory dismissal and while the board usually orders compensation for lost wages, it does not usually order the woman to be reinstated in her job in a work environment freed by the employer of any sexual harassment.

The Task Force believes that stronger measures are necessary to protect persons who make human rights claims. A precedent exists in labour legislation where, once a unionization campaign has been commenced, the employer has the burden of proving that any negative action against the employees was not in violation of the *Act*.

In the same way, once a human rights claim has been filed, the respondent should have the burden of showing at a hearing that any negative action against the claimant or against the claimant's witnesses does not violate the *Act*.

A section of the Ontario *Labour Relations Act* on burden of proof states:

On an inquiry by the Board into a complaint .... that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to the person's employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organisation did not act contrary to this Act lies upon the employer or employers' organization.<sup>42</sup>

In the same way, once a human rights claim has been filed, the respondent should have the burden of showing at a hearing that any negative action against the claimant or against the claimant's witnesses does not violate the *Act*.

**RECOMMENDATION (16):**

- **Where a person alleges that they have suffered any negative action contrary to the anti-reprisals section of the *Code*, the burden of proof that any respondent did not act contrary to the *Code* should be upon the respondent.**