

#### XIV. OTHER CLAIMS ROUTES - CIVIL AND CRIMINAL

##### Civil Actions in the Courts

One suggestion made to the Task Force was that individuals should be able to take human rights claims directly to the courts as civil actions. This is not possible at present. The Supreme Court of Canada ruled in *Board of Governors of Seneca College v. Bhadauria* that human rights claims must be handled through the special human rights system provided under the *Code*.<sup>43</sup>

The Task Force carefully considered this suggestion.

Changing the *Code* to allow people, if they wished, to take their human rights claim directly to the courts seems an attractive idea for a number of reasons. It would give people a choice, and it might also take some of the pressure off an Equality Rights Tribunal.

Some people said they considered courts to be more prestigious than Equality Rights Tribunals, and so might prefer to have their claim heard in the courts where other important rights such as *Charter* rights are handled. Allowing the courts to deal with discrimination issues could ensure that both the courts and Equality Rights Tribunals applying the *Charter* shared the same equality view. Monetary awards are also currently higher in the courts.

It would also make sense to have the discrimination issues that are part of existing civil actions (for example, wrongful dismissal) dealt with by the courts at the same time, and not have a separate discrimination claim before another tribunal based on the same facts.

Allowing human rights cases to be decided by the civil courts, however, presents a number of significant disadvantages. Specialized Equality Rights Tribunals were set up precisely because the courts demonstrated a lack of knowledge and understanding of human rights.<sup>44</sup>

In a research paper prepared for the Task Force, former Justice of the Courts, the Honourable Robert F. Reid, stresses that the courts are not expert in the subject matter of human rights and should not hear human rights cases.

Judges as a group have traditionally been drawn from social classes unsympathetic to social change. This has been perceived as clouding their judgment by inclining them to decide against the change the legislation seeks to achieve. Judges have been perceived as unsympathetic to the problems of the "common-man."<sup>45</sup>

Courts by their very nature traditionally approach issues in a legalistic, narrow manner. The Supreme Court of Canada has rejected this approach as inappropriate for human rights cases.<sup>46</sup>

Giving the courts jurisdiction over the interpretation and application of human rights laws may well lead to the return of an approach based on intent and blame.

Equality seeking groups have fought hard to get away from an individualistic, legalistic approach to human rights, yet one person taking a case to the courts could get a narrow, legalistic interpretation that would then apply to everyone else. This approach also might lead to conflicting judgments from courts and tribunals.

Taking a human rights case to court is an option usually available only to people with the resources to do so, and the delays in the court system are quite serious. This option, therefore, has a number of drawbacks.

In the view of the Task Force, people making human rights claims should have access, within a reasonable time period, to a respected, competent adjudicator.

The system proposed by the Task Force provides this. It also ends the ability of the Human Rights Commission to control access to a hearing.

In these circumstances, which allow claimants access to a hearing, the Task Force believes there are more advantages to be gained by having tribunals with expertise in human rights decide claims. The Task Force also believes that the focus for resources and training at this time should go into the Tribunal, rather than diverting potential resources to judges train and to the civil courts to deal with human rights issues.

If the system the Task Force is recommending is not put in place or does not have sufficient resources to operate satisfactorily, so that claimants do not, in fact, have real access to a hearing, the option of allowing human rights cases to go directly to the courts as civil actions should then be reconsidered. But for now, the focus and resources should be on the new enforcement system.

#### **RECOMMENDATION (17):**

- **Human rights claims should continue to be decided by tribunals with expertise in human rights. The *Code* should not be changed to allow claims to go to the courts as civil actions.**
- **If the system the Task Force is recommending is not put in place or does not have sufficient resources to operate satisfactorily, so that claimants do not, in fact, have real access to a hearing, the option of allowing human rights cases to go directly to the courts as civil actions should be reconsidered.**

### *Criminal Actions in the Courts*

Some individuals and groups strongly recommended to the Task Force that human rights claims should be dealt with separately in the courts as criminal offences. In their view, this practice would send a clear message that discrimination is a serious crime with devastating effects.

These groups, primarily from the visible minority community, pointed out the contradiction that criminal law is used to turn a disproportionately high number of people in their community into "criminals," while those who practise and benefit from such discrimination are not so labelled or treated.

The Task Force shares the view that discrimination is a very serious matter. It also believes that, in some instances, people practising discrimination clearly demonstrate that they are motivated by malicious intent, for example, someone in a workplace sabotaging equipment used by a visible minority or female worker who is the first to enter a non-traditional job.

The Task Force also believes that people who commit a criminal offence with the malicious intention to discriminate should also be subject to a higher *Criminal Code* penalty. For example, a person who assaults or steals from a person with a disability because that person is vulnerable and can't fight back should be subject to being convicted of assault or theft with wilful intention to discriminate.

The Task Force does not agree that our human rights laws should be enforced through the criminal courts. In fact, human rights in Ontario were first enforced only as criminal laws.<sup>47</sup> This approach was very unsuccessful and has many disadvantages.

In order to win a criminal case in the courts, it is necessary to prove beyond a reasonable doubt that a person intentionally carried out a criminal act. The *Charter of Rights and Freedoms* sets out a number of protections to ensure that an accused person's right to be presumed innocent is not infringed.

The stress in a criminal case is on individual intent and guilt. The criminal process places a heavy burden on claimants, and criminal penalties are not conducive to seeking or imposing systemic remedies.

Discrimination across Canada is deeply entrenched and systemic. The challenge, in the view of the Task Force, is to find ways to bring about significant, broad changes to end that discrimination. The Task Force believes that requiring positive action to be taken to overcome discrimination; letting claimants get their case before a competent Tribunal; making sure Tribunal decisions are monitored and implemented; and taking strong action to enforce a decision, when necessary, are practical and effective ways to advance equality rights.

In cases involving flagrant acts of overt racism or discrimination against people the *Code* is designed to protect and where criminal intent can be shown, action should be taken under the

*Criminal Code* of Canada. Similarly, a criminal offence with the intent to discriminate should be a more serious criminal offence with higher penalties.

Certain acts of discrimination are already expressly criminal offences. Section 318 of the *Criminal Code* makes it an indictable offence to advocate or promote genocide.<sup>48</sup> Section 319 of the *Criminal Code* makes it an offence to publicly incite hatred or wilfully promote hatred against an identifiable group.<sup>49</sup> This latter section of the *Criminal Code* has been used.<sup>50</sup> Some offences under the *Criminal Code*, even though not explicitly dealing with discrimination, have been invoked against those who intentionally discriminate. Zundel, for example, was prosecuted under section 181 of the *Criminal Code*, which makes it an indictable offence to spread false news.

As well, the *Criminal Code* offence of aggravated sexual assault is a precedent for the notion that a person may be convicted of a separate, more serious offence based on the type of the assault.

Criminalizing malicious discrimination through the *Criminal Code* will also ensure that the enforcement mechanism under Ontario's *Human Rights Code* remains civil and remedial in nature. Criminal laws are usually enacted to express society's strong disapproval of certain conduct. Malicious acts of discrimination should constitute such conduct and the commission of criminal offences with the intent to wilfully discriminate should also attract greater society disapproval.

The Task Force believes that hateful, intentional discrimination should be punished and that the availability of *Criminal Code* sanctions in these circumstances would assist in the fair and effective enforcement of *Code* rights.

The Task Force is aware that, constitutionally, the federal government has jurisdiction over criminal laws and that the provincial government would therefore have to negotiate with the federal government concerning this recommendation.

#### **RECOMMENDATION (18):**

- **The Task Force recommends that the Ontario government negotiate with the federal government to:**
  - **make a *Criminal Code* offence malicious acts of discrimination against persons the *Human Rights Code* is designed to protect and**
  - **make a more serious category for a criminal to commit a *Criminal Code* offence like assault or theft where it is committed with wilful intention to discriminate.**