

XIX. RECONSIDERATION AND ENFORCEMENT OF TRIBUNAL DECISIONS

Reconsideration of Tribunal Decisions

It was brought to the attention of the Task Force that opportunity must be given to the Equality Rights Tribunal to reconsider its decisions, where necessary. Such a need could arise in two ways either a party or the Tribunal may wish that a decision be reconsidered.

Currently, the *Code* does not provide for reconsideration. Rather, parties have a right to appeal decisions of Boards of Inquiry to the Ontario Court of Justice (Divisional Court).⁷⁴ In practice, this is unusual. Normally, there is no appeal from decisions of expert tribunals, the rationale being that courts lack the expertise to deal appropriately with the difficult questions of law and policy that arise in a policy area. Allowing expert tribunals to reconsider their decisions provides an opportunity for another look at a decision, somewhat like an appeal process.

The following describes the usual relationship between expert tribunals and the courts. Expert tribunals provide open access to a full hearing. They are given the power to reconsider their decisions. These decisions are then protected from court interference or second-guessing by clauses in the tribunal's statute that state that decisions are final. Court review can then only occur when a party is able to prove that the tribunal reached a patently unreasonable decision. The *Pay Equity Act* and the *Labour Relations Act* are examples of this arrangement.⁷⁵

The Task Force endorses and adopts this approach for the Equality Rights Tribunal. To do otherwise would be expensive, lead to delay, and cause uncertainty in the enforcement of decisions. Moreover, judges lacking appropriate training and expertise would have the power to determine what human rights should be protected and how they should be enforced. These are inconsistent with the principles the Task Force has adopted to guide the new system.

The power of reconsideration must include the usual power to vary, revoke, or substitute any decision. This allows the Tribunal to reconsider decisions in cases where decisions are clearly inappropriate or inconsistent, or where there is a problem with the fairness of the hearing process. For example, a decision may become inappropriate when it has not been complied with and a new remedy becomes necessary, or when evidence becomes available that could change the outcome but was not reasonably available at the time of the hearing.

Given that the Tribunal's initial decision is final, the power to reconsider a decision would usually be used only in exceptional circumstances.

RECOMMENDATION (58):

- **The Tribunal should have the power to reconsider any decision and to vary, revoke, or substitute a new decision.**
- **Apart from the power to reconsider, the Tribunal's decision should be final and protected from review by the courts except where the decision is patently unreasonable.**

Enforcement of Decisions

Many people told the Task Force that decisions should be enforced in an effective, prompt, and accessible manner. In this vein, the Task Force believes that the Tribunal must have the power to enforce its own orders and to prevent an abuse of its powers.

Currently, abuse is prevented and orders are enforced when the Board of Inquiry order is filed in the civil courts and then enforced as if it were an order of those courts.⁷⁶ A violation of an order of the civil courts leads to fines and/or imprisonment. There is also provision in the civil courts for ordering costs against the party who violates the order.

While these powers sound good in theory, actual access to these enforcement remedies is awkward and costly and usually requires the assistance of a lawyer.

The new human rights system will provide a more accessible enforcement process. Tribunal Officers will have the authority to monitor and enforce the Tribunal's decisions. Rather than not complying because of an order is not clear, respondents will be able to seek clarification from these Officers on how to comply. Claimants, too, will be able to call on these officers to assist if compliance becomes an issue.

The monitoring remedies that the Tribunal will be able to order are referred to in Section XVI.

RECOMMENDATION (59):

- **The Tribunal should take a proactive approach to enforcement by ensuring that the Tribunal Officer assists both the claimant and the respondent in the enforcement of an order.**
- **The *Code* should provide that orders of the Tribunal, when filed with the Ontario Court of Justice (General Division), have the same force and effect as an order of that Court and therefore can result in fines and/or a jail term for non-compliance.**

Appropriate Fines

It is a provincial offence to impede an investigation under the *Code*, contravene an order of a Board of Inquiry, and infringe a person's right under the *Code*.⁷⁷ In order to prosecute anyone under this section, it is necessary to get the consent of the Attorney General. Fines under this section are limited to \$25,000.

The Task Force was asked to consider increasing the fine to a figure more consistent with the serious nature of the offence. The *Pay Equity Act* has fines of up to \$50,000.⁷⁸ Environmental protection legislation has fines that start at a minimum of \$2,000 and increase to over \$200,000.⁷⁹

The Task Force believes that the current fine amounts do not reflect the seriousness of the offence and that they should be increased to a level similar to that required to protect the physical environment. The Commission recommended to the Task Force that any fines be paid into a special levy fund. The Task Force agrees with this approach.

RECOMMENDATION (60):

- **The *Code* should be amended to increase the fines for obstruction of the Tribunal process or failure to comply with a Tribunal order to a level that is consistent with environmental protection legislation, that is, a minimum fine of \$2,000 and a maximum fine of \$200,000.**
- **The money collected by the Treasurer of Ontario from the fines imposed under this section should be paid into an Enforcement Fund that could be called upon when extra funds are needed for the new human rights enforcement system.**

Order for Payment of Legal Costs Inappropriate

The Task Force considered whether the Tribunal should have the power to order a party to pay the costs incurred by other parties in a hearing on any grounds. The Task Force believes that this Tribunal, like the other tribunals in the field, should not have such power. Neither the Pay Equity Hearings Tribunal, nor the Ontario Labour Relations Board, nor the Workers' Compensation Appeals Tribunal have the power to do so.

The Task Force is concerned that including a power to order costs will act as major deterrent to the filing of legitimate claims because claimants may be afraid that they will be bankrupted by a potential costs order and therefore, will not pursue a claim.

Currently, the *Code* provides that the Commission may be ordered to pay the costs of a respondent if the complaint against the respondent is dismissed and the Board of Inquiry finds that

- the complaint was trivial, frivolous, vexatious, or made in bad faith; or,
- in the particular circumstances, undue hardship was caused to the person complained against.⁸⁰

It appears this costs section was thought to be necessary in deterring the Commission from forcing a respondent to defend itself at a Board of Inquiry when there was no merit to the case.

In the current system, the Commission has carriage of the complaint and the decision to appoint a Board of Inquiry.

In the proposed system, the Tribunal, not the Commission, would have the responsibility, at the request of a party or on its own request, to dismiss a complaint shown to lack any merit. It is hoped that the various procedures that the Task Force has suggested to deal with cases lacking merit will significantly reduce the likelihood that respondents will be required to incur significant costs in such cases.

The Task Force also considered whether to limit a possible costs order to those situations where a party was obstructing or unduly delaying the Tribunal process. Although it is important to ensure that all the parties at the Tribunal are respectful of the Tribunal's procedures, the Task Force believes that the Tribunal's considerable powers to control its own process (either through its own Tribunal Officer or through the courts) should be sufficient to deal with the issue of obstruction, delay, or violation of an order. There is also provision for prosecution in those circumstances.

While the Task Force understands the advantages that a power to order costs will have in controlling the caseload, it believes the disadvantages substantially outweigh any advantages.

RECOMMENDATION (61):

- **The Tribunal should not have the power to order any party to pay legal costs to another party.**