

## XVI. EQUALITY RIGHTS TRIBUNAL

### **Access to a Hearing**

The Ontario *Human Rights Code* is legislation of almost constitutional importance, yet recent figures show approximately 96 per cent of persons filing claims under the *Code* never get a hearing. The decision whether or not to refer the case to a hearing is made by Commissioners at a closed meeting at which the person is not allowed to appear.

At its public hearings and in the submissions it received, the single, strongest recommendation made to the Task Force was for claimants to have direct access to a hearing process they directed.

The Task Force agrees with this recommendation. The Task Force believes it is unconscionable for the *Code* to give people and groups fundamental equality rights and then deny them access to a hearing to claim those rights.

### **RECOMMENDATION (27):**

- **All claimants should have direct access to a hearing to assert their claim for equality rights.**

### ***Need for a Permanent Hearing System***

In the past, the process for hearing human rights claims has been haphazard and inefficient.

The system set out in the *Code* is as follows. The Minister appoints a panel of persons to act as members of Boards of Inquiry.<sup>54</sup> When the Human Rights Commission decides to refer a case to a hearing, it requests the Minister to appoint a Board of Inquiry.<sup>55</sup> A person or persons from the panel are then asked by the Minister to sit as a Board of Inquiry for that particular case.

This has meant that each Board of Inquiry was a separate, temporary happening. No permanent Board of Inquiry office existed to coordinate and encourage clear, consistent procedures for all boards or to organize administrative matters on a permanent basis.

Since Board of Inquiry members are only involved part-time and on a transitory basis with no certainty as to how much work they will be assigned, they usually have other full-time

jobs. This causes problems in scheduling hearings with resulting unacceptable delays, as well as difficulty in building consistency, expertise and training among adjudicators.

In September 1991, for the first time, the position of Chair of the Boards of Inquiry Panel was created and is presently filled by Maryka Omatsu. Adjudicators for each case are now appointed by the Minister upon the recommendation of the Chair of the Boards of Inquiry Panel. A Board of Inquiry Office was also established, with responsibility to schedule and coordinate all Board of Inquiry matters.

The creation of this position and this office have led to significant improvement in coordinating Board of Inquiry activity. However, the position of Chair is part-time and the resources at present limited.

In a submission to the Task Force, the Chair of the Board of Inquiry Panel said the prior lack of a central agency to coordinate human rights hearings and Adjudicators has led to a lack of uniformity of procedures and awards.

It is clear that even with the relatively small number of cases referred to Boards of Inquiry to date, the unstructured, ad hoc manner of setting up human rights hearings is not satisfactory.

Under the system proposed by the Task Force, where an increased number of cases will go to hearings, a permanent panel of trained, qualified human rights Adjudicators will clearly be needed, as well as a permanent agency responsible for the hearings.

#### **RECOMMENDATION (28):**

- **The new enforcement system requires a permanent expert Tribunal.**

#### ***An Equality Rights Tribunal***

The Task Force believes one Equality Rights Tribunal should hear cases under the *Human Rights Code*, the *Pay Equity Act*, and the *Employment Equity Act*. All three statutes deal with the adjudication of human rights issues of fundamental public importance to Ontarians.

The *Pay Equity Act* and the *Employment Equity Act* acknowledge systemic employment discrimination faced by women, persons of colour, Aboriginal peoples and people with disabilities. They require employers to take specific positive measures to redress the discrimination without waiting for individual claims. Similar kinds of employment equity measures have already been ordered by one Tribunal under the *Canadian Human Rights Act* in the *Action Travail des Femmes* case.<sup>56</sup>

In the view of the Task Force, coordination of human rights, pay equity and employment equity cases would benefit everyone.

- The parties to a discrimination claim and their advocates would have only one hearing body to deal with, which would make access simpler.
- The issues covered by the three acts overlap at times. For example, an employee who is subjected to racial harassment could file a claim under the *Code*, but might also be able to challenge the harassment under the employment equity plan, as a breach of the employer's obligation to eliminate barriers to participation. A person with a disability may file a claim under the *Code* and the employer may respond that measures in the employment equity plan to overcome barriers are sufficient as a remedy.
- If one Equality Tribunal handles both human rights and employment equity cases, it will avoid the confusion and duplication of different, separate tribunals handling the same case or issues.
- Sharing administration, expertise, personnel and resources would be efficient and cost effective and lead to more creative mediation and adjudication.

The Task Force does not believe it is practical or efficient to set up two new Tribunals, one for human rights and one for employment equity. Various individuals and groups from both the equality seeking and the respondent communities stressed the desirability of coordinating the pay equity, employment equity and human rights systems and, in particular, recommended the creation of one Tribunal. They felt this would make recourse simpler and more accessible for persons experiencing discrimination. Representatives of respondent groups favoured this as a "one stop shopping" system.

The Task Force consulted with the Chair of the Pay Equity Hearings Tribunal, The Chair of the Boards of Inquiry and the Employment Equity Commissioner concerning the possible development of a joint Tribunal. All three supported such a move, provided that the particular needs of the individual equality areas would be respected in the design of the new Tribunal. The consultation should continue on an ongoing basis, if this recommendation is accepted.

In her Statement to the Legislature on June 25th concerning the *Employment Equity Act* the Minister indicated that:

[the government aims] to eventually bring all our equity initiatives under one combined system.<sup>57</sup>

Some groups and individuals expressed concern, however, that human rights cases might be marginalized in a Tribunal dealing also with major, complex employment equity and pay equity cases. Groups dealing with housing discrimination feel a particular anxiety as they see

the danger of an Equality Rights Tribunal focusing on employment discrimination, because of the presence of employment equity and pay equity cases. This anxiety is underscored by the fact that the human rights system itself, in their view, has in the past demonstrated less concern and awareness for housing discrimination claims than employment discrimination claims.

Unions raised a concern that one Tribunal, dealing with other areas as well as employment, would not have sufficient understanding of the trade union perspective. Responsibility for Pay Equity Hearings Tribunal falls under the Ministry of Labour; human rights comes under the Ministry of Citizenship.

In addition, different groups are covered by the different laws. Pay equity deals with pay discrimination against women; employment equity is expected to deal with four target groups; whereas the *Human Rights Code* covers a broader range of groups who experience discrimination, such as persons who are poor, lesbians and gay men, ethnic and religious minorities, persons with a record of offences. Clearly, it is essential that an Equality Rights Tribunal deal fairly and effectively with cases of discrimination against these groups, as well as the groups that are covered under both employment equity and human rights protections.

The Task Force believes the concerns expressed are valid. However, the Task Force believes the different concerns and needs can be addressed within one Tribunal. Special care must be taken to ensure that the distinct character of human rights cases be respected. Particular attention must be paid to cases involving grounds and types of discrimination not covered by employment equity and pay equity laws.

The Task Force recommends that the position of Chair, Equality Rights Tribunal be established to have overall responsibility for the joint Tribunal and its administration. Three Associate Chair positions should then be established to be responsible respectively for human rights, employment equity and pay equity.

A panel of Vice-Chairs should be named to hear human rights, employment equity and pay equity cases. Vice-Chairs (adjudicators) would be certified to hear cases in one or more of the three areas, depending on the particular individual's qualifications. In this way, a person would not hear a human rights case, unless the individual had specific expertise to do so.

On the other hand, a person with expertise in both employment equity and human rights could be chosen to hear a case which raised both employment equity and human rights issues. It is also possible that the Tribunal could in one hearing decide a case under two or more of the statutes.

Although the system referred to throughout this report is a joint Tribunal, the structure and process the Task Force is recommending would also work effectively with a Tribunal that handled only human rights cases. (See Chart in Appendix 3-2)

If however a new joint Tribunal is set up, the Task Force believes the measures and structures it is proposing will respect the particular needs of each area, while maximizing the benefits of a shared, coordinated Tribunal. (See chart in Appendix 3-1)

The Task Force believes that it is important for the new joint Tribunal to be established with a fresh start. Given the possibility that employment equity legislation may be passed before any procedural amendments to the *Code* arising from this report, it may make sense for the new Tribunal to be set up to start dealing initially with employment equity claims and the human rights and pay equity hearing bodies could then join up afterwards.

### ***Tribunal Advisory Committee***

In light of the important role the Tribunal plays in the new enforcement system, involvement of the consumers of the Tribunal's mediation and adjudication services is very necessary.

A Tribunal Advisory Committee, representative of all the parties and interests who are served by the Equality Rights Tribunal, should monitor the working of the Tribunal and provide advice to the Chair. The Committee could provide input among other things on the development of fair and accessible rules and procedures, the operation of the Registrar's office and the Mediation Section. The Committee could also advise the Chair on matters such as criteria and qualified candidates for Vice-Chair positions. Unlike the Commission, the Tribunal is a quasi-judicial body and the Committee could not provide advice on how to deal with particular cases as this would be undue influence.

Ensure equality seeking groups dealing with grounds of discrimination and areas not covered by employment and pay equity must be properly represented on the Advisory Committee.

The Task Force recommends that a Tribunal Advisory Committee with representatives of the groups served by the Tribunal be appointed by a process acceptable to interested groups.

### **Appointment Process**

The Task Force believes that the process for appointing the Chair and the four Associate Chairs of the Equality Rights Tribunal should be independent and credible. Since the Government is itself a major respondent appearing before the Tribunal, it is essential that the appointment process be, and be seen to be, free of any political interference.

The Task Force recommends that the Equality Rights Appointments Committee should be responsible for appointing the Chair of the Equality Rights Tribunal, the Associate Chairs for Human Rights, Pay Equity and Employment Equity and the Associate Chair, Mediation.

(This is dealt with in Section IX - Ensuring the Independence and Competence of the New Enforcement System).

The Appointments Committee will advertise the positions, the qualifications and how to apply are appropriately advertised so that they come to the attention of interested communities.

The Task Force believes that Adjudicators should be named by the Chair, in consultation with the relevant Associate Chair and the Tribunal Advisory Committee. This will allow those operating the Tribunal, who have the closest knowledge of what the needs are, to be in charge. It will also allow for the termination of an Adjudicator whose performance is found unsatisfactory, for example because of inability to hand down decisions in a reasonable and timely way.

The chair would be consulted on the renewal of the appointment of any Associate Chair.

### **Qualifications for the Tribunal**

Given the crucial role the Tribunal will play in deciding equality rights, it is essential that qualified, competent persons be appointed.

The Task Force believes that clear job descriptions should be prepared that detail the tasks to be performed and the qualifications required.

The Supreme Court of Canada has recently noted that administrative Tribunals "can, and often should, reflect all aspects of society". The Court noted that there should not be undue concern that persons who have spoken out on various issues in the past, will not "strive for fairness and a just result", when they are called upon to decide a case.<sup>58</sup>

Since people of colour, people with disabilities, women, people with low incomes, have traditionally been excluded from opportunities, particularly from senior positions in administrative tribunals, training should be provided, if necessary, to enable them to qualify. A legal background should not be mandatory.

### **RECOMMENDATION (29):**

- **The Task Force recommends that a permanent, full-time Equality Rights Tribunal be established to deal with human rights, pay equity and employment equity cases.**
- **An independent Tribunal Advisory Committee, representative of all the parties and interests who are served by the Equality Rights Tribunal, should monitor the effective operation and accessibility of the Tribunal and provide advice to**

**the Chair (but not concerning specific cases). Care should be taken to ensure equality seeking groups, dealing with human rights grounds and areas not covered by employment and pay equity are represented on the Advisory Committee.**

- **The Chair of the Equality Rights Tribunal should be responsible for the overall functioning of the Tribunal and three Associate Chairs should be responsible respectively for adjudication human rights, employment equity and pay equity cases.**
- **A Panel of Vice-Chairs (Adjudicators) should be certified to hear cases in one or more of the three areas on the basis of their particular expertise for one or more areas. They should be appointed by the Tribunal Chair, in consultation with the relevant Associate Chair and the Tribunal Advisory Committee.**
- **Training should be provided where necessary to encourage the recruitment of candidates from diverse background.**

### *Adjudication Services*

The Tribunal will be divided into two major sections - the Adjudication Section to hear cases, a Mediation Section to try and resolve claims without going to a hearing. The Adjudication Section will include the Chair, the Associate Chairs for each equality area and the adjudicators (Vice-Chairs).

### **Chair**

The Chair will preside over the Tribunal both as the senior adjudicator and the chief executive officer with the power to administer the Tribunal, choose Vice-Chairs, with input from the Tribunal Advisory Committee, assign members and preside over cases. The Chair will be responsible for consulting with the three Associate Chairs of the three equality areas to monitor that these areas are appropriately and fairly resourced.

The Chair will report annually to the Legislative Equality Rights Committee on the state of human rights enforcement as viewed from the Tribunal's perspective, and will make recommendations for required changes to policies, laws and budget.

The appointment will be for a five year period with an option to renew for a further five years. A long term of appointment will encourage strong candidates to leave other positions to take this position.

The Chair should have:

- demonstrated experience and expertise in the field of human rights. If the Tribunal were to deal with all three equality issues, the Chair should demonstrate expertise in the areas which the Tribunal will be called upon to consider, namely equality of treatment in the area of human rights, pay equity and employment equity;
- demonstrated commitment to taking a proactive and innovative approach to the investigation, mediation, adjudication and enforcement of anti-discrimination legislation; and
- leadership skills to carry out the chief executive officer functions.

#### *Associate Chairs*

Associate Chairs in charge of each equality area will be appointed for a five year period with an option to renew for a further five year term.

Each Associate Chair should have:

- demonstrated experience and expertise in their particular area of responsibility,
- demonstrated commitment to taking a proactive and innovative approach to the mediation, adjudication and enforcement of anti-discrimination legislation, and
- leadership skills.

#### *Vice-Chairs*

The Vice Chairs are the adjudicators who will hear and decide the cases.

The Associate Chair for the particular area will consult with Chair and the Tribunal Advisory Committee on the criteria, as well as names of candidates.

**RECOMMENDATION (30):**

- **The *Code* should require adjudicators to take all reasonable steps to ensure that claims are dealt with expeditiously and fairly and that inquiry and decision-making into a claim is conducted in an understandable, straightforward and not unduly legal or technical way.**

*Mediation Services**... background ...*

Many groups and individuals expressed great dissatisfaction with the *Code's* present settlement process.

Representatives of equality seeking and respondent groups said the process can be coercive and unfair. For example, claimants know, and are sometimes specifically told, that if they do not accept a settlement, which in their view is unjust, their case will be dismissed by the Commission. Since they have no other choice, they feel forced to accept the "settlement".

Often settlements involve the payment of a certain sum of money. A number of claimants felt that such settlements are offensive and unprincipled, as it appears that human rights are being bought and the serious underlying questions of discrimination are not addressed or rectified.

Members respondent groups said they sometimes accept settlements, which in their view are unjustified, because of the time and cost to them of a human rights case lasting for years at the Commission.

Representatives of both claimants and respondents said human rights officers lack training in mediation and, because they also play roles as investigators and made recommendations on cases, people have difficulty relating to them as neutral mediators.

Under the *Code* the Commission is presently required to try to settle every claim. Over half of all claims made to the Commission (55 per cent) are settled at an early settlement stage, prior to any investigation.

Some employer groups told the Task Force that this rate of settlement showed that the present system is a good one and should be kept, with a few refinements.

The Chair of the Board of Inquiry believes it necessary to have some form of mandatory settlement process to encourage settlements or withdrawal of claims and reduce the caseload burden at the Tribunal.

Representatives of community groups overwhelmingly recommended that the *Code* not require settlement be attempted in every human rights case. This view was supported by the Commission.

It appears to the Task Force that under the heavy workload faced by the Commission, the settlement process became more a caseload management technique than a process to encourage parties to arrive at genuine settlements.

***... settlement services should be voluntary ...***

Mediation should recognize power imbalances and should be guided by persons who understand the *Code's* standards.

The Task Force considers that settlement of human rights claims is desirable and should be facilitated. However, it is essential in the Task Force's view, that settlements be principled, genuine and voluntary. This view was supported by the Harvard Negotiation Project which provided a report to the Task Force.

A forced "settlement" where, in the words of one employer, "you are left with a bad taste in your mouth", or as many claimants put it, you are left angry, hurt and offended, is no real settlement at all.

***... mediation section ...***

In order to facilitate settlements, the Equality Rights Tribunal should offer mediation services as a way of resolving human rights claims. An Associate Chair, Mediation, should be responsible for an independent Mediation Section with trained mediators. This will ensure that mediation is equally as respected as going to a hearing in the adjudication section.

Parties to a claim should be asked by the Tribunal if they have considered settlement, but the parties should have the right to refuse.

The Tribunal could also assist parties who want to resolve a rights claim before positions are written down in a claim and response.

*... community mediation ...*

Community mediation services that exist in certain parts of the province and meet proper standards should also be used. This would provide services closer to where people live and would draw benefit from community experience, energy and creativity. Joint training and information exchange sessions on successful mediation techniques and settlements should be regularly held between community and tribunal mediators.

*... mediation process ...*

The mediation process should be informal and confidential. A legalistic, adversarial approach should be discouraged. Persons involved in the mediation process could not be required to provide information at a hearing.

Mediators should be representative of the regional and cultural diversity of the province. They should be trained in mediation skills, in human rights and in cross-cultural awareness and accessibility issues.

In order to deal with power imbalances, a claimant would be entitled to the assistance of an advocate.

Time limits should be placed on the mediation process so that normally it will be completed within 45 days, with an extension possible. If the mediation proves unsuccessful, the case will be referred to a hearing.

Settlements should be registered with the Tribunal so that terms that are not respected can be enforced by the Tribunal. Settlements should be public unless the claimant requests confidentiality or the mediator considers it appropriate. Respondents should not be allowed to request a clause keeping the terms secret.

*... advantages of mediation ...*

The Task Force believes that mediation can be an empowering and effective way of resolving human rights claims. It also allows for confidentiality in a case where a claimant does not wish to go before a hearing, for example in a sexual harassment case.

A number of claimants said they wanted to be able to tell a respondent what it felt like to be discriminated against. They asked for a non-adversarial process which was respectful and fair. They were offended by the present settlement process, where they have no control and feel they are being "bought off".

The Task Force believes that offering mediation services, with trained and specialized mediators, will produce better results than forcing parties to go through a settlement process.

In addition, opening up access to a hearing will, in the Task Force's view, increase the number of voluntary settlements between the parties. The imminence of a hearing has often proven to be a strong incentive to settlement.

For these reasons the Task Force rejects the idea of making settlement efforts compulsory. This would, in the Task Force's view be counter-productive and, in fact, decrease the chances of successful settlement.

*... settlements not approved ...*

The Task Force also believes that settlements need not be approved by the Tribunal. The public interest in the sufficiency of settlements will be met by the provision of high quality mediation services, guided by the principle of achieving *Code* compliance, and a provision that any settlement could be challenged as invalid, if it was obtained through coercion or unconscionable means.

**RECOMMENDATION (31):**

- **An Associate Chair, Mediation, heading a separate Mediation Section of the new Tribunal should be responsible for providing mediation services to bring about fair and effective settlements of human rights claims.**
- **Use of mediation services should be facilitated, but should be voluntary.**
- **Persons providing mediation services should:**
  - **be knowledgeable about and supportive of the principles and purpose of the *Code*,**
  - **guide the parties to reach a settlement which complies with the *Code*,**
  - **be aware of and sensitive to power imbalance between the parties in a case,**
  - **be respectful towards persons who experience discrimination.**
- **Settlements in human rights cases do not need to be approved by the Tribunal but could be challenged if they were obtained by undue coercion or other unconscionable means.**

- **Persons involved in mediating claims should not be required to give information during a hearing.**
- **Information on settlements should be public, but with discretion allowing confidentiality to be protected when requested and when considered appropriate by the mediator, such as in a sexual harassment or AIDS case.**
- **Various options, such as using community mediation services, should be permitted, provided they meet the necessary standards.**
- **A time limit of 45 days should be set for completing settlement, with an extension possible if requested by both parties and the mediator believes further mediation services would be appropriate.**
- **Settlements should be registered with the Tribunal so that if the terms of the settlement are not respected, they can be enforced by the Tribunal as if they were a breach of the Act. If a person claims that the settlement was reached under duress, the Tribunal could decline to enforce the settlement.**
- **If settlement efforts are unsuccessful, the parties should have a right to a hearing before an adjudicator.**

### ***Office of the Registrar***

A Registrar will be responsible for assisting persons wishing a hearing or mediation services. Deputy registrars for human rights, employment equity and pay equity, and intake officers will work under the Registrar in the Office.

#### ***... intake officers ...***

Intake officers will be highly trained, experienced staff, since they are the first point of contact for claimants.

Strong criticism was expressed to the Task Force that presently the intake officer at the Commission is a junior position and so the person does not have the necessary training or expertise to deal properly with the variety of different and sometimes new or complex issues involved in a claim.

Many people stressed that the intake officer should be one of the most experienced and skilled positions to ensure the case got started correctly. This would, in fact, save a lot of wasted time and frustration at later stages.

The Task Force agrees with this view.

*... advice about community services ...*

If a claimant contacts the Tribunal directly, the intake officer will advise the person of the various community advocacy services that provide assistance and support to claimants.

**RECOMMENDATION (32):**

- **The position of Registrar should be established with responsibility to administer the fair, accessible and effective functioning of the Tribunal.**
- **Deputy registrar positions for human rights, employment equity and pay equity should be established and trained intake officers and other staff provided.**
- **The functions of the Registrar should include:**
  - **administering the Tribunal;**
  - **administering the filing and handling of claims throughout the Tribunal process;**
  - **assigning intake staff to assist people in filing claims who would make sure the rules for the filing of responses and disclosure are followed;**
  - **responsibility for establishing case management procedures to ensure cases are moved through the system fairly and expeditiously;**
  - **general administrative responsibility for ensuring the adjudicative and settlement process is accessible to the public and particularly to unrepresented claimants and respondents and to those who are disadvantaged because of disability, literacy problems, social and economic disadvantage, cultural differences;**
  - **ensuring claims are prioritized where there are more claims to hear than adjudicators available or where there is a need to have it heard quickly, e.g. an AIDS case;**
  - **ensuring that any necessary accommodation needs are identified and met, such as the use of tapes or interpreters;**
  - **ensuring claims are served and appropriate notices, if any, are posted;**

- reviewing claims as they are initially filed to determine if they are within jurisdiction or on their face disclose a violation of the *Code*. If they did not, the Registrar would refer the claim to an Associate Chair for a decision to dismiss. This decision could be appealed to a hearing presided over by a Vice-Chair; and
- ensuring claimants are advised of the various community advocacy services that exist to provide support.

### *Resource and Training Services*

#### *... background ...*

Until now resources and information about human rights decisions have been badly lacking. Information about decisions handed down under the *Code* has been haphazard at best and non-existent at worst. No resource centre exists where people can obtain needed information about decisions.

This lack of information works to the detriment of the equality seeking and respondent communities, the general public and the human rights system itself.

No mechanism has existed to provide consistent training for persons who investigate, settle and decide human rights cases. Such training would promote high and consistent standards for investigation, settlement and decision-making. It would also sensitize adjudicators and staff concerning human rights issues and awareness and commitment to cross-cultural and accessibility concerns.

#### *... Resource and Training Section ...*

The Task Force recommends a Resource and Training Section, headed by a Director, be established at the Tribunal.

The Section will conduct initial and ongoing training sessions for Tribunal Adjudicators. Such training will help ensure that lay persons who become Adjudicators received proper training.

The Section would also assist the Chair and the Associate Chairs determine qualifications and testing for certifying Vice-Chairs to handle human rights, pay equity or employment equity cases. The Section will train and certify adjudicators who handle human rights cases under other statutes, for example arbitrators under collective agreements.

The Section will ensure that Tribunal Officers, Intake Officers and Mediators who handle various types of equality cases are appropriately qualified and trained. It is essential that members of the Tribunal be appropriately trained both on their hire or appointment and on an ongoing basis.

The Centre should be required to operate in an accessible manner - for example, by having a TDD number, a 1-800 number and by using modern technology to ensure their information is accessible to the different regions of the province and to persons with disabilities.

**RECOMMENDATION (33):**

- **A Resource and Training Section should be established in the Tribunal under a Director.**
- **The resources and training provided by this Section should include :**
  - **providing access to all the decisions, information and research needed to mediate and decide equality rights disputes, not only to the Tribunal staff and adjudicators, but to everyone in the community who requires the information, such as claimants and respondents, lawyers and advocates, Equality Rights Centres, Human Rights Ontario, equality seeking groups, unions and other community groups;**
  - **providing initial and ongoing training and education for the Chair, Associate Chairs, Mediator, Registrar, Tribunal Counsel Office, Mediators, Intake Officers and Tribunal Officers;**
  - **publishing regular reports of Tribunal decisions and bulletins with easily understood summaries of the decisions;**
  - **keeping on public file copies of all claims filed with the Tribunal as a public record of discrimination issues being raised at the Tribunal, and copies of settlements which are authorized to be made public by the Mediator. If necessary, the Protection of Privacy Act should be amended to allow the complaints and responses filed with the Tribunal to be made public, subject to the claimant's consent;**
  - **maintaining statistics and other information concerning the number, nature and results of claims filed;**
  - **providing information on equality rights cases; providing initial and ongoing training for the Vice-Chairs, Mediators, Intake Officers and Tribunal Officers; and**

- **training and certifying arbitrators under the *Labour Relations Act*.**

### ***Tribunal Counsel Office***

A Tribunal Counsel Office is needed to provide legal advice to the Tribunal and legal assistance to any non-legally trained adjudicators. Tribunal counsel would be assisted by legal assistants who could review the case materials coming forward to adjudication and perform other delegated tasks appropriate to their skills.

Tribunal Counsel Office would:

- provide legal research and advice to the Chair, Associate Chairs, Vice-Chairs, Registrar, mediators, officers and other staff in their day-to-day functions;
- work with the Registrar and Tribunal Advisory Committee to develop Tribunal rules and procedures for the filing of claims, the hearing process and related procedures, practices and policies and prepare or revise practice notes and forms;
- advise the Tribunal on the issues arising in cases, rules of evidence, possible legal impact of past and potential decisions of the Tribunal and other tribunals;
- consult with mediators and Tribunal Officers on legal issues that may arise in the course of their work;
- represent the Tribunal's interests in court;
- prepare summaries of selected significant Tribunal decisions;

Adjudicators should be allowed to speak to Tribunal Counsel or other members of the Tribunal throughout the hearing process. This will particularly facilitate the use of adjudicators who have human rights expertise but may not have formal legal training or where the parties are not both represented.

The section 38(2) restriction on the ability of the adjudicator to talk to counsel and seek legal advice should be deleted to allow for a more collegial Tribunal process.

**RECOMMENDATION (34):**

- **A Tribunal Counsel Office should be established to provide legal advice to the Tribunal and to provide particular legal assistance to any non-legally trained Vice-Chairs.**
- **Section 38(2) of the *Code* which restricts the ability of the adjudicator to talk to counsel and seek legal advice should be deleted.**

***Regional Access***

The Equality Rights Tribunal should take all possible measures to make itself accessible to persons throughout the province.

Vice-Chairs who hear cases should, for example, come from every region in the province.

Although the Tribunal's main office will likely be in Toronto, hearings will take place around the province, using where possible Adjudicators who live in or are familiar with that region.

In order to maximize consistency, sharing of expertise and high standards, such regional adjudicators will receive training and spend regularly periods of time working at the central Tribunal office. Likewise, in order to increase awareness and sensitivity to the varied reality of the province, adjudicators from the central office will be sent out to hold hearings around the province.

Tribunal Officers and mediators should also come from every region of the province and steps should be taken to ensure their services are regionally accessible.

The Tribunal may enter into arrangements so that its intake functions can be handled by other persons or organizations in order to make the function more accessible to the regions and its cultures.

With technology available today where, for example, each day a newspaper can be written in one location, edited in another, and published and distributed somewhere else, it is certainly feasible and practical to schedule hearings around the province from one central office. In this way, administrative costs can be minimized and regional accessibility maximized.

The Tribunal could also adopt, where appropriate, the procedures now being used by the Supreme Court of Canada of using video-conferencing or teleconferencing to facilitate the hearing of cases where the parties are from different regions of the province.

The Equality Rights Centres, the centres of particular expertise, and the community groups funded to handle human rights claims would provide assistance to claimants to take their case to the Tribunal. They would have claim forms and easily accessible information in varied formats explaining what the *Code* is about and how claims are handled.

These agencies providing services to claimants will be located all around the province and will have ready access to the Tribunal through modern technology. More detailed information about these agencies provided earlier in this section.

#### **RECOMMENDATION (35):**

- **The Tribunal should take all reasonable measures to make itself accessible throughout the regions of Ontario, such as having cases heard around the province and choosing adjudicators, mediators and officers, some of whom live in the regions.**
- **The Tribunal should make use, where appropriate, of modern technology including computers, video-conferencing and teleconferencing in order to maximize accessibility and minimize cost.**

#### ***Staffing***

Employment equity considerations in staffing should be a priority and should include all groups covered by *Code* and not just *Employment Equity Act* groups. Staff should also be representative of Ontario's regional diversity.

The Task Force believes many people currently working for the Commission are qualified or could be trained to take on positions in the new Tribunal. Many of the skills required by Commission staff will be needed in the Tribunal.

The Task Force believes it is essential that the Commission staff are given this opportunity and that the new Tribunal be covered by the Ontario Public Service Employees Union's collective agreement so that they do not lose the important collective bargaining rights they currently have.

#### **RECOMMENDATION (36):**

- **Staffing of the Tribunal should take into account employment equity considerations including all groups covered by the *Code* and not just those in the *Employment Equity Act*.**

- **Current Commission staff should be provided with training, where appropriate, to allow them to qualify for positions in the Tribunal.**
- **The new Tribunal should be covered by the Ontario Public Service Employees Union public service collective agreement.**

### *Procedures and Powers of the Tribunal*

The Task Force notes that there is always tension between the need to develop rules to make procedures clear and the problem that such rules may become too complex and act as a barrier. There is a fine line to draw and the Tribunal will be assisted by its Advisory Committee to recognize specific barriers and address them.

#### *... procedural rule-making power ...*

The Pay Equity Hearings Tribunal has very clear published rules and procedures which were developed in conjunction with the community it serves and are re-evaluated every year with that community. These rules are also provided in a plain language format with pictures.

Currently there are no published rules for the Boards of Inquiry and there is no provision in the *Code* which provides for a common set of rules to bind all the temporary adjudicators. These adjudicators have long called for a set of rules to ensure more even-handedness and predictability and less misunderstanding.

Tribunal procedures should be developed to make hearings understandable, expeditious, and less formal. This is necessary to meet the needs of people who will come before the Tribunal, some of whom may be unrepresented or represented by lay advocates.

The Chair and the Registrar should consult with the Tribunal Advisory Committee on the formulation of rules and accessibility issues.

The Office of the Boards of Inquiry has prepared a working Guidelines Practice for the current panel of ad hoc adjudicators.

The *Code* should be amended to provide that the Tribunal has the power to make all necessary rules instead of being bound by more complex general rules covering most Tribunals.<sup>59</sup> The Tribunal should have the power to make its own rules to suit the nature of its unique decision-making. The specific procedural powers covered by the Workers' Compensation Appeals Tribunal would be very relevant to consider.<sup>60</sup>

**RECOMMENDATION (37):**

- **Tribunal procedures should be developed to make hearings understandable and less formal in order to meet the needs of the persons who will come before the Tribunal, some of whom may be unrepresented.**
- **The Tribunal must have the power to make rules and procedures required to fairly, expeditiously, and effectively decide human rights cases.**

***Inquiring Active Adjudication***

The Task Force heard from many that they wanted the hearing process to be less legalistic and more comfortable for claimants.

The adjudication process at the Tribunal will have a non-traditional consumer orientation. The adjudicators will be required by the *Code* to be active inquirers into the real substance and merits of the case rather than just sitting and listening.

An active inquiring approach is necessary for the adjudication of human rights claims, where claimants are often disadvantaged and proof of discrimination is sometimes difficult to bring forward. Such an approach is used at the Workers' Compensation Appeals Tribunal. It allows the Tribunal to assist its consumers - the parties - to understand the hearing process and to come forward with the necessary evidence.

An inquiring adjudication approach, combined with informal procedures, will assist unrepresented parties and lay advocates to appear at the Tribunal.

***... mandatory disclosure rules ...***

Parties should be required to provide each other with the material facts on which they rely in a case and with the documents which are relevant to deciding the case. Failure to comply with this requirement should have consequences. Officers would assist parties to ensure disclosure happens in timely fashion.

***... tribunal power to order production of information and compelling of witnesses***

...

The Tribunal needs to make its decisions on the basis of the necessary information. The Tribunal should have the power to order anyone to attend the hearing and to bring documents or testify.

***... ability to order investigation by Tribunal Officers ...***

Under the proposed new system, there will no longer be a mandatory requirement for the Human Rights Commission to investigate every human rights claim. A public investigation would only occur where an Adjudicator thought it was appropriate and necessary in order to properly hear the claim on its real merits.

This might occur where the process of informal investigation conducted by the parties and the results of the mandatory disclosure rules had not provided sufficient evidence.

Similarly a Labour Board procedure, once the Tribunal Officer completes the investigation, a report of its results go to the adjudicator and the parties.<sup>61</sup>

Ordering a Tribunal Officer investigation could also be used where the adjudicator wished to delegate to the Tribunal Officer the hearing but not deciding of some evidence. For example, in a case where a landlord has been ordered to compensate a tenant for her losses as a result of being denied accommodation, the Adjudicator could ask the Tribunal Officer to ascertain the facts.

The *Code* should clearly provide for the necessary broad powers of the Tribunal Officers or other authorized person to investigate and inquire into any claim.

These are similar to the powers given to Review Officers under the Pay Equity Act<sup>62</sup> and to officers under the new *Employment Equity Act*, s.22(1).

As investigation will normally be ordered by the adjudicator, a quasi-judicial officer. There should no longer be any necessity to get a warrant under the *Code*, if the respondent objects to the producing the information.

**RECOMMENDATION (38):**

- **The Tribunal should be required to base its decision upon the real merits and justice of the case. It will not be bound to follow strict legal precedent but shall give a full opportunity for a hearing.**<sup>63</sup>
- **The Tribunal Officer or other authorized person should have the power:**
  - **enter any place at any reasonable time and post any notice at such place;**
  - **request the production for inspection of documents or things that may be relevant to the carrying out of the duties;**

- upon giving a receipt therefore, remove from a place documents or things produced so long as they are promptly returned; and
  - question a person on matters that are or may be relevant to the carrying out of the duties subject to the person's right to have counsel or some other representative present during the examination and.
- Failure to comply with this requirement should have consequences. Officers would assist parties to ensure disclosure happens in timely fashion.
  - The Tribunal adjudicator shall have the power to order a Tribunal Officer to conduct any necessary investigation in order to ensure that the case is heard on its real merits or in order to delegate to the Officer the hearing of any evidence. A warrant should not be required.
  - The Tribunal Officer would then provide a report on the investigation results to the adjudicator with copies to the parties.
  - The Tribunal adjudicator should have the power to compel evidence through a summons to appear or bring documents.

### ***Expedited Hearings***

The Task Force believes the Tribunal should be able to prioritize claims and to respond to the requests of parties for an issue to be dealt with on an emergency or expedited basis. An example of an emergency might be where Black and Jewish community organizations have learned that a white racist organization intends to hold a public Klu Klux Klan meeting. Such organizations should be able to apply to the Tribunal for an immediate hearing to prevent the meeting from taking place if such meeting would violate the *Code*.

This could also apply to situations where a person complains they have been improperly discharged, evicted, denied housing, denied an essential service or otherwise penalized contrary to the *Code*.

The Quebec Charter of Human Rights and Freedoms has such a provision:

#### Emergency measures

81. Where the commission has reason to believe that the life, health or safety of a person involved in a case of discrimination or exploitation is threatened or that any evidence or clue pertaining to such a case could be lost, it may apply to a tribunal for any emergency measure capable of putting an end to the threat or risk of loss.

Measures such as this would serve to establish the credibility of the Tribunal to deal with equality issues in a way which recognizes the immediacy of the consequences of discrimination and the need to have a prompt and effective public response.

**RECOMMENDATION (39):**

- **The Tribunal shall have the power to hold an emergency or expedited hearing on short notice, where necessary, to ensure the proper protection of a claimant's human rights.**

*Power to Assign One or more Adjudicators*

The Tribunal should be able to assign one or more adjudicators to the hearing of a case depending on their skills and background. Only adjudicators who are certified in an equality area will be allowed to adjudicate in that area. An adjudicator may be certified for more than one of the areas.

This would also allow the assignment of two adjudicators - one who is experienced (either legally or in human rights) and one who needs further experience. This is a practice used successfully by the Social Assistance Review Board to ensure proper training and to encourage the interchange of ideas between those of different backgrounds.

Another reason for assigning more than one Chair is that often the acceptance of an important decision will be greater if there is more than one person hearing it and also Chair can receive additional input from other members with a broad base of experience to draw upon.

This process might also allow the Chair to bring in outside part-time adjudicators who might provide an important perspective for a particular case.

With a flexible power in this area, the Pay Equity Hearings Tribunal could continue, if it wished, to have its present tripartite system of assigning a Vice-Chair and an employee representative and an employer representative on each panel.

However, the Task Force believes a tripartite system is not appropriate in the human rights field and would be costly and inefficient. This view was supported by most of the Tribunal Chairs that the Task Force consulted. It is also not clear who any members would represent in the human rights context.

To ensure timely and fair adjudication of claims, the Task Force believes that the vast majority of cases should be heard by one adjudicator.

**RECOMMENDATION (40):**

- **The Tribunal should be able to assign one or more adjudicators to the hearing of a case depending on their skills and background.**
- **The *Code* should be amended to provide that the Chair not the Minister could decide to assign one or more Vice-Chairs to sit on a case depending on the type of case and its importance.**

***Initial Hearings***

An important feature of the new Tribunal system is the initial hearing which should take place within 45 days of filing claim.

The adjudicator who is assigned to the case would hear and decide the following matters:

- sufficiency of the disclosure which had taken place as a result of the mandatory disclosure in the rules. Parties could be ordered to make further productions within a specified time frame;
- dealing with motions to dismiss by a party or a Tribunal because of lack of jurisdiction, delay, failure to disclose violation on face of claim, or referral to other jurisdiction, or because adequately and fully dealt with by another authorized statutory procedure;
- request for an interim order pending the decision;
- request by a party or a Tribunal for the Officer do investigation where necessary;
- ascertain any areas of agreement and try to narrow the issues which need to be litigated;
- determine whether any other parties should be added or motion by equality group to appear as Intervenor;
- determine the order parties will call evidence; and
- determine the number of hearing days requested and schedule them.

**RECOMMENDATION (41):**

- **Parties to a claim will have an initial hearing before the adjudicator assigned to their case within 45 days from the date of the filing of the claim in order to**

**decide all the preliminary matters which are necessary to prepare for the full hearing of the case. Such matters would include requests for a preliminary dismissal for lack of merit; for further disclosure or investigation; or for an interim order.**

### ***Time Limits to be Imposed on Process***

The Task Force believes it is essential to ensure that the unconscionable delays under the current system are avoided at all costs in the new system. Mr. Justice Reid in his research paper for the Task Force called strongly for effective time limits with consequences for their breach.

While the imposing of fixed time limits is important, the Task Force also realizes that the amount of time necessary to decide cases may vary for a number of reasons. Simple individual complaints may be completed quickly while systemic cases may take many months. It is important that the time limits in the *Code* are flexible enough to recognize this diversity in cases.

In order for the Tribunal to deal with its caseload and to ensure that everyone is given hearings in a timely fashion, it is necessary that the adjudicator be given the power to conclude a hearing in as expeditious and fair a manner as possible given the complexity of the case. This will allow the Tribunal more control to ensure the Tribunal's resources are conserved, if appropriate and consistent with the fair hearing of the case.

The Task Force believes it is essential that the *Code* should require that an initial hearing into a claim should take place within 45 days after the claim is filed. After that, the adjudicator would be directed by the *Code* to ensure the hearing process is concluded in a fair and timely fashion. The adjudicator shall normally give a decision within 30 days after hearings on the claim are concluded.

These time limits could be extended on consent of the parties or in the discretion of the adjudicator so long as the adjudicator states in the decision the reasons for extending the time<sup>64</sup>

An adjudicator may also give an oral decision if appropriate to expedite the process.

If a decision is not given within the prescribed time, the Associate Chair may make such orders as are necessary to ensure the decision or reasons will be given without undue delay.

### **RECOMMENDATION (42):**

- **The *Code* must be rewritten in a way that introduces effective time limits for the hearings process and gives to those, in whose favour they run, the means to enforce them.**

- **Claims should receive an initial hearing within 45 days after the claim is filed and the decision should be released within 30 days after the end of the hearing.**
- **The Adjudicator should have the power, where appropriate, to direct the hearing process so as to conclude a hearing in a fair and expeditious fashion.**
- **The Associate Chair shall have the power to order an adjudicator to comply with the time limits for making a decision, but may extend those time limits if appropriate.**

### ***Full Hearing***

The full hearing into a case will likely take place approximately 15 days after the initial hearing. This hearing will hear all the evidence from the parties and any investigation report from the Tribunal Officer. The parties will then make submissions about whether the evidence supports a violation of the *Code*. The adjudicator will consider the evidence and submissions and make a decision and order a remedy if appropriate.

### **Who Should be Part of a Hearing Process**

***... parties ...***

A party has the right to attend the hearing, be represented, call evidence and make representations. A party is also bound by the decision of the Tribunal. The Task Force believes that people who are directly necessary for the proper determination of the case should automatically be made parties.

### **RECOMMENDATION (43):**

**The *Code* should provide that the necessary parties to a claim are:**

- **the claimant or the person or organization representing them;**
- **any person the claimant alleges has infringed a right under the *Code*;**
- **any person who appears to the Tribunal to have potentially infringed the right;**
- **any person, who in the Tribunal's opinion, had the authority or legal obligation to penalize or prevent the conduct complained of; and**

- where the collective agreement is at issue, the trade union ...
  - any other person directly necessary for the proper adjudication of the claim.
- A party may be added by the Tribunal at any stage of the proceeding upon such terms as the Tribunal considers proper.

*... intervenors ...*

Intervenors are persons or groups who do not have the automatic status of parties, but who have been permitted to participate because of their particular interest in or connection with the claim that is being adjudicated. Intervenors may be given the full participation rights of a party, (the right to call, and examine witnesses, the right to bring other evidence), or they may be given limited rights such as "Friends of the Tribunal", to have oral and written submissions.

#### **RECOMMENDATION (44):**

- **Human Rights Ontario should have the right to intervene with full participation rights to represent the public interest in any case involving the public interest, unless the Tribunal decides it is established that allowing the Commission to have standing would unduly hinder or delay the fair hearing of the case.**
- **Appropriate intervenors or friends of the Tribunal, such as equality seeking groups, should be granted intervenor status in the process if they have a sufficient interest in the claim; are able to provide helpful assistance to the Tribunal in reaching its decision, and their presence would not unduly lengthen the hearing.**

#### *Necessary Powers*

*... exclusive power to decide all questions of law and fact ...*

The power to decide all questions of law or fact will ensure the Tribunal can consider Charter issues relevant to its jurisdiction.

**RECOMMENDATION (45):**

- **The Tribunal should have the exclusive jurisdiction to exercise its power to determine all questions of fact or law that arise in any matter before it.<sup>65</sup>**

**... listen to non-traditional evidence ...**

**RECOMMENDATION (46):**

- **The Tribunal should be able to accept any evidence which it believes is reliable and relevant whether it is allowed as evidence in a court or not.**

**... interim orders ...**

There needs to be a specific provision in the *Code* which allows the Tribunal to order interim relief where appropriate. This might be an order to an employer that they can't discharge an employee or a landlord can not rent an apartment until a hearing is held. An expedited hearing would then be ordered.

**RECOMMENDATION (47):**

- **The Tribunal shall have the power to make any interim order where appropriate.**

**... successor rights provision ...**

This is of significance when a business is sold and there is an outstanding human rights claim under the *Code*.<sup>66</sup> Should the successor owner be liable in any way? A suggestion to bind such owners came forward from the consultation with the Office of the Boards of Inquiry with the current adjudicators. The Task Force believes that the need for such a provision will vary with the circumstances surrounding the sale or transfer of a business; with the nature of the claim; and with the person or business against which it is directed. This means the Tribunal must be flexible.

**RECOMMENDATION (48):**

- **The Code should ensure that, where a business is sold, the Tribunal have the discretion to add successor businesses as necessary parties and to make any necessary order against them to ensure Code's purpose upheld.**

*... communication of information ...*

**RECOMMENDATION (49):**

- **The Tribunal should be able to order respondents to communicate necessary information and bring to the attention of appropriate persons connected to the case. Such communication should be done by posting a copy of the document in prominent places in each workplace or otherwise communicating it in a manner which may be understood by all concerned.<sup>67</sup>**

*... amendment to join claims ...*

**RECOMMENDATION (50):**

- **The Tribunal should be given explicit power to bring together a variety of claims to be heard jointly if that is considered strategic, fair and necessary to avoid undue duplication of evidence.**
- **The Tribunal should also have the power to amend claims so that the case is heard on its merits.**

*... tribunal to have power to seek advice of experts ...*

**RECOMMENDATION (51):**

- **The Tribunal should have the power to seek legal advice, consult its own experts as appropriate without restrictions contained in s.38(2).**

*... recording of evidence and transcript requirement ...*

**RECOMMENDATION (52):**

- **In light of informality of the process, and the elimination of a full appeal right, there should be no requirement to record evidence.<sup>68</sup>**

*... power to refer issue to commission for study and report ...*

Giving the Tribunal a power to refer an issue to the Commission for inquiry and report would allow the Tribunal to identify for inquiry issues which it believes need to be addressed by way of either substantive changes to the *Code* (eg. where case is dismissed because of *Code's* substantive limitations) or by other proactive measures.

**RECOMMENDATION (53):**

- **When dealing with a case or otherwise, the Tribunal should be able to refer an issue to the Commission to study and report on.**