TRANSITIONING TO ONTARIO'S NEW HUMAN RIGHTS SYSTEM: WHAT DO YOU NEED TO KNOW?

PART II
NEW TRIBUNAL RULES:
Applications filed with the Tribunal as of June 30, 2008

By Jo-Anne Pickel
June 2008

Cavalluzzo Hayes Shilton McIntyre & Cornish LLP
474 Bathurst Street, Suite 300, Toronto, Ontario M5T 2S6
phone: 416-964-1115, Fax: 416-964-5895
www.cavalluzzo.com
jpickel@cavalluzzo.com

I. INTRODUCTION

On June 30, 2008, Ontario's new human rights enforcement regime comes into force. As of June 30, 2008, applications alleging violations of the *Human Rights Code* will be filed directly with the Human Rights Tribunal of Ontario ("the Tribunal") rather than with the Ontario Human Rights Commission. Complaints will be handled in accordance with the Tribunal's new Rules of Procedure ("Rules"). As described below, the Tribunal's new Rules provide the Tribunal with very extensive powers to control its proceedings. It will be important for parties to learn how to strategically leverage the Tribunal's extensive procedural powers to their advantage.

This paper examines both the *Human Rights Code* and the new Rules and explains:

- what happens to complaints referred by the Commission to the Tribunal after June 30, 2008;
- the Tribunal's approach to new Applications;
- how to make an Application with the Tribunal (who can make Applications, when, information that must be provided, etc.);
- how to respond to Applications (timing, information that must be provided, etc.);
- how to intervene in an Application;
- the rules governing Commission Applications to the Tribunal; and
- the Tribunal's dispute resolution process under its new Rules.

Unless otherwise indicated, all references in this paper to provisions of the *Human Rights Code* refer to the amended provisions that are in effect as of June 30, 2008. Readers should consult the Tribunal's website for a copy of the Rules, accompanying guides, and the forms that must be filled out: www.hrto.ca.

This paper is Part II in a series of practical and strategic guides that Cavalluzzo Hayes Shilton McIntyre & Cornish LLP has prepared to assist parties in navigating the new human rights regime. Part I provides an overview of the key changes implemented by Bill 107; Part III reviews the Rules that apply to existing complaints that are transferred from the Commission to the Tribunal after June 30, 2008; and Part IV (forthcoming) will provide an analysis of strategic consideration that are of particular interest to trade unions. The complete four-part series is available online at www.cavalluzzo.com.

II. COMMISSION REFERRED COMPLAINTS

In January 2008, the Tribunal made special Rules of Practice to govern Commission-referred complaints as of January 31, 2008. These special Rules will continue to govern complaints that

the Commission refers to the Tribunal after June 30, 2008. They will apply to these Commission referred complaints until they are finally disposed of by the Tribunal. (See the Tribunal's website for the January 31, 2008 Rules and a Guide to Commission Referred Complaints.)

III. TRIBUNAL'S APPROACH TO NEW APPLICATIONS

The Human Rights Tribunal will take an active approach to dispute resolution once the new human rights system comes into force on June 30, 2008. The Tribunal's Rules provide the Tribunal with wide powers to manage its process. These powers will allow the Tribunal to be an active, engaged adjudicator with effective powers to control its process to best suit the case before it. The Rules are also aimed at ensuring that appropriate and relevant evidence is brought forward early in the process.

What this means is that parties must provide more information at the very outset of the process. Persons/groups filing complaints (now called "Applicants" who file "Applications") and persons/organizations responding (now called "Respondents") will be expected to provide much more detailed information at the very beginning of the process, rather than waiting to until later on. What this means for both Applicants and Respondents is that they will have to take steps to gather relevant information before they either make or respond to an Application. If they do not provide information at the outset of the process, Applicants and Respondents may be prevented from relying upon this information once they reach the dispute-resolution phase of the process.

At all points in the process, the Tribunal has the power and discretion to take charge of the process. The Tribunal's Rules require that the Tribunal fulfill its mandate to ensure a "fair, open, accessible process" and that it provide parties the "opportunity for fair, just and expeditious resolution of Applications made under the Code.": Introduction to Rules. The steps that the Tribunal may take in managing its dispute resolution process are described in more detail below.

IV. MAKING AN APPLICATION

A. Who Can Make an Application?

A person who believes that his or her rights have been infringed can make an Application to the Tribunal and two or more persons who are each entitled to make an Application, can make an Application jointly: Rule 6.1, s. 34(1)(4) of Code. A person or organization, other than the Commission, may make an Application on behalf of another person with the other person's signed consent: Rules 6.1, 6.8 and s. 34(5) of the Code. This means that organizations such as trade unions or community-based organizations may make Applications on behalf of one or more of their members. It also means that individuals may undertake a form of class action whereby one or more named Applicants make an Application on behalf of a group of others, so long as they obtain their signed consent.

B. Timing

The time frame for filing Applications is now within one year after the incident to which the Application relates or, if there was a series of related incidents, within one year after the last incident in the series: s. 34(1)(a)(b) of the Code. An Applicant may make an Application after this time frame "if the Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay": s.34(2) of the Code. This one year time frame is longer than the time frame under the old Code which was just six months. Some Applicants who may have missed the six month time frame in place prior to June 30, 2008 will be able to file their Application after this date they make their Application within a year of the incident to which the Application relates.

C. Information Required

In order to make an Application at the Tribunal, Applicants must now complete two separate and lengthy forms. Applicants must first fill out Form 1 which is the general form for making an Application. Applicants must then fill out a separate form (one of the supplementary Forms 1A through 1E) which correspond to, and seek further information relating to, the social area in which the discrimination arises (e.g. employment, housing, services, etc.). Applicants must provide the information requested in every section of the Application forms. They must set out all of the facts that form the substance of their discrimination claim including a description of what occurred, where and when it occurred, and the names of the person(s) alleged to have violated the Applicant's rights under the Code: Rule 6.2.

The information that must be provided on the main Application form includes:

- details of every incident of alleged discrimination the Applicant wants to raise at the hearing;
- for each incident: what happened, who was involved, when and where it happened;
- how the incidents affected the Applicant (financially, socially, emotionally, etc.);
- the remedy sought;
- whether there has been a civil action begun based on the same facts giving rise to the Application; if so, detail concerning the civil action;
- whether another proceeding based on the same facts was begun and/or completed; if so details concerning this proceeding.

Applicants also must fill out all of the information requested on the supplementary Application form (Forms 1A - 1E) relating to the area of alleged discrimination (e.g. employment, accommodation, services, etc.). Applicants who allege discrimination in employment must fill out Form 1A and provide additional information which includes:

- details concerning their position or job;
- contact information for their union or professional association, if applicable;
- details about the discrimination;
- whether the discrimination arose from a workplace policy;
- whether the Applicant complained to their employer;
- if so, whether an investigation was conducted;
- detailed information about the discrimination being alleged;
- for disability-related Applications, any needs relating to the Applicant's disability and whether the Respondent met those needs.

In addition, the Applicant must list the following in their Application:

- documents that are relevant to their Application which are either in their possession or in the possession of the Respondent(s) or others;
- a confidential list of witnesses they intend to rely upon at the hearing.

It is extremely important that Applicants provide a reasonably complete description of facts and issues and a reasonably complete list of documents and witnesses with their Application. The Tribunal may refuse to allow an Applicant to present evidence or make submissions with respect to any issue that was not raised in the Application, unless it is satisfied that there would be no substantial prejudice or undue delay to the proceedings: Rule 5.7.

If an Application is not sufficiently complete, the Tribunal may send it back to the Applicant to complete within 20 days. The Tribunal may decide not to deal with an Application if it is not filed in compliance with the Rules: Rule 5.3. This would mean that the Tribunal would have the discretion not to deal with an Application if all of the information required by the Rules has not been provided.

If the Tribunal accepts an Application for processing and determines it has jurisdiction over the Application, it will send the Application to all Respondents and any trade union or professional organization identified in the Application. However, the confidential witness lists included in the Application and related witness information will not be provided to the Respondent(s), and union or professional organization: Rule 6.7.

D. Deferral Request

An Applicant may request that the Tribunal defer (postpone) consideration of its Application if there are other legal proceedings dealing the subject matter of the Application. That is, if the same issues raised in the Application are being considered by an arbitrator or other decision-maker, the Applicant may request that the Human Right Tribunal defer consideration of the

Application until the completion of the other proceeding. The one exception to this right to request a deferral is where an Applicant has begun a court action for civil remedies for the infringement of the Code (see s. 46.1 of the Code for the circumstances in which a person can seek a civil remedy for the infringement of the Code). In such a case, the Applicant is barred from making a complaint to the Tribunal with respect to the same subject matter being dealt with in the civil case: s. 34(11), Rule 7.2.

The Tribunal may decide to defer consideration of an Application of its own initiative or at the request of another party: Rule 14.1. Regardless of whether the deferral is requested by the Applicant or another party, or the Tribunal is proposing to defer of its own initiative, the Tribunal shall not defer consideration of an Application without providing all parties, trade union or professional association identified in the Application, and other affected persons an opportunity to make submissions: Rules 7.4, 14.2, s. 43(2) of Code.

E. Request to Expedite Application

The Applicant may request that the Tribunal deal with the Application on an expedited basis if an urgent resolution is required: Rule 21. This can be done at the same time as the Application is filed or any time thereafter. The Applicant must complete a special Request to Expedite Application form which includes the following information:

- any urgent circumstances that may affect the fair and just resolution of the Application;
- the harm that would result if the request is denied;
- whether the other parties consent to the request to expedite the Application: Rule 21.2.

F. Right of Reply

The Applicant has a right to reply to new matters raised in the Response filed by the Respondent. The reply must be delivered to all other parties and filed with the Tribunal no later than 14 days after the Response was sent to the Applicant: Rule 9.

G. Withdrawal of an Application

An Applicant may withdraw an Application by completing a Request to Withdraw and delivering it to all parties, and any trade union, professional organization, and affected person identified in the Application. If the Application was made on behalf of another person, that person must consent to the withdrawal by completing a written Consent: Rule 10.2.

It should be noted that a Respondent and any other person or organization that receives the Request to Withdraw may file a Response with the Tribunal within 14 days: Rule 10.5. Where a Response to an Application has already been filed, the Applicant can only withdraw the Application with the permission of the Tribunal “and upon such terms as the Tribunal may

determine": Rule 10.5.

It is not clear in what circumstances the Tribunal may order terms for the withdrawal of an Application. Such terms can only be ordered if a Response to the Application has already been filed. The Tribunal does not have the power to order any terms if a Response has not yet been filed. Whatever terms may be ordered if an Application is withdrawn after a Response has been filed cannot include an order to pay costs to the other party(ies). Neither the Code nor the Rules provide the Tribunal with the power to order costs against an Applicant in any circumstances. The *Statutory Powers Procedure Act* (which supplements the Tribunal's Rules) does provide a power to order costs against a party if the party's conduct has been "unreasonable, frivolous or vexatious" or a party has acted in bad faith: s. 17.1 (2), SPPA. However, this power is contingent on a tribunal's having made rules with respect to the ordering of costs. Accordingly, the Tribunal does not have the power to order costs against an Applicant for withdrawing an Application after a Response has been filed unless the Tribunal formally makes a Rule specifying that costs may be ordered in these circumstances.

H. Representation and Access at the Tribunal

In proceedings at the Tribunal, parties may be:

- self-represented;
- represented by a person licensed by the Law Society of Upper Canada (i.e. a lawyer); or
- represented by a person authorized to provide legal services in accordance with the *Law Society Act* and its regulations and by-laws: Rule 1.6.

The last category of representative outlined above would include paralegals who are licensed under the *Law Society Act* as well as a range of other individuals who, under the Law Society regulations and by-laws, are exempt from the licence requirement, such as union representatives, members of the Human Resources Professionals Association of Ontario, employees of legal clinics and some non-profit organizations that are similar to legal clinics, and individuals whose occupation is not the provision of legal services and who are providing assistance to a family member, friend or neighbour without fee.[1]

While it is not specifically addressed in the Rules, the Applicant could also get advice, assistance and legal services from the Human Rights Legal Support Centre: s. 45.13.

[1] The list of persons who may be "authorized to provide legal services in accordance with the *Law Society Act* and its regulations and by-laws" is relatively lengthy. The examples set out here are only illustrative and not exhaustive. For further information see the Law Society's website at www.lsuc.on.ca.

Parties, representatives and witnesses are entitled to accommodation of *Code*-related needs by the Tribunal. To receive such accommodation, individuals should advise the Registrar as soon as possible if accommodation is required: Rule 2.1. The Tribunal has also circulated a draft Policy on Accessibility and Accommodation which is available online on the Tribunal's website.

The Tribunal's proceedings (i.e. all processes of the Tribunal whether it be a hearing, mediation or other process) may be conducted in English, French, American Sign Language (ASL) or Quebec Sign Language (QSL). Where a party wishes all or part of a proceeding conducted in French, ASL or QSL, the party must notify the Registrar as soon as possible: Rule 3.8. An individual who requires interpretation services in a language other than English, French, ASL or QSL may request the Tribunal to provide the appropriate interpreter services. The Registrar must be notified as soon as possible of such requests: Rule 3.9. (See also the Tribunal's Practice Direction for Language Interpretation which is available on its website.)

V. RESPONDING TO AN APPLICATION

A. Timing

Consistent with its objective of providing an expeditious process, the Tribunal has set short time frames for responding to Applications. A Respondent must now respond to an Application within 35 days after a copy of the Application was sent to the Respondent by the Tribunal: Rule 8.1.

B. Information Required

Applicants must complete a Response on Form 2. Like Applicants, Respondents are required to provide detailed information at the outset of the process – i.e. in their Response. A Respondent must provide the information requested in every section of the Response form. They must respond to each allegation set out in the Application and include all additional facts and allegations upon which they are relying: Rule 8.2.

A Respondent does not have to respond to allegations raised by the Applicant that are the subject of

- a full and final release;
- a civil court proceeding; or
- a complaint filed with the Ontario Human Rights Commission.

In such a case, the Respondent must attach to their Response a copy of the applicable release, statement of claim or court decision, or complaint filed with the Commission. Even in such circumstances, the Tribunal retains the power to direct the Respondent to file a complete

Response if it considers appropriate: Rule 8.2.

The information that must be provided on the Response form includes:

- whether the Respondent is seeking to rely upon an exemption under the Code;
- when the Respondent first became aware of the events described in the Application;
- how it responded to these events and the outcome;
- for disability-related Applications: the essential job duties of the position; whether the Applicant could meet these duties; if not, what the Respondent did to meet the Applicant's needs so they could do the job;
- whether the Responsdent has a policy relating to the type of discrimination alleged in the Application;
- whether it has a complaint process to deal with discrimination and harassment;
- whether the Applicant made a complaint under an internal dispute resolution process, if one existed;
- how the Respondent responded to the internal complaint and the outcome.

In addition, the Respondent must list the following in its Response:

- documents that are relevant to its Response which are either in the Respondent's possession or in the possession of the Applicant or others;
- a confidential list of witnesses the Respondent intends to rely upon at the hearing.

It is extremely important that Respondents provide a reasonably complete description of facts and issues and a reasonably complete list of documents and witnesses with their Response. The Tribunal may refuse to allow a Respondent to present evidence or make submissions with respect to any issue that was not raised in the Response unless it is satisfied that there would be no substantial prejudice or undue delay to the proceedings: Rule 5.7.

If a Response is not sufficiently complete, the Tribunal may send it back to the Respondent to complete within 20 days. Respondents who do not respond to an Application may face very serious consequences. The Tribunal may do any of the following if a Respondent does not respond:

- deem the Respondent to have accepted all the allegations in the Application;
- deal with the Application without further notice to the Respondent;
- deem the Respondent to have waived any rights to further notice or to

participation in the proceeding;

- decide the matter only on the material before the Tribunal.

The Response that the Tribunal sends to the Applicant and to any other affected person or organization will not include the confidential witness list and related witness information provided with the Response: Rule 8.6.

VI. REQUESTS TO INTERVENE

A. Intervention by Person or Organization Other Than the Commission

A person or organization that wishes to intervene in a proceeding must make a request to intervene that includes the following information:

- description of issues that the person or organization wants to address;
- the proposed intervenor's interest in the issues and expertise regarding the issues;
- the proposed intervenor's position on the issues raised in the Application and Response; and
- all material facts upon which the proposed intervenor will rely: Rule 11.3.

Parties may respond to a Request to Intervene within 21 days after the Request to Intervene was delivered: Rule 11.4.

B. Interventions by the Commission

The Commission has the express right to intervene in any Application before the Tribunal on such terms as the Tribunal may determining having regard to the role and mandate of the Commission under the *Code*: s. 37(1) of the Code. The Commission may intervene as a party with the consent of the Applicant: s. 37(2). However, the Commission may intervene in an Application even without the Applicant's consent. In such cases, the Tribunal will permit the Commission to intervene "on such terms as the Tribunal considers appropriate": Rule 11.6. When the Commission seeks to intervene it must provide the following information:

- a statement of the issues the Commission wants to address;
- if the Applicant does not consent, an explanation of how the issues relate to the Commission's role, mandate and the public interest;
- the Commission's position on the issues raised in the Application and Response;
- all the material facts upon which the Commission will rely;
- the remedies the Commission is seeking;

- the terms on which the Commission seeks to intervene: Rules 11.8 and 11.13.

VII. HUMAN RIGHTS COMMISSION APPLICATIONS

The Commission has the power to file an Application with the Tribunal if it considers it in the public interest to do so: s. 35 of the Code. The Commission's Application must include the following information:

- a statement of why the Commission considers the Application to be in the public interest;
- all issues the Commission wants to address;
- all material facts upon which the Commission intends to rely;
- the remedies the Commission is seeking: Rule 12.2.

The Respondent(s) and any identified affected parties may respond to the Commission's Application no later than 60 days of delivery: Rules 12.3. The Response must include:

- the Respondent or affected person's position with respect to the issues and facts set out in the Commission's Application;
- all material facts upon which the Respondent or affected person intends to rely;
- a Response to the remedies sought by the Commission: Rule 12.3.

The Tribunal will convene a Case Conference with all parties within 45 days of the filing of Responses to discuss the conduct of the proceeding: Rule 12.5.

VIII. TRIBUNAL'S DISPUTE RESOLUTION PROCESS

A. Active Approach to Adjudication

The Tribunal will aim to have a hearing completed within one year of receiving a completed Application form (see Tribunal's guide to its processes, May 2008). In order to achieve this expeditious outcome, the Tribunal has an extensive set of powers that it may use in order to provide a fair, just and expeditious proceeding. These powers permit the Tribunal to control the evidence that is adduced in a proceeding, to obtain additional evidence, to control the timing and form in which evidence is presented, and to narrow and focus the issues addressed in the proceedings.

These powers are listed in Rule 1.7 and include the power to:

- consolidate or hear Applications together;

- determine and direct the order in which issues, including preliminary issues, will be considered and determined;
- define and narrow the issues;
- examine records or make other inquiries;
- determine and direct the order in which evidence is presented;
- on the request of a party, direct another party to adduce evidence or produce a witness under certain circumstances;
- permit a party to give a narrative before questioning commences;
- question a witness;
- limit the evidence or submissions on any issue;
- require a party or other person to produce any document information or thing;
- on the request of a party, require another party or other person to provide a report, statement, or oral or affidavit evidence.

The Tribunal will discourage parties from raising preliminary technical objections that will slow the process down (see the Tribunal's guide to its processes, May 2008). As such, the Tribunal may limit the parties' ability to raise preliminary objections or requests. Alternatively, the Tribunal may delay the consideration of such requests until such time as the Tribunal considers appropriate in order to ensure that the other party is not placed at a disadvantage and the process is not unnecessarily drawn out.

The Tribunal has various powers to deal with parties who do not comply with the Tribunal's Rules. As noted above, the Tribunal may decide not to deal with an Application that is not filed in compliance with its Rules: Rule 5.3. As also noted above, the Tribunal also has the power to take a number of actions if a Respondent fails to respond to an Application: Rule 5.5. The Tribunal also has the power to proceed with the Application if a party fails to attend a hearing, including:

- proceed in the party's absence;
- determine that the party is not entitled to further notice of the proceedings;
- determine that the party is not entitled to present evidence or make submissions;
- decide the Application based solely on the materials before it: Rule 3.13.

As described below, the Tribunal may use procedures other than traditional adjudicative procedures to process and determine an Application.

B. First Step: Tribunal Decides Whether to Deal with Application

(a) Deferral of Applications

Any party may request that the Tribunal defer (postpone) consideration of the Application until any other proceeding into the same facts (e.g. an arbitration) is completed. The Tribunal may also defer consideration of an Application of its own initiative: Rule 14. An exception to this right to request a deferral arises in situations where an Applicant has begun a court action for civil remedies for the infringement of the Code: Rule 7.1 (see s. 46.1 of the Code for the circumstances in which a person can seek a civil remedy for the infringement of the Code.)

Whether it is a party who requests the deferral or it is being proposed at the Tribunal's own initiative, the Tribunal must provide the parties with an opportunity to make submissions with respect to the deferral. If the Tribunal does decide to defer consideration of an Application, it will retain jurisdiction to consider the Application if the other proceeding did not appropriately deal with the substance of the human rights claim.

A party who wants the Tribunal to proceed with an Application that has been deferred pending completion of another proceeding must make a request within 60 days of the completion of the other proceeding: Rule 14.4.

(b) Dismissal of Applications

The Tribunal may dismiss an Application that is outside its jurisdiction, either at the request of a party or of its own initiative: Rule 13.1. If the Tribunal considers that an Application may be outside its jurisdiction, it will send a notice to the Applicant setting out reasons for its intended dismissal. The Applicant then will have the opportunity to file written submissions within thirty days. Whether the Tribunal dismisses the Application or decides to continue to deal with it, it will send its decision to the Applicant, Respondent, trade union or professional organization identified in the Application. Even if the Tribunal decides to continue to deal with an Application, it may decide to dismiss it at a later date if it decides that it does not have jurisdiction over the Application: Rule 13.5.

The Tribunal may also dismiss an Application where it considers that another proceeding has "appropriately dealt with the substance of the Application": Rule 22.1, s. 45.1 of the Code. The Tribunal must provide the parties with an opportunity to make submissions before dismissing an Application on this basis.

C. Procedures Prior to/Instead of Regular Hearing

The Tribunal's Rules provide it with the power to use procedures other than traditional adjudicative or adversarial procedures: Rule 1.6. The Tribunal may take one or more of the following steps to deal with an Application:

(a) Summary Hearing

The Tribunal has stated that it will conduct summary hearings in appropriate cases. A summary hearing may provide a forum for parties to raise preliminary legal objections. The Tribunal's guide to its processes suggests that summary hearings may be scheduled to deal with issues such as:

- whether an Application is within the authority of the Tribunal;
- whether the substance of an Application has been appropriately dealt with in another proceeding;
- how to deal with a Respondent who has failed to respond to an Application (see the Tribunal's guide to its processes, May 2008).

The Tribunal has also stated that a summary hearing might be appropriate in cases where there are no facts in dispute and the Application can be determined in a day or less. The Tribunal Rules do not specifically address summary hearings, nor how they may differ from regular hearings.

(b) Mediation

Mediation is not mandatory, but will be encouraged by the Tribunal in appropriate cases. The Rules provide that the Tribunal may offer mediation assistance at any time after an Application is filed, or at the request of a party: Rule 15. Mediations will be conducted by Tribunal members. The mediator will adopt a rights-based, active listening approach in which the mediator will evaluate the Application based on the materials filed and the applicable caselaw.

(c) Case Assessment Direction

The Tribunal may provide the parties with a Case Assessment Direction which addresses "any matter that, in the opinion of the Tribunal, will facilitate the fair, just and expeditious resolution of the Application": Rule 18.1. The Case Assessment Direction may include directions made in accordance with the Tribunal's powers discussed in Section A above. At the hearing, parties will be expected to respond to any issues raised in the Case Assessment Direction and to proceed in accordance with the directions set out in the Case Assessment Direction: Rule 18.2. The purpose of the Case Assessment Direction is to help parties to get to a hearing on the real substance of a dispute quickly. Adjudicators will identify the main issues that need to be addressed, any common ground between the parties, procedural issues that need to be decided before the start of the hearing and the witnesses who should attend the hearing.

(d) Tribunal Ordered Inquiries

Under the new Code, Applications will no longer be investigated by the Commission. However, if a party considers that it is necessary to have a matter investigated, it can request that the Tribunal appoint a person to conduct an inquiry. The request should be made promptly after the party becomes aware of the need for an inquiry: Rule 20.1. The Tribunal may order an

inquiry if:

(i) an inquiry is required in order to obtain evidence;

(ii) the evidence obtained may assist in achieving a fair, just and expeditious resolution of the merits of the Application: s. 44 of Code.

In a Request for a Tribunal-ordered Inquiry, a party must include the following information:

- the evidence or nature of the evidence to be obtained;
- why the evidence is necessary to achieve the fair, just and expeditious resolution of the Application;
- a description of the efforts already made to obtain the evidence;
- reasons why an inquiry is necessary to obtain the evidence;
- proposed terms of reference for the inquiry: Rule 20.2.

The other parties will have the opportunity to respond to the inquiry request.

A report submitted by the person conducting the inquiry cannot be used as evidence in a proceeding unless the author testifies, the parties otherwise agree or the Tribunal otherwise directs: Rule 20.7.

(e) Orders During Proceedings

Parties may request that a Tribunal make an order at any time during a proceeding either orally or in writing: Rule 19.1. For example, parties may request that the Tribunal dismiss the Application because it is outside its jurisdiction, order production of documents, order a non-party to provide a report, statement, or oral or affidavit evidence in accordance with Rule 1.7(r), make orders in accordance with any of the other powers listed in Rule 1.7.

Requests for orders can be made at any time during the Application process, not just at the hearing. However, due to the Tribunal's stated intention to limit preliminary technical legal objections early in the proceeding, the Tribunal may not entertain requests for orders until later in the Application process if it determines that the request will interfere with the fair just and expeditious determination of the Application.

A Request must provide the information required under Rule 19.4. Parties responding to the request for an order have 14 days in which to do so, unless the Tribunal directs otherwise. The responding party to the request must provide the information listed in Rule 19.6.

D. Hearings

Applications that are not resolved through mediation or summary hearings will proceed to a regular hearing. The Tribunal has described the role of the adjudicator at the hearing as follows:

> The adjudicator can focus the hearing and ask questions, and may structure how the hearing takes place, including the order in which witnesses testify. However the adjudicator will not take responsibility for identifying and leading evidence such as happens in a public inquiry. (Tribunals guide to its processes, May 2008).

(a) Disclosure Obligations

The parties' disclosure obligations are engaged once the Tribunal schedules a hearing in a case. These obligations are very significant as a party may be prevented from relying upon any information that was not disclosed in advance in accordance with the Rules.

(i) Disclosure of Documents

Upon receiving the Tribunal's Confirmation of Hearing, each party has a maximum of 21 days in which to deliver to every other party:

- a list of "arguably relevant" documents in their possession (for documents over which the party is claiming privilege, they must describe the nature of the document and the reason for the privilege claim);
- a copy of each document on the list, except documents over which privilege is claimed: Rules 16.1.

Following this, no later than 45 days prior to the first scheduled hearing day, each party must deliver the following to every other party and file with the Tribunal:

- a list of documents it intends to rely upon at the hearing
- a copy of each document on the list or a confirmation that the document has already been provided: Rules 16.2 and 16. 3.

Parties will not be permitted to rely upon any document that was not disclosed in accordance with the Rules unless granted permission by the Tribunal: Rule 16.4.

(ii) Disclosure of Witnesses

No later than 45 days prior to the first scheduled hearing date, the parties must deliver to all other parties and file with the Tribunal:

- a list of witnesses the party intends to present to the Tribunal (including expert witnesses);
- a brief "will say statement" summarizing each witness' expected evidence
- for expert witnesses: a copy of their expert report or full summary of proposed

evidence, and their curriculum vitae: Rule 16.

As with the documents that must be disclosed, the consequences of a party's failure to make complete disclosure of intended witnesses can be serious. The party will not be permitted to call a witness who was not included on their disclosure list except with the Tribunal's permission: Rule 17.4.

E. Remedies

(a) Remedies upon Disposition of the Case

The Tribunal's remedial powers are set out in sections 45.2 and 45.3 of the Code and discussed in more detail in Part I of this series of papers on Ontario's new human rights system. The Tribunal's Rules do not address the issue of remedies except to provide the Tribunal with the power to make interim remedies (see next section) and to provide the Tribunal with the power to consider public interest remedies, either of its own initiative or at the request of a party: Rule 1.7 (u).

(b) Interim Remedies

The Tribunal has a power to grant interim remedies. The Tribunal may grant an interim remedy where:

- the Application appears to have merit;
- the balance of harm or convenience favours granting the interim remedy; and
- it is just and appropriate in the circumstances to do so: Rule 23.2.

An Applicant requesting an interim remedy must include the following information in their request:

- a detailed description of the order sought;
- one or more declarations signed by persons with direct first-hand knowledge detailing the facts relied upon;
- submissions with respect to the Request.

The other parties may respond to the Request within 7 days. The Response should include:

- one or more declarations signed by persons with direct first-hand knowledge detailing the facts relied upon;
- submissions with respect to the Request: Rule 23.5.

(c) Costs

At present, the Tribunal Rules do not grant the Tribunal the power to award costs. There is also no power to award costs under the provisions of the new Code. Under the Statutory Powers Procedure Act, a tribunal only has the power to award costs if it has made rules specifying the circumstances in which costs will be awarded. Therefore, the Tribunal does not have the power to award costs unless it makes a new Rule with respect to costs.

F. Reconsideration

Any party may request reconsideration of a final decision of the Tribunal. They must do so within 30 days of the date of the decision. The request must include the reasons for the request, submissions in support of the request and the remedy or relief sought: Rule 26.3. The Tribunal will only grant a request where:

- there are new facts or evidence that could potentially be determinative of the case and that could not reasonably be obtained earlier;
- the party was entitled to notice of the proceeding or hearing but did not receive such notice through no fault of their own;
- the decision or order is in conflict with established jurisprudence or Tribunal procedure and the proposed reconsideration involves a matter of general or public importance; or
- other factors exist that outweigh the public interest in the finality of Tribunal decisions: Rule 26.5

The Tribunal shall not grant the request without providing the parties with the opportunity to make submissions (written submissions unless the Tribunal decides otherwise).

The Tribunal may also reconsider a decision on its own initiative.

G. Stated Case

The Commission may apply to the Tribunal to have the Tribunal state a case to the Divisional Court if it believes that a decision or order of the Tribunal is inconsistent with one of the Commission's policies: s.45.6. The Commission may only apply for a stated case in proceedings in which it has been a party or intervenor.

Any party who supports or opposes the Commission's application to request a stated case can make submissions to the Tribunal. Parties who support the Commission's application must make their submissions within 20 days of the Commission's application. Parties who oppose the application have 30 days in which to file submissions.

A Commission's application to request a stated case does not operate as a stay of the Tribunal's decision or order at issue, unless otherwise ordered by the Tribunal or Court.

H. Judicial Review

Instead of the statutory right to appeal that existed under the old Code, Tribunal decisions are now reviewable only on an Application for judicial review to the Divisional Court. The Code specifically provides that the Tribunal's decisions are reviewable on a standard of patent unreasonableness. In light of the Supreme Court of Canada's ruling in *Dunsmuir v. New Brunswick* which eliminated the patently unreasonableness standard, it remains to be seen how the courts will approach judicial review and whether the legislature will amend this prescribed standard.