Canadian Human Rights Tribunal Stakeholder Consultation

NATIONAL LABOUR AND EMPLOYMENT LAW SECTION, NATIONAL CONSTITUTIONAL AND HUMAN RIGHTS LAW SECTION, NATIONAL ADMINISTRATIVE LAW SECTION, AND NATIONAL ALTERNATIVE DISPUTE RESOLUTION SECTION

CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Labour and Employment Law Section, the National Constitutional and Human Rights Law Section, the National Administrative Law Section, and the National Alternative Dispute Resolution Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Labour and Employment Law Section, the National Constitutional and Human Rights Law Section, the National Administrative Law Section, and the National Alternative Dispute Resolution Section of the Canadian Bar Association.

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I. INTRODUCTION

The Canadian Bar Association's Labour and Employment Law, Constitutional and Human Rights Law, Alternate Dispute Resolution and Administrative Law Sections (the CBA Sections) appreciate the opportunity to participate in the Canadian Human Rights Tribunal's Stakeholder Consultation regarding the procedural changes recently implemented by the Tribunal.

The CBA Sections view the Canadian Human Rights Tribunal as a key pillar of Canada's human rights system, given the Tribunal's jurisdiction over national infrastructure industries including railways, telecommunications, broadcasting, airlines and interprovincial trucking.

It is essential that the Tribunal offer a fair and transparent system that is not overly burdened by procedural complexity, delay and cost. More than a decade ago, the CBA's Systems of Civil Justice Task Force Report expressed the concern that the civil court system was increasingly inaccessible to the general population because of these issues.[1] Those challenges continue today and we urge the Tribunal to ensure its processes avoid a similar fate.

The CBA Sections support the adoption of procedures that are flexible, that appropriately balance the interests of both applicants and respondents and that focus aggressively on early settlement and facilitating varied early dispute resolution options.

However, many of the CHRT's reforms seem to lead to more process and more stringent timelines, making the Tribunal a less desired choice for parties dealing with human rights issues in the federal sector. The increased complexity is a potential deterrent to applicants

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1 Canadian Bar Association, *Report of the Task Force on Systems of Civil Justice* (Ottawa: Canadian Bar. Association, August 1996).

who are self-represented[2] or respondents who want a fair hearing on a timely basis. The potential for significant increases in costs is also problematic for the parties, whether those costs are legal, administrative or organizational in nature.

Fairness, transparency, plain language, easy to understand processes, and practicality should be built into every step of the resolution procedure at the Tribunal for it to be its most effective and efficient.

II. DISCUSSION ON CONSULTATION TOPICS

The CBA Sections' response to the consultation topics is in the same order as in the Chair's December 17, 2010 email to the stakeholder community. In addition, we identify and provide recommendations on additional issues for the Tribunal's consideration.

A. Initial Contact with the Parties

The CHRT has replaced the first conference call between the complainant and respondent with a letter to the parties. The CBA Sections believe that a letter rather than a conference call puts self-represented parties at a disadvantage and undermines the goals of clear, transparent, inclusive and accessible procedures. A letter, especially if it is complex or uses legal language, may not be read or understood by self-represented parties, who may not be familiar with legal processes, or have literacy or reading comprehension deficits.

In contrast, a conference call allows self-represented parties to learn interactively about the steps and procedures involved in pursuing a complaint through the CHRT from the beginning stages to the hearing, and ask questions about that process. It also provides all parties the opportunity to discuss the procedures and timelines that are particular to their proceeding. A conference call likely builds a self-represented party's trust in the CHRT processes and therefore will allow the parties to focus on resolution at an early stage. In addition, the CHRT's interaction with the parties during a conference call allows identification of potential

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[2] We recognize that there are ongoing debates regarding the use of the terms "unrepresented" or "self-represented" to describe those without legal representation; however, this issue is beyond the scope of this submission. We have used the term "self-represented" throughout to refer to any party who is not represented by legal counsel, whether or not that is by choice, due to lack of legal aid or funds for private counsel, or any other reason.

comprehension challenges, and allows the Tribunal to tailor its communication accordingly to ensure fair and accessible justice.

Given that almost half of Canadians have below minimum levels of levels of literacy thought to be required to cope in our knowledge-based economy,[3] and the Tribunal's processes are intended to be accessible to self-represented parties, we encourage the Tribunal to reconsider this change. A letter, though it speeds up the timelines for a proceeding and may be less resource intensive for the Tribunal, does not provide the parties with the opportunity to ask questions and clarify how the particular proceeding will be carried out. Instead of realizing cost and resource savings for the Tribunal, first contact by letter alone risks delays, misunderstandings and protracted proceedings in the long run, particularly in cases involving self-represented parties.

We recommend that, by default, the CHRT hold a conference call with parties and follow up with a clear, simply worded letter confirming the timelines and other issues discussed on the conference call. The CHRT would retain the discretion to dispense with either of these steps in appropriate cases, such as where the parties are represented by experienced counsel.

B. Evaluative Mediation

While evaluative mediation is effective, it should not necessarily be used at the beginning of every proceeding. In the experience of CBA members, each case needs to be assessed individually to determine what type of mediation would be most effective. The rules should provide sufficient flexibility to allow either interest-based mediation or evaluative mediation when appropriate. Some members feel that interest-based mediation early in the process, and throughout the process if necessary, seems to be the most effective in motivating the complainant and respondents to consider more comprehensive and creative resolutions. Others believe that evaluative mediation at the outset functions as an independent, expert, "reality check" to the risks associated with the case, and therefore saves parties time and money. They point out that in most cases, interest-based mediation will have already occurred and failed in the Commission process and a distinct approach could add significant value.

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[3] Statistics Canada and Human Resources and Skills Development Canada "Building on our Competencies: Canadian Results of the International Adult Literacy and Skills Survey" (Ottawa: Minister of Industry 2005) at page 9.

Thus, both evaluative and interest-based mediation have their place at the Tribunal and both options should be available. We are encouraged by the references in the Tribunal's more recent consultation material that both evaluative and interest-based mediation will be available. We presume this change is based on the input from stakeholders during the Ottawa and Vancouver roundtable meetings and applaud the Tribunal's responsiveness to stakeholders' input. We encourage the Tribunal to revise its publicly available guides and material to reflect this flexibility and provide information to parties about the differences between the two approaches and criteria for preferring one approach over another in a particular case. We encourage the Tribunal to permit the parties to provide input on whether evaluative or interest-based mediation is appropriate for their case based on the stage of the proceeding, the type of issues in the case and other relevant factors. Where the parties fail to reach a consensus on the approach to adopt, the Tribunal would retain the discretion to decide its mediation approach.

We support the suggestion that a hearing date for a proceeding be set at the outset, before mediation. Deadlines for all interim procedural matters would then be set counting back from this date, in consultation with the parties. This would adequately balance the need for flexibility with the need to keep matters moving forward.

C. Two-Stage Mediation with Earlier Post-Disclosure Mediation

The CBA Sections support the Tribunal's approach of offering mediation at both pre- and post-disclosure stages. However, we recommend that post-disclosure mediation be offered one month prior to the hearing rather than two weeks, with resulting adjustments to the other milestones in the procedural timeline.

To achieve the goals of early and cost-effective resolution of complaints, post-disclosure mediation should be scheduled close enough to the hearing date to ensure that the parties will be engaged and focused on resolution, while still sufficiently far enough in advance of the hearing to give the parties an incentive to avoid further legal costs by settling. If mediation occurs two weeks prior to the hearing, the final stages of hearing preparation will largely be completed and there will be less incentive for settlement. Although one-month pre-hearing is a useful guideline, we recommend that the Tribunal's processes permit the parties to request later post-disclosure mediation.

D. Continuity in Mediators

The Tribunal's Evaluative Mediation Procedures Guide addresses continued case management by the mediator, but does not expressly address whether the same Tribunal member will conduct both pre-disclosure and post-disclosure mediations.

The CBA Sections recommend that, by default, the same Tribunal member should conduct both mediations unless one of the parties provides a reasonable justification for using a different mediator. This system would be a more efficient use of the Tribunal's and parties' resources. In considering parties' requests for a different second mediator, the Tribunal should recognize that where interest-based mediation does not result in a settlement at the pre-disclosure stage, the parties may not wish to attempt evaluative mediation with that same mediator at a later time, given the nature of the disclosure during interest-based mediation.

E. Narrowing the Issues in Dispute

The CBA Sections support the Tribunal's attempt to expedite the hearing process by having the mediator narrow the issues in dispute and provide direction for the adjudication of the outstanding issues. These measures should lower hearing preparation costs for the parties and make the process more accessible. It will also economize Tribunal resources by shortening hearing times.

We recommend that the Tribunal's procedures be amended to require the mediator to send a letter to the parties clearly stating the issues or facts that were resolved at mediation and those that remain in dispute. This step will permit the parties to correct any errors and save valuable hearing time that might otherwise be devoted to resolving these issues.

F. Eliminating the Post-Mediation Withdrawal Period

At page 8, the Tribunal's Evaluative Mediation Procedures Guide states that if a party is not represented by a lawyer and an agreement is reached at the evaluation mediation, the settlement will not become final for seven days after the evaluative mediation. During that seven day period, the self-represented party can think things over and obtain legal advice with respect to the settlement and advise the Tribunal that they no longer accept the settlement.

We understand that this withdrawal period was part of the Tribunal's procedures before the recent changes. If so, it was not a widely known procedure and we believe that if used, could be very damaging to the mediation process.

The CBA Sections are not aware of any other administrative tribunal or court system that permits a party to withdraw from a settlement to which they agreed, absent duress, mental incapacity or some other legally recognized circumstance that would vitiate the agreement. The CBA Sections recommend that the post-settlement withdrawal period be eliminated.

Reaching agreement is a result of a particular momentum and dynamic created by the parties during mediation. That momentum and dynamic would be significantly harmed by allowing self-represented parties to walk away from mediation and reconsider their agreement at a later time. Permitting parties to withdraw from settlements is a disincentive to participation in mediation.

The withdrawal period is particularly problematic in the context of the Tribunal's current procedure of scheduling post-disclosure mediation two weeks prior to a hearing. If a self-represented party has seven days following mediation to withdraw from a settlement, the opposing party could learn a week before the hearing that the complaint it believed to be resolved is actually proceeding to hearing. This is an untenable position, which is not fair or conducive to promoting settlement.

If the Tribunal's underlying concern is facilitating a party obtaining legal advice regarding a settlement, the withdrawal period is not an effective method of achieving that goal. Parties should be responsible for seeking appropriate legal, financial and other advice during the mediation process and fulfilling their obligations under any settlement agreement once they sign it. A party who wishes to have legal advice to assist them in concluding a settlement at mediation should retain counsel rather than being permitted to withdraw from a settlement to which they agreed.

Eliminating the withdrawal period would not prevent parties from making settlement offers at mediation that remain open for acceptance for a specified period of time. It would be better for the Tribunal to encourage this practice in circumstances where applicants wish to seek legal

advice, rather than permitting applicants to withdraw from an agreement they previously signed.

RECOMMENDATION

1. **By default, the CHRT should hold a conference call with parties and follow up with a clear, simply worded letter confirming the timelines and other issues discussed on the conference call. The CHRT would retain the discretion to dispense with either step in appropriate cases, such as where the parties are represented by experienced counsel;**
2. **The Tribunal should revise its publicly available guides and material to reflect that both evaluative and interest-based mediation are available for each case, include information about the differences between the two approaches, and specify selection criteria that can be used to select an approach;**
3. **For each case, the parties should be permitted to provide input on whether evaluative or interest-based mediation is appropriate based on the stage of the proceeding, the type of issues in the case and other relevant factors. Where the parties fail to reach a consensus on the approach to adopt, the Tribunal would retain the discretion to decide its mediation approach;**
4. **Post-disclosure mediation should be scheduled one month prior to the hearing rather than two weeks prior, subject to agreement of the parties otherwise;**
5. **By default, the same Tribunal member should conduct both pre-disclosure and post-disclosure mediations in a particular case;**
6. **The mediator should send a letter to the parties clearly stating the issues or facts that were resolved at mediation and those that remain in dispute and permit comment/correction on this letter; and**
7. **The post-mediation withdrawal period should be eliminated.**

G. Enhanced Disclosure of Expert Testimony

The CBA Sections support early and thorough disclosure of anticipated evidence, including anticipated expert testimony.

It can be time consuming to identify and retain an appropriate expert. We recommend that the procedures be amended to expressly contemplate obtaining leave from the Tribunal to extend the timelines for providing disclosure of anticipated expert testimony. Rather than specifying the circumstances that the Tribunal should consider for extensions of time, we believe this should be left to the Tribunal to develop through its decisions. We also recommend equalizing the time frame for each party to disclose anticipated expert testimony.

RECOMMENDATION

8. **The Tribunal's procedures should expressly contemplate obtaining leave to extend the timelines for providing disclosure of anticipated expert testimony; and**
9. **The time frame provided for each party to disclose anticipated expert testimony should be equalized.**

H. Signed Witness Statements

The CBA Sections support rigorous disclosure requirements for anticipated evidence, to assist in narrowing the issues and facts in dispute, and to encourage settlement. Disclosure should be early enough and in sufficient detail so that the other party can fairly prepare for hearing. It may be the case that a witness is not available to a party until they are sent a subpoena to attend the hearing and even then, that witness may not be available to a party to facilitate the preparation and submission of a witness statement. The Tribunal's processes should address what the parties should do in these circumstances.

It would be incongruous for the Tribunal to require formal affidavits setting out anticipated evidence when these are not required for civil trials. Given the Tribunal's mandate to provide access to justice, and the difficulty of self-represented applicants knowing the technical requirements of preparing an affidavit, we support instead requiring signed witness statement in which the witness solemnly declares that the contents of the statement are true. The CBA Sections support requiring witness statements to include a statement above the signing line such as the following:

> By signing below, I solemnly declare that all of the information provided in this statement and any documents attached to it are true and correct to the best of my knowledge, information and belief, and I solemnly declare that no deliberate misrepresentations have been made. I understand that this statement will be

> submitted to the Canadian Human Rights Tribunal as part of ongoing litigation and will be relied on by the parties and the Tribunal.

This will ensure the witness appreciates the use of their statement and declares its truth, notwithstanding the lack of a formal affidavit. We would also recommend that the requirements of the witness statements be stated in plain language.

For the content of witness statements, the CBA Sections recommend clarifying the Tribunal's Practice Direction No. 3, which requires "clearly outlining the direct evidence of each witness" in the document and Rule 6(1)(f), which requires "a summary of the anticipated testimony of each witness." These phrases require two different levels of detail in the statement – one a summary and one a clear statement of a witness' evidence, presumably in detail. The CBA Sections prefer the latter approach, which gives the other party a clearer understanding of the evidence. It may also permit the Tribunal to expedite the hearing by admitting witness statements supplemented by limited examination in chief to address issues raised in other witnesses' evidence, and then permitting cross-examination. The Human Rights Tribunal of Ontario (HRTO) has adopted this approach with success. As long as self-represented parties are provided a fair opportunity to call evidence and present their case, this approach would not prejudice a self-represented party who did not prepare detailed witness statements.

Finally, using the term "direct evidence" to explain this requirement may be confusing to non-lawyers. We recommend that this wording be removed.

RECOMMENDATION

10. **The Tribunal's processes should address the situation in which a witness who must be subpoenaed is not available to a party for the preparation or submission of a witness statement;**
11. **The CHRT should require witness statements but not affidavits;**
12. **Witness statements should include a solemn declaration that the contents are true and an acknowledgement that the witness statement will be relied on by the Tribunal and the parties;**
13. **The level of detail required in the witness statement should be "a clear statement of the witness' evidence" rather than a summary; and**

14. The Tribunal should remove technical legal terminology (*i.e.* "direct evidence") when explaining what is required for the statements.

I. Process Mediation

It is not clear whether Process Mediation is just case management by another name. Case management, particularly in complex cases, is an important step in the process. While the input of the parties should be taken into account, the Tribunal member should make the final decision as to how the case will proceed. The involvement of the Tribunal member provides rigor and predictability and ensures reasonable timelines.

J. Rigorous Disclosure of Remedies Sought or Proposed

The CBA Sections strongly support this change to the Tribunal's procedures, which requires detailed disclosure of the remedies being sought and supporting documentation.

We anticipate that this change will have at least four significant effects. First, requiring applicants to articulate and disclose the remedies they seek from the Tribunal process means applicants will consider the types of remedies the Tribunal has the power to order and assess whether their expectations on remedy are realistic. Second, respondents will have more information on which to practically and realistically assess the risk of proceeding to a hearing and the benefits of settlement. Third, the Tribunal member and the respondent will have sufficient information to ensure that relevant evidence on remedies is lead and appropriately tested at a hearing. Lastly, and perhaps most importantly, early and thorough disclosure of the remedies being sought and supporting documentation will make mediation more likely to succeed. We recommend that the Tribunal rigorously enforce this requirement.

RECOMMENDATION

15. The CHRT should rigorously enforce the requirement for disclosure of remedies sought and supporting documentation.

III. GENERAL COMMENTS AND FURTHER RECOMMENDATIONS

The CBA Sections would like to provide the following additional comments and recommendations with the hope they will be of assistance to the Tribunal.

First, while we feel that it is important to build flexibility into the process, there should also be an explicit enforcement mechanism for procedural requirements to prevent any abuse of process and to ensure predictability. This mechanism could take the form of specifying potential consequences for non-compliance, including refusal or limitations on admitting evidence that was not disclosed in accordance with the Tribunal rules or refusal to hear evidence from late-announced witnesses.

RECOMMENDATION

16. The Tribunal's procedures should expressly address the consequence of a failure to meet procedural requirements, which may include refusal or limitations on admitting evidence that was not disclosed in accordance with the Tribunal rules an or refusal to hear evidence from late-announced witnesses.

Our second comment relates to the Chair's December 17, 2010 email to stakeholders, where she announced the Stakeholder Consultation and a new vision for the Tribunal:

> Providing access to justice for ordinary Canadians through expedited complaint resolution.

While the CBA Sections applaud the Chair's focus on the Tribunal's role in access to justice for Canadians, we encourage the Tribunal to amend the vision to:

> Providing access to justice for all Canadians through fair and expedited complaint resolution.

This wording change may seem minor, but we believe it would provide important guidance for the Tribunal's approach to its mandate. Instead of labeling Canadians who access its services as "ordinary", using the descriptor of "all" Canadians is more inclusive. In addition, adding the term "fair" to the focus on "expedited" complaint resolution clearly states the Tribunal's focus on fairness and justice. Resolutions that are expeditious but unfair must be excluded from the Tribunal's intended vision.

RECOMMENDATION

17. The Chair's vision should be amended to emphasize fairness and inclusion.

In the same email, the Chair indicated her wish that the roundtable sessions in Toronto and Vancouver as part of the current consultation would lead to an ongoing consultation group. The CBA Sections strongly support the creation of an ongoing consultation group and recommend emulating the approach recently taken by the HRTO in creating a standing Practice Advisory Committee.

As stated in the HRTO's Annual Report 2008/2009[4] and Committee Terms of Reference,[5] the HRTO's Practice Advisory Committee was created as a resource for consultation and feedback about the effectiveness of the HRTO's policies, practices, rules, practice directions and services. The feedback is intended to ensure the HRTO is carrying out its mandate of fair, just and expeditious resolution of proceedings before it.

Under its Terms of Reference, the HRTO's Practice Advisory Committee includes the Committee's co-chairs representing the perspectives of applicants and respondents respectively, the HRTO chair and counsel to the Chair, eight people from the community of those who regularly appear or represent parties before the HRTO, a representative from the Ontario Human Rights Commission, and an Ontario Bar Association representative. The Committee meets at least three times per year.

The CBA Sections believe that an ongoing Consultation Committee would add tremendous value to the Tribunal's processes. It would provide an avenue for ongoing engagement of stakeholders and effective feedback on the Tribunal's rules and processes. It would be important for the Tribunal to use technology to bridge the geographic distribution of the Tribunal's stakeholders, who are located across the country. This could be done by, for instance, holding committee meetings via videoconference or teleconference and pairing meetings with related conferences when they take place in major centres. The CBA Sections would be pleased to participate on an ongoing Consultation Committee.

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4 Human Rights Tribunal of Ontario, *Annual Report 2008/09,* online: http://www.hrto.ca/hrto/sites/default/files/AnnualReports/HRTO%20Annual%20Report%202008-2009.pdf.

5 Human Rights Tribunal of Ontario, *Terms of Reference for the Human Rights Tribunal of Ontario Practice Advisory Committee,* online: http://www.hrto.ca/hrto/sites/default/files/About/TermsOfReference.pdf.

RECOMMENDATION

18. The CHRT should create an ongoing Consultation Committee.

IV. CONCLUSION

Once again, the CBA Sections thank the Tribunal for the opportunity to provide feedback on its recent procedural changes, and would be pleased to answer any questions about this submission.

V. SUMMARY OF RECOMMENDATIONS

1. By default, the CHRT should hold a conference call with parties and follow up with a clear, simply worded letter confirming the timelines and other issues discussed on the conference call. The CHRT would retain the discretion to dispense with either step in appropriate cases, such as where the parties are represented by experienced counsel.

2. The Tribunal should revise its publicly available guides and material to reflect that both evaluative and interest-based mediation are available for each case, include information about the differences between the two approaches, and specify selection criteria that can be used to select an approach.

3. For each case, the parties should be permitted to provide input on whether evaluative or interest-based mediation is appropriate based on the stage of the proceeding, the type of issues in the case and other relevant factors. Where the parties fail to reach a consensus on the approach to adopt, the Tribunal would retain the discretion to decide its mediation approach.

4. Post-disclosure mediation should be scheduled one month prior to the hearing rather than two weeks prior, subject to agreement of the parties otherwise.

5. By default, the same Tribunal member should conduct both pre-disclosure and post-disclosure mediations in a particular case.

6. The mediator should send a letter to the parties clearly stating the issues or facts that were resolved at mediation and those that remain in dispute and permit comment/correction on this letter.

7. The post-mediation withdrawal period should be eliminated.

8. The Tribunal's procedures should expressly contemplate obtaining leave to extend the timelines for providing disclosure of anticipated expert testimony.

9. The time frame provided for each party to disclose anticipated expert testimony should be equalized.

10. The Tribunal's processes should address the situation in which a witness who must be subpoenaed is not available to a party for the preparation or submission of a witness statement.

11. The CHRT should require witness statements but not affidavits.

12. Witness statements should include a solemn declaration that the contents are true and an acknowledgement that the witness statement will be relied on by the Tribunal and the parties.

13. The level of detail required in the witness statement should be "a clear statement of the witness' evidence" rather than a summary.

14. The Tribunal should remove technical legal terminology (*i.e.* "direct evidence") when explaining what is required for the statements.

15. The CHRT should rigorously enforce the requirement for disclosure of remedies sought and supporting documentation.

16. The Tribunal's procedures should expressly address the consequence of a failure to meet procedural requirements, which may include refusal or limitations on admitting evidence that was not disclosed in accordance with the Tribunal rules an or refusal to hear evidence from late-announced witnesses.

17. The Chair's vision should be amended to emphasize fairness and inclusion.

18. The CHRT should create an ongoing Consultation Committee.