



Education Law eBulletin

A newsletter for educators

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Are You Ready for Bill 107?

In December 2006, the Ontario Legislature passed Bill 107, *An Act to amend the Human Rights Code*, which provides for the most significant changes to Ontario's human rights legislation in over 25 years. In particular, the enforcement scheme under the *Code* has been completely overhauled by Bill 107. The new human rights enforcement procedures under Bill 107 take effect on June 30, 2008, and they will have a major impact on the way school boards, employers, and other respondents deal with human rights complaints.

Key provisions

Bill 107 ushers in a new model of "direct access" for complainants. The new law allows an individual who believes that his or her rights under the *Code* have been infringed to apply directly to the Human Rights Tribunal of Ontario for a remedy in respect of the infringement. Rather than file a complaint with the Ontario Human Rights Commission, the complainant (now called the "applicant" under Bill 107) will file an "application" directly with the Tribunal.

Bill 107 eliminates the role of the Commission with respect to the investigation of complaints and the administration of the enforcement scheme under the *Code*. In particular, the new law removes the Commission's "gate-keeping" power to decide what complaints are referred to the Tribunal for hearing. The Commission will no longer perform this screening-out function; instead, applicants will file their applications directly with the Tribunal.

Bill 107 gives significant new powers to the Tribunal to deal with applications brought before it. The Tribunal has been given very broad powers to enable it to govern its own practices and procedures. The new law expressly authorizes the Tribunal to conduct hearings in a manner that is "alternative to traditional adjudicative or adversarial procedures." The Tribunal can now wield more inquisitorial-like powers, including the power to define and narrow the issues in the hearing, to determine the order in which the issues and evidence will be presented at the hearing, to limit the evidence (both documents and witnesses) that may be called by parties to the hearing, to limit the submissions that may be made by the parties, and to authorize the Tribunal to conduct its own examinations or cross-examinations of witnesses. Where the Tribunal makes a finding of liability against a respondent, there are no express limits on the amount of monetary compensation that may be ordered. The decisions of the Tribunal are final and not subject to any appeal to the civil courts.

New tight time-lines

In recent years, the Commission typically received about 2,300 new complaints each year. It is expected that the Tribunal will receive no less number of applications and, indeed, the new direct access model may encourage more individuals to apply to the Tribunal for redress under the *Code*. As well, it is estimated that approximately 4,000 complaints will remain outstanding at the Commission as of June 30, 2008. Under the transitional provisions of Bill 107, the Commission will still be able to refer backlogged complaints to the Tribunal up until December 31, 2008, and complainants currently in the Commission system will be given the ability to opt out of the Commission process and take their case to the Tribunal. So unless the complaints are resolved or otherwise determined by the Commission in the next 6 months, the Tribunal will eventually have to contend with this accumulated inventory of complaints that are still before the Commission and have not yet been processed. Clearly, inheriting the Commission's inventory of complaints and dealing with its own caseload of new applications will impose significant operational challenges on the Tribunal.

Moreover, the Tribunal is, of course, aware of the perennial criticism of the Commission that it took too long to process complaints filed with it. One may reasonably expect, then, that the Tribunal will be highly motivated to develop and implement its new powers in a manner that seeks to avoid the same criticism to which the Commission was routinely subjected. Accordingly, the Tribunal has issued new *Rules of Procedure* (effective July 1, 2008), one of the purposes for which is to provide for “expeditious proceedings for the resolution of applications made under the *Code*.”

How will these considerations and the Tribunal’s new *Rules of Procedure* impact school boards, employers and other respondents? To take just one example, respondents should pay special attention to the provisions of new rule 8.1 of the *Rules of Procedure*, which require a respondent to file its response to the application within 35 days after the application was sent to the respondent by the Tribunal. The response form under the *Rules*, which is 17 pages in length, requires the respondent to address each allegation set out in the application, to provide information about any applicable internal human rights policy, to list all important documents that either the respondent, applicant or another person has, and to list the names of all the witnesses that the respondent intends to rely upon at the hearing.

In practice, the 35-day time period will prove to be a very tight time-line for many respondents to satisfy. It is imperative, then, that when a new application is received by the respondent, immediate attention must be paid to it. They cannot be allowed to “sit on someone’s desk”. School boards, employers and other respondents will have to provide internal training sessions for their managers in order to ensure that the organization has sufficient time to be able to respond fully and effectively to the new applications it receives.

Transitional provisions: the Tribunal’s “expedited process” for addressing the outstanding Commission caseload

The Tribunal has proposed a new initiative to deal with human rights complaints that are still outstanding before the Commission as of June 30, 2008. This new initiative will be available to any individual who filed a complaint with the Commission prior to June 30, 2008, if the complaint has not been finally dealt with by the Commission, withdrawn, or settled by that date. Complaints that were filed with the Commission prior to June 30, 2008, are “continued” for a period of 6 months, and the Commission will continue to have its current powers under the *Code* (i.e., to investigate, attempt to resolve, and refer these complaints to the Tribunal) until December 31, 2008.

However, in accordance with section 53(3) of the amended *Code*, an individual who has a complaint continued at the Commission may choose, at any time between June 30, 2008, and December 31, 2008, to abandon their Commission complaint, and file an application with the Tribunal using a separate, “expedited process.” This expedited process is entirely optional for complainants. It is designed to be less formal and more expeditious than traditional adversarial or court-like procedures.

Under this new expedited process, applicants will complete a very short application form, and respondents will complete a short response form, and the parties’ respective forms will be shared with each other. All applications will be scheduled for a *mandatory mediation* conference where a member of the Tribunal will assist the parties to try to reach a settlement.

If the matter does not settle at mediation, the parties will then prepare and exchange a statement of facts and issues they intend to present at a Case Resolution Conference. The parties will also exchange relevant documents with each other. The matter will then be heard and finally determined by way of an in-person Case Resolution Conference, which will generally be scheduled for only one or two days, where an adjudicator (a member of the Tribunal) will direct the Conference in order to get to the substance of the case quickly. The Conference will be conducted informally but the adjudicator may exercise pro-active powers, including the power to question the parties, their representatives and their witnesses; to express his or her views; to define or redefine the issues; to determine what issues are agreed upon or are in dispute; and to determine what additional evidence may be required to decide the application.

Most significantly, it should be noted that sworn evidence and cross-examination of witnesses by the other party will only be part of the process at the Case Resolution Conference if the adjudicator decides it is necessary to resolve a particular aspect of the dispute. Obviously, this is a significant departure from the more familiar and traditional adversarial procedures involved in a trial-type process. Clearly, the adjudicator at the Case Resolution Conference will wield considerable authority.

It should also be noted that the Case Resolution Conference is not a pre-hearing or case management step. Rather, it is the stage in the expedited process where the application will be finally determined. Any party may request reconsideration of the adjudicator's decision at the Case Resolution Conference but it may not be appealed to the courts.

School boards and other respondents to complaints that are outstanding before the Commission as at June 30, 2008, will have no control over whether the complainant will elect to opt out of the Commission's process and file an application for this new expedited process. Again, the time-lines are designed to be very tight. Accordingly, school boards and other respondents should ensure that, for any complaint that is before the Commission as of June 30th, they have taken all necessary steps (such as preparing a defence or response to the complaint, collecting relevant documents, interviewing relevant witnesses, etc.) so that they will be in a position to defend against the complaint and respond to any application for an expedited process.

If you have any questions about Bill 107 or how its provisions will be implemented in practice, please call Paul Howard or Sheila MacKinnon or any one of the members of our Education & Public Law Group, who would be pleased to assist you.

Creating Enforceable Obligations Through Press Statements

It is difficult to dispute the import that school board decision-makers follow established processes and procedures when engaging in any decision making process, especially when the decision in question impacts upon the rights of students, including issues ranging from suspensions and expulsions to school closings. However, even where policies and procedures exist, additional requirements may be imposed by promises or representations made by decision-makers, and it should not come as a great surprise that courts will hold governmental ministries or departments to their representations in this respect. In *Small v. New Brunswick (Minister of Education)*, the New Brunswick Court of Queen's Bench found that a statement made to the press by the Minister of Education created an obligation to provide parents with an opportunity to make representations in respect of a french immersion program that was being cut.

On March 14, 2008, the New Brunswick Minister of Education made an announcement that the Early French Immersion Program (the "EFI Program") was going to be phased out, beginning with Grade 1 in September 2008. Accordingly, the applicants, parents of anglophone children in the french immersion program, sought judicial review of the Minister's decision, arguing that the cutbacks infringed their rights under the *Charter*, specifically, s. 16 (Official Languages), s. 16.1 (English and French Linguistic Communities in New Brunswick) and 23 (Minority Language Educational Rights). The applicants further challenged the Minister's decision on the common law basis that it was made "contrary to the rights of the Applicants to natural justice and procedural fairness."

In respect of the *Charter* challenges, the court relied on previous Supreme Court of Canada decisions which clearly state that s. 23(2) of the *Charter* does not equate minority language education and immersion. The court further dismissed the applicants' s. 16 and 16.1 *Charter* arguments.

Having regard to the duty of fairness, the applicants challenged the Minister's decision on the common law basis that it was made "contrary to the rights of the Applicants to natural justice and procedural fairness." The applicants contended that as parents with children registered to begin Grade 1 in the EFI Program in September 2008, they had legitimate expectations that the EFI program would not be cancelled without being granted a reasonable opportunity to make representations. The applicants' position in this respect was supported by the fact that the Minister himself indicated that there would be sufficient time to "allow for a full debate" after an initial report was released by the Ministry suggesting changes to the french immersion program. However, the initial report to the public did not use plain language to suggest that the EFI Program would be cut. A further news release requesting input from the public also failed to warn the public that the Minister was considering phasing out the EFI Program. In fact, any and all news releases made by the Minister failed to warn the public or address the fact that cuts were going to be made to french immersion programs; all press releases were positively worded proclaiming only improvements to French second-language programming. The result was that, within two weeks of the issuance of the 99 page report which, *inter alia*, recommended the phasing-out of the EFI Program, the recommendation had been implemented without any real knowledge of the Minister's intentions regarding the EFI Program. Thus, there was arguably no opportunity for a full debate.

Although the court confirmed that the principles of natural justice and procedural fairness may not lead to substantive rights outside the procedural domain, the purpose of the doctrine is to take into account the promises or regular practices of administrative decision makers and that it will generally be unfair for such decision makers to act in contravention of representations as to procedure or to backtrack on substantive promises without according significant procedural rights.

The court therefore held that the Minister's decision to adopt the recommendations was in contravention of his own assertion that the decision-making procedure would have time to "allow for a full debate." Thus, the court quashed the Minister's decision, finding it unfair and unreasonable.

Although school boards are well aware of the importance of adhering to established processes and procedures, this decision further illustrates the necessity for school boards and their administrators to choose their words carefully when making representations to the public. Press releases should, in most cases, be prepared statements to avoid making "off-the-cuff" promises or guarantees which could create positive obligations on the decision-making body. Moreover, information released to parents or other individuals who may be affected by a decision should be clear and forthright such that the affected persons have notice of the actual issue. It is arguable that, because the press releases did not clearly indicate that the EFI Program would be cut, this contributed to the finding that the Minister's decision was unfair and unreasonable.

CASES

The Alberta Labour Relations Board held that persons performing research at the University of Calgary, paid out of trust monies including government research grants and private research grants, were in fact employees of the University, with some exceptions. *University of Calgary (Re)*, [2008] A.L.R.B.D. No. 30.

Regarding a class-action brought against the Crown on behalf of all children with autism, the Ontario Court of Appeal upheld the Superior Court's decision that there is no constitutional obligation on the province to ensure that every school-aged child had access to specific educational services. *Sagharian (Litigation guardian of) v. Ontario (Minister of Education)*, [2008] O.J. No. 2009.

The Ontario Superior Court ordered the production of school records and police records in respect of an alleged schoolyard assault by one grade two student against another grade two student; the plaintiff argued that the school records would establish that the school knew of the assailant's violent behaviour and failed to take steps to properly supervise him. *Kin Hang Lee et al. v. Toronto District School Board et al.*, [2008] O.J. No. 1759.

Have a Wonderful and Safe Summer!



We welcome your comments and questions. Send them, and any updated contact information, to bryce.chandler@shibleyrighton.com. If you wish to unsubscribe to this eBulletin, please send a blank e-mail to unsubscribe@shibleyrighton.com

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