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Bill 107 – Tribunal Issues Draft Rules of Procedure for Consultation

Date: February 1, 2008

Bill 107, the *Human Rights Code Amendment Act*, will come into force effective June 30, 2008. The Human Rights Tribunal (the Tribunal) has recently released long awaited draft Rules of Procedure for review and comment by members of the human rights community.

It is important to note that Bill 107 did not amend any of the substantive provisions of the Code. The changes made by Bill 107 exclusively concern the enforcement processes applicable to human rights disputes. As of June 30, 2008, complaints (or applications) will be filed directly with the Tribunal. In accordance with these important changes, the proposed Rules of Procedure governing Tribunal hearings will also change significantly. Not surprisingly, the proposed Rules mirror quite closely the extensive "process" revisions which were contained in Bill 107. Set out below is a summary of the proposed Rules which will be of interest to those who handle human rights complaints involving their organizations.

THE HEARING PROCESS

The proposed Rules vest the Tribunal with significant discretion in determining its processes and in dealing with and disposing of applications before it. Indeed, the proposed Rules specifically state that they are to be "liberally interpreted". As contemplated by Bill 107, the proposed Rules clearly recognize that the Tribunal may choose to use non-traditional and non-adversarial approaches in dealing with proceedings before it. Powers provided to the Tribunal include the following:

- the ability to shorten or lengthen any time limit;
- the power to add or remove a party;
- the power to direct that an application be determined in a "summary fashion";
- the power to define and narrow the issues in a proceeding;
- the ability to direct and determine the order in which evidence is to be presented; and
- the power to limit the evidence or submissions on any issue.

In light of the foregoing, we expect that there will be a significant impact upon the conduct of hearings under the new process.

Notably, the proposed Rules also provide that the Tribunal may schedule hearings or other dates "with or without consultation with the parties". The Tribunal may also conduct hearings in person, in writing, by telephone, or by other electronic means as appropriate. Furthermore, the proposed Rules expressly note that hearings will be "open" to the public.

TIMELINES AND DISCLOSURE

While the proposed Rules do not provide any glimpse into how quickly applications will now be brought on for hearing, they do establish strict timeframes that must be met by the parties, as well as significant disclosure obligations that must be met once an application is filed.

The proposed Rules provide that applications and responses must be complete and in accordance with the prescribed forms (which have not yet been released), or they will be declared incomplete and sent back for completion. The proposed Rules also contemplate that both applications and responses will include the following information:

- a list of key witnesses;
- a list of key documents; and

- a list of documents in the possession of the other party.

Upon receipt of an application, the time limits begin to run; after having been served with an application, a Respondent has 35 days to file a complete response, which must include the information set out above. The short timeframe for the disclosure of this information will mean that Respondents must move very quickly to marshal their evidence to begin preparing a defence. Accordingly, it will be imperative for Respondents to begin preparing for litigation from the moment they receive notice of an application. If a Respondent fails to respond within the timeline, the Tribunal may dispose of the application without further notice to the Respondent.

Once the matter is scheduled (or a "confirmation of hearing" has been sent to the parties), additional disclosure obligations arise. Each party then has 45 days to meet their disclosure obligations, which include disclosure of witnesses who will be called and preparation of a "will say" statement for each witness, which summarizes the testimony the witness will provide at the hearing.

PRELIMINARY OBJECTIONS BY RESPONDENTS

Bill 107 eliminated section 34 of the Code, which permitted a party to raise a number of preliminary objections which went to the Commission's jurisdiction to entertain a complaint. The proposed Rules contemplate a process whereby a Respondent can seek an "order" (under Rule 20) that the Tribunal dismiss an application that is "outside the jurisdiction of the Tribunal" (Rule 12.1). To date, no information is available with respect to the interpretation that might be placed on this phrase. A request for such an "order" can be made only once the proceedings have commenced. Accordingly, Respondents will still be required to defend the application in its entirety upfront and will be required to file a complete response to the application before a Rule 20 "order" can be sought.

The proposed Rules also allow for an Applicant to make an application to "defer" the Tribunal process (Rule 7) if another legal proceeding is pending; Rule 14 permits the Tribunal to "defer" an application on its own initiative, or to defer an application upon the request of any party (including a Respondent), pursuant to a request for an order under Rule 20. Again, it would appear that notwithstanding the preliminary nature of these requests, a full response will be required first, in accordance with the 35 day timeframe set out under Rule 8.

SUMMARY PROCEEDINGS

Despite creating what could be a fairly lengthy hearings process in the normal course, the proposed Rules also provide the Tribunal with the power to choose to schedule an application for a "summary hearing" (Rule 15) or it may deal with an application on an expedited basis (Rule 22) if "urgent circumstances" are present. It remains to be seen how frequently that might occur and what might be considered "urgent circumstances".

MEDIATION

While the proposed Rules provide for mediation, the parties are not entitled as of right to mediation. The proposed Rules provide only that the Tribunal "may" provide these services. It would appear that the Tribunal will use its discretion to determine the cases for which mediation may be appropriate.

CASE ASSESSMENT

The proposed Rules also provide that the Tribunal may prepare a "case assessment" (either at a case conference or in writing). The purpose of this assessment is to provide directives to the parties with respect to how the matter will be heard. While there will be an opportunity for a Respondent to challenge any directive issued (either at a case conference or at the commencement of a hearing), it is clear that this proposed Rule will be used to allow the Tribunal to exercise its broad powers to control its own processes and the hearing processes.

INTERIM REMEDIES

Rule 24 provides that a party may request that the Tribunal grant an “interim remedy”. While the proposed Rules do provide some guidance with respect to the conditions that must be satisfied before an interim order will be granted, it is not clear that an oral hearing will be provided to the parties when an interim order is sought. The proposed Rules instead contemplate that where a written request for such an interim order is made, “submissions” can be provided by a responding party. Clearly, we may expect to see requests for interim reinstatement, among other remedies, given this express power.

RECONSIDERATION OF A TRIBUNAL DECISION

Finally, the proposed Rules provide a route to seek review from a Tribunal decision. Any party who is dissatisfied by a Tribunal decision may invoke the reconsideration process under Rules 27.

CONCLUSION

As noted above, the Tribunal has invited consultation from the community in respect of these proposed Rules. If you have any questions regarding these proposed Rules, or about Bill 107, your Hicks Morley lawyer will be happy to assist you.

The proposed Rules of Procedure can be accessed by visiting the Tribunal’s website.
