

In light of the evolving situation with the COVID-19 pandemic, the Tribunal has decided to postpone its planned stakeholder consultations to a later date, to be determined.

We would greatly welcome receiving by e-mail any responses to the questions from our Discussion Paper that you have to offer.

*While no deadline is attached to this request, feedback provided by **Monday, April 30, 2020** would be most helpful.*

Discussion Paper: Pay Equity Act Rules of Procedure

On December 13, 2018, *An Act to Establish a Proactive Pay Equity Regime within the Federal Public and Private Sectors* (referred to as the *Pay Equity Act*) received Royal Assent, as part of Bill C-86, the *Budget Implementation Act, 2018, No. 2*. The *Pay Equity Act* establishes a proactive pay equity regime requiring employers with 10 or more federally regulated employees to examine their compensation practices to ensure that women and men receive equal pay for work of equal value.

The *Pay Equity Act* is expected to come into force in 2020 and will apply to the federal public and private sectors, parliamentary workplaces, and the Prime Minister's and ministers' offices.

The *Pay Equity Act* grants the Canadian Human Rights Tribunal ("CHRT") two distinct new roles:

- (1) The Referral Mandate: Under s. 162, the Pay Equity Commissioner ("PEC") may refer an important question of law or a question of jurisdiction to the CHRT for determination.
- (2) The Appellate Mandate: Under s. 168, an employer, bargaining agent, or other affected person may appeal certain decisions or orders rendered by the PEC to the CHRT.

The Tribunal expects to receive its first referrals and/or appeal files under the *Pay Equity Act* as early as the spring of 2021. The preparation required for this new workload includes drafting and implementing new Rules of procedure, as well as developing operational processes, templates, guides and other communications tools to inform Canadians.

Purpose of this Paper

The purpose of this discussion paper is to solicit the opinions of stakeholders as we begin to develop our Rules of Procedure. The stakeholders we are consulting include employer, labour and advocacy stakeholders, as well as institutional actors, pay equity professionals and experts. [Confirm against final outreach list]

Your opinions will contribute to the development of fair and efficient referral and appellate processes that further the goal of achieving pay equity through proactive means.

Questions asked in this discussion paper are meant to guide and facilitate stakeholder input. Feel free to provide comments on all or some of these questions, or on any other issues that you consider relevant.

Note: This consultation paper is available in English and French.

Please send your input by **April 30, 2020** to: chrt-tcdp-information@tribunal.gc.ca

Part 1: Rules of Procedure - Format

In addition to its new mandate under the *Pay Equity Act* (“PEA”), the CHRT is also currently preparing to take on an appellate role under the new *Accessible Canada Act* (“ACA”). These two new mandates share certain similarities, as each involves receiving appeal files from decisions of a Commissioner of the Canadian Human Rights Commission. However, the vocabulary used to assign these new mandates to the CHRT varies from one act to the other. Moreover, the PEA includes a referral mandate, which the ACA does not, and the CHRT will likely receive its first pay equity appeals at least two years before it begins hearing accessibility appeals.

There are several possible approaches to implementing rules of procedure for these new mandates. One solution would be to add provisions or groups of provisions specific to Pay Equity and Accessibility to the existing CHRT Rules, which currently govern our first-instance human rights inquiries. Another would be to create one set of rules for both new mandates (*ACA* and *PEA*), with general rules applicable to both new mandates and specific rules for each one of them. Finally, separate rules could be created for each of the two new mandates.

For reference, the *Federal Courts Rules* include general rules and specific ones (for instance, see Part 3 – [Rules Applicable to All Proceedings](#), Part 4 – [Actions](#) and Part 5 – [Applications](#)). The Social Justice Tribunals of Ontario cluster has taken a similar approach, with common rules of procedure applicable to all proceedings: : the [Common Rules](#), which are supplemented by certain specialized rules and practice directions applicable only to each individual tribunal.

1. Should standalone Rules of Procedure be drafted for each new Act, jointly for the two appellate/referral mandates, or would it be preferable to add new rules specific to the *PEA* to the CHRT’s existing Rules of Procedure?
2. Please refer to the [current CHRT rules](#) and consider which of the existing rules could serve the same purpose for pay equity appeals and referrals.
3. The *PEA* does not expressly require the CHRT to formally publish pay equity appeal and referral rules via the gazetting process. Should Rules of Procedure be formally published at the outset? Or would it be preferable to establish a working set of rules that can be refined with input from stakeholders as the caseload grows and the Tribunal gains experience, with formal publication occurring later?

Part 2: Pre-hearing Procedures

What steps and processes could be put in place at the very outset of a *Pay Equity Act* proceeding at the CHRT to set the stage for effective and timely outcomes? Mediation is a powerful tool for dispute resolution which CHRT's members already utilize for human rights inquiries with significant success. Other appellate administrative bodies offer mediation – see, for example, the [alternative dispute resolution process](#) set out in Rule 20 of the Immigration and Refugee Board of Canada's Immigration Appeal Division Rules.

A) Alternative Dispute Resolution

1. Do you see a role for mediation for *Pay Equity Act* matters at the CHRT stage, prior to hearing an appeal? If so, should it be voluntary or mandatory? What style of mediation would best suit the parties in these proceedings?
2. If so, should there be a rule regarding Consent Orders following successful mediation?
3. If not mediation, do you see a role for a pre-hearing settlement conference, where a Member could explore settlement but also assist with narrowing issues?
4. If you agree mediation (or some kind of settlement conference) would be appropriate, to what extent should it be confidential? Should confidentiality extend to any Consent Orders issued by the CHRT arising out of a mediated settlement?

B) General Pre-Hearing Procedures

5. Do you have any recommendations for the Notice of Appeal form?
6. Would e-filing be an asset for Pay Equity appeals and referral proceedings?
7. How should parties obtain the record of the decision of the Pay Equity Commissioner? Should the Rules mandate a transfer of the file from the Pay Equity Commissioner within a certain time frame of an appeal being filed?
8. What kind of sanction powers would you like to see codified to deal with noncompliance or abuse of process? For example, should there be a provision for proceeding in the absence of a party who has failed to participate in a referral or appeal?
9. Should there be a process for the joining of appeals? Why or why not?
10. Should a proactive approach to accommodating special needs be included in the Rules? Please elaborate.

Part 3: Hearing Referrals and Appeals

Pay equity cases under section 11 of the *CHRA* were long and complex. While the switch from a complaint-based to a proactive model may very well remedy these issues, we want to ensure that, when a party does come to us for an appeal, or when the Commissioner refers an important question of law or jurisdiction to us for inquiry, the matter is resolved quickly and fairly. Keeping in mind the nature of the issues and the parties involved, please share your thoughts

regarding what the referral and hearing process at the CHRT might look like in order to achieve these goals.

1. Should a timeline for scheduling a hearing be set by the Rules? If so, please explain.
2. Would there be any compelling benefits or drawbacks to allowing hearings to take place via video or tele-conference?
3. Could some appeal hearings and/or referrals take place solely in writing? If so, how should the CHRT determine the form of the hearing?
4. In the case of oral hearings, should the CHRT set time limits for oral representations? Please elaborate.
5. If there is a standard written argument, should there be a page limit? What would you see as reasonable, if so? What about replies?
6. What are your views regarding confidentiality of proceedings? The referral regime effectively imports the provisions of s. 52 of the *CHRA*, while the appeal regime is silent on this matter. Should the Rules establish an identical regime for appeals?
7. Should the CHRT establish a process for granting status at the hearing of an appeal to interested parties? (Note that s. 164(1) expressly allows for interested parties in the referral regime, while the appeal regime is silent on the question).
8. Should there be a presumptive grant of standing to non-unionized or unionized employees in mixed workplaces where only one or the other files an appeal?
9. Should a timeline attach to the issuance of reasons? Should there be a difference between referrals and appeals? Please explain.
10. The *Pay Equity Act* provides for referrals and appeals to be heard by either a single member or a panel of three, at the Chairperson's discretion and considering the complexity of the matters under appeal. What factors would militate in favour of a hearing by a panel, in your opinion? Do you have other considerations or questions regarding the assignment of members or the makeup of panels?

Part 4: General

1. What concerns, if any, do you have about the appeals or referral processes? Are there any specific challenges or roadblocks you have experienced in other proceedings that you would hope to avoid at the CHRT?
2. Should there be a rule concerning the withdrawal of appeals and referrals? Please explain.
3. Should there be a rule allowing for appeals to be held in abeyance pending negotiation? If so, what should the time limit be on this? Should the parties be required to report on their progress at certain intervals therein?
4. Should there be a rule providing for Status Review of referrals and appeals that do not advance through the process due to inaction of one or more parties? Should proceedings that are not diligently prosecuted be summarily dismissed?

5. Do you have any other recommendations surrounding guidance documents or other communications documents that should issue from the CHRT regarding the *Pay Equity Act*?

Conclusion and Next Steps

We will circulate a summary of what we heard through these consultations, and your responses will contribute to the development of Rules of Procedure for Pay Equity proceedings at the Canadian Human Rights Tribunal.

Additionally, at a later date you will have the opportunity to provide comments on the draft rules after their pre-publication in Part I of the *Canada Gazette*.