Social Justice Tribunals of Ontario
Public Consultation on New Proposed Rules of Common Procedure

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Submitted to: Social Justice Tribunals Ontario

Submitted by: The Ontario Bar Association, Constitutional, Civil Liberties and Human Rights Section and Labour and Employment Law Section

ONTARIO BAR ASSOCIATION
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L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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Introduction

The Ontario Bar Association ("OBA") appreciates the opportunity to provide input on the New Proposed Rules of Common Procedure for all tribunals in the Social Justice Tribunals Ontario ("SJTO") Cluster.

The OBA commends the goals of the SJTO to improve processes in an effort to increase access to justice. The OBA remains active in developing options to further enhance tribunal excellence and we look forward to further discussions on this.

The OBA

As the largest voluntary legal organization in the province, the OBA represents approximately 18,000 lawyers, judges, law professors and students in Ontario. OBA members are on the frontlines of our justice system in no fewer than 38 different sectors and in every region of the province. In addition to providing legal education for its members, the OBA assists government and other decision-makers with several policy initiatives each year - both in the interest of the profession and in the interest of the public.

This submission was formulated by the OBA Constitutional, Civil Liberties and Human Rights (CCLHR) Section with additional input from the Labour and Employment Section. The members of these sections represent applicants and respondents before various tribunals of the SJTO, particularly the Human Rights Tribunal of Ontario ("HRTO").

General Comment regarding a Set of Common Rules

While some of the changes found in the consultation document are helpful, it is unclear how a number of the changes will improve access to justice or assist the parties or the tribunals themselves in dealing with applications.

It is not clear that the addition of a common set of rules adds further value to the current rules of the individual tribunals and, in fact, this may be a disadvantageous approach. The following are the general concerns

(a) While the provincial government promotes clustering for efficiency, the many tribunals of the SJTO deal with wide and divergent subject matters. It is not clear that there is enough commonality to justify a set of common rules;

(b) It would appear that the current model involves a set of common rules and individual rules for each tribunal. Counsel and parties would, therefore, be required to master two sets of rules instead of one, which certainly does not enhance access to justice;

(c) In some cases, attempts to formulate a common set of rules, involves removing specificity from individual tribunal rules. This may, in some cases make the rule less useful to the individual tribunal and the parties before it.

There are, however, some specific changes which human rights practitioners would hope to see in the revised rules. These changes are discussed in the following section.

Specific Changes Recommended

The CCLHR Section has indicated that there are specific revised rules that they feel would be of assistance to parties appearing before the HRTO. These include:

1. Definitions: There are many terms referenced in the rules that have a legal/technical meaning. For example "vexatious" "good faith" "proportional" "abuse of process". The HRTO should either provide a working definition based on its own case law or a link to cases which provide meaning to these words.

2. Expedited Hearings: It is beneficial to have recognition of expedited hearings for vulnerable workers who are about to be or at risk of being repatriated.

3. Summonsing Authority: The CCLHR Section recommends including a specific provision which recognizes the HRTO's authority, on its own initiative to issue a summons: either under Rule 17 or 19 or both of the HRTO Rules of Procedure.

4. Settlements: The time frame for filing Form 25 to dispose of a matter based on a settlement should be reworded to be 10 days from the date that the full terms of the settlement have been implemented (particularly monetary terms). This will save the HRTO and the parties time and money and avoid further proceedings when someone fails to comply with the terms of settlement. (See Rule 15.6 of the HRTO Rules of Procedure).

5. Disclosure of Witnesses and Expected Evidence: As currently written, Rule 17. 2 of the HRTO Rules of Procedure requires a "brief statement summarizing each witness's expected evidence." Without elaboration, this may result in frustration on both sides as those unfamiliar with the HRTO's interpretation of what is required may fail to provide sufficient information or detail. In practice the information required is more than a lay person or someone unfamiliar with dealings at the HRTO might assume. The HRTO has developed case law on this issue. There should either be a better explanation of the requirement in the rule or a link to the case law.

6. Litigation Guardians: This section should be simplified with general references to "who" and "when" as well as further reference to the specific form that details what must be completed. Where these rules are applicable to the HRTO, they should be incorporated as such. Two sets of rules are redundant and lead to confusion.

7. SJTO Rule A6 - Language: There is a reference to interpretative services being provided in accordance with the HRTO policy; it is advised to provide a link to this policy. It is anticipated that these rules will be translated into several languages so they are accessible to all parties.

8. SJT0 Rule A9 - Representatives: When detailing representatives, the rules should include language that union representatives are able to represent parties provided they are NOT being paid by the party for such representation.

9. Code Related Needs: It is recommended that the rules include clearer language in Accommodation of "Code Related Needs" or, at least, provide a link to related policy.

10. Mediation: The model as currently drafted is based on opt-in with consent of the parties and this is a good model for human rights. However, what would be helpful is mandatory "early case direction and/or mediation", which would require the parties to attend and mediate if they are in agreement. If there is no agreement to mediate, the HRTO could spend the time dealing with preliminary and case processing issues. This process allows initially unwilling and uninformed parties to hear about the pros and cons of mediation for those. For those who do not want mediation, it also provides a way of getting the parties' case on track at a much earlier stage.

Protecting Resolute Advocacy

Further to the comments provided by the OBA CCLHR Section, the OBA Labour and Employment Section proposes an addition be made in SJTO Rule A7.1 which would make clear that the requirements of civility and good faith operate alongside, and not as an antithesis to, the resolute and fearless advocacy required by the Lawyers' *Rules of Professional Conduct*

The Labour and Employment section recommends the wording be changed to:

> All persons participating in proceedings before or communicating with the tribunal must act in good faith and in a manner that is courteous and respectful of the tribunal and other participants in the proceeding, while maintaining the obligation to resolutely and fearlessly represent clients before the tribunal.

Conclusion

The Ontario Bar Association appreciates the opportunity to provide feedback on the SJTO Draft Rules. We look forward to continued consultation.