JUSTICE FOR CHILDREN AND YOUTH

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BILL 107 – Human Rights Code Amendment Act
Qualified Support for the Direct Access Model

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Justice for Children and Youth is a legal clinic and the operating arm of the Canadian Foundation for Children, Youth and the Law. The clinic provides select legal representation to youth aged 17 and under in the areas of education, income maintenance, criminal law, family law, mental health law, health law, constitutional law and human rights. The clinic also provides public legal education to youth and youth-serving agencies

The Foundation prepares policy/law reform positions on issues relating to the legal practice of the clinic based on the needs and experience of its clients. The Foundation also conducts test case litigation, through interventions and applications, on specific issues related to the rights of children and youth.

Introduction

Bill 107 or the *Human Rights Code Amendment Act* was introduced by the Ontario Government for the Legislature's consideration on April 26, 2006. The Bill has passed first and second reading and was referred on June 6th, 2006 to the Standing Committee on Justice Policy.

The legislation proposes significant changes to how human rights are enforced in Ontario. Justice for Children and Youth (JFCY) is interested in these reforms and recognizes a foreseeable impact these initiatives may have upon on children and youth in this province and how they access and experience human rights enforcement. Accordingly, JFCY proffers the following submission on Bill 107 and its potential impact on children and youth in Ontario.

Bill 107 and the Direct Access Model for Ontario's Human Rights System

***Submission I:* JFCY supports an adequately-funded direct access model for Ontario's human rights system.**

***Submission II:* JFCY recommends that the Bill be amended so as to require the Ontario Human Rights Tribunal to provide reasons for dismissal of any applications.**

JFCY supports a well-funded direct access model because of its empowering and open process. We submit that of the Paris Principles[1], the most applicable in a human rights enforcement system are adequate power, accessibility and accountability. These are the qualities that should help guide reform of the Ontario human rights system. By providing direct access to the Ontario Human Rights Tribunal for all applicants, thereby requiring written and published decisions from the Tribunal in its response to those applications, Bill 107 renders the administrative tribunal more accountable and transparent. This is in stark contrast to the current system, where the Commission's gate-keeping function is such that it renders the process of accessing the Tribunal more opaque, inconsistent and less reviewable. Currently, the Commission has the power to decide whether to pursue or investigate a complaint, refer it to the Tribunal or reconsider any decision it has made in these matters. The exercise of this administrative power by the Commission, however, is accorded far more deference by a reviewing court and is subject to less public scrutiny than the proposed direct access model. Under section 41 of the proposed legislation there exist several circumstances in which the Tribunal may dismiss an application without a hearing. While this is a power often granted to administrative tribunals, we submit that procedural fairness would be best observed by requiring the Tribunal to provide reasons

[1] The Paris Principles were established to provide guidance for the development and enhancement of national institutions in a wide variety of contexts. Supporting these principles are a number of "effectiveness factors" for state institutions that have been advanced by the United Nations Centre for Human Rights. See, Principles relating to the status of national institutions ("Paris Principles"), UN Commission on Human Rights Resolution 1992/54 of 3 March 1992, annex (E/1992/22); General Assembly Resolution 48/134 of 20 December 1993, annex.

for dismissal of the application. The mandatory provision of reasons would ensure that any subsequent judicial review of that decision could be more effectively pursued by an applicant.

The problem with the current model in Ontario relates to a lack of resources available to support the human rights system. The opportunity for change afforded by this new reform initiative is significant, with a renewed focus on preventative work and education, along with a more workable model for redress of discrimination. All of these advances, however, can only be realized with significantly increased funding to the human rights system. Otherwise, Ontarians will be left with a human rights system enforced and sustained by hollow and ineffective legislation.

Despite our support for a direct access model, JFCY does have some concerns about the model as drafted in Bill 107. The following is a list of suggested amendments to the proposed legislation.

1. Legal Representation and Support for Claimants

<u>Submission III:</u> JFCY submits that publicly-funded legal assistance should be provided to all human rights applicants regardless of means, and recommends that the Bill be amended so that the Human Rights Legal Support Centre is established and enshrined directly within the legislation.

Specifically, accessibility through legal representation and support for claimants should be articulated and fortified in the legislation. Upon the introduction of Bill 107, the Attorney General promised to create a new "Human Rights Legal Support Centre" that would provide "full access to legal assistance," including information, support, advice, and legal representation to all persons seeking a remedy before the tribunal.[2] Nothing in the legislation, however, makes reference to or creates this legal support centre, let alone ensures its public funding and accountability. On its face, Bill 107 essentially privatizes legal representation within the human rights system, creating in effect a two-tier system of representation and accessibility that can only stifle access to justice for the most vulnerable and disadvantaged, whether because of age, disability, or cultural background. Thus, it is our assertion that effective and fully-funded legal assistance should be explicitly guaranteed in the legislation and that the provision of those legal services not be means tested. Income status of the complainant should be irrelevant where human rights violations are at issue.

This lack of specificity is pervasive throughout the legislation and forms another point of concern for JFCY. The bulk of the Tribunal's procedures and powers are left to as-yet undefined regulations. While this model for law-making has the advantage of providing flexibility and discretion to law-makers, the principle of equal and direct access is so fundamental to the success of the legislative amendments that the proposed human rights centres and funding requirements need to be expressly

[2] Ministry of the Attorney General, news release and backgrounder, April 26, 2006.

recognized in the legislation itself and not left to any discretionary implementation in the regulations.

2. Who May Make an Application

a. Standing for Children

<u>Submission IV:</u> JFCY submits that standing before the Ontario Human Rights Tribunal be accorded to all individuals whose human rights have been infringed, including older children and those children who are able to communicate their wishes, needs and views.

JFCY supports the introduction of direct access under the proposed legislation, in part, because individuals can file an application directly to the human rights tribunal. The benefits of direct access, however, would be undermined by any restrictions to those who may make an application to the Tribunal. Under *section 35(1)*, if a person believes that any of his or her rights under Part I have been infringed, the person may apply to the Tribunal for an order under *section 42*. As written, it appears that applications to the Tribunal can be filed by individuals whose personal rights under the *Code* are infringed. As "person" remains undefined in the legislation, it is our assumption and recommendation that children be granted standing to file their own application with the Tribunal. Human rights belong to the individual, and as such, it is necessary to accord standing to children or youth claiming discrimination and not deny them access through some sort of adult proxy requirement. In addition, from our extensive experience in advocating for children in special education cases, the accommodation needs and desires of parents and their children can vary significantly. 16 and 17 year old students with accommodation issues distinct from and in conflict with their parents should not be barred from initiating their own human rights complaint. It is the position of JFCY that these claims should have the opportunity to be advanced irrespective of the support of the parent.

As the Supreme Court of Canada recognized in *Eaton*, children and youth hold rights as individuals in and of themselves, not at the discretion, or through the benevolence, of their parents or those standing in their place.[3] Furthermore, parents do not always act in the child's best interests and, in making decisions, the views of a child able to express them are of great importance. The participation of children in decision-making processes affecting them is a fundamental principle of the *United Nations Convention on the Rights of the Child.* Thus, where a decision-making body, like the Ontario Human Rights Tribunal, must ensure that its determination of the appropriate accommodation for an exceptional child be from a subjective, child-centred perspective, it is essential that older children and those who are able to communicate their wishes, needs and views be presumed to have standing in order to do so. Those children unable to initiate

[3] *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at 278-79.

their own applications because of tenderness of age or inability should be provided a mechanism for representation. That said, JFCY scknowledges that parents can indeed be effective advocates for their children. The common practice of allowing parents to commence claims on their children's behalf should continue so long as it does not become a barrier to a direct application, or the participation of the, the young person affected.

b. Representative and Group Applications

<u>Submission V:</u> JFCY submits that the Bill be amended so as to allow for representative and group applications to the Tribunal.

In addition, while the Commission will have the ability under the new regime to file systemic applications, it does not appear that applications can be filed in a representative capacity by outside parties. As written, Bill 107 may preclude public interest groups like JFCY from filing complaints on behalf of individuals or groups who may be vulnerable to reprisals if they bring applications in their own names. One example is youth in custodial settings, where fear or inability can preclude them from initiating a human rights complaint on their own. Another example is children in foster care and the discriminatory treatment they can face within the education system, where they are vulnerable to both the stigma of public scrutiny and to school board's authority. We submit that enabling representative and group applications could advance children's access to justice, particularly in the education setting where certain exceptional students may be experiencing the same accommodation issues.

3. Systemic Applications by the Commission

<u>Submission VI:</u> JFCY supports the role designated to the Ontario Human Rights Commission as an originator of systemic applications, but submits that the Bill be amended so as to provide the Commission with accompanying investigative powers.

JFCY supports the inclusion of section 36(1) in the legislation, which extends to the Commission the power to file an application with the Tribunal where it perceives infringements "of a systemic nature." Education cases, specifically, lend themselves to the systemic approach in human rights enforcement, as evidenced by the Toronto District School Board settlement.[4] Another example that illustrates the need for systemic and group applications from the Commission is its decision in January of 2004 to refer an unprecedented 121 autism-related complaints to the Human Rights

[4] Following a Commission-initiated complaint against the Board, the parties reached a settlement which dealt with the application of safe school provisions of the *Education Act* as well as its regulations and related TDSB policy, recognizing the disproportional impact on racialized students and students with disabilities. See, "Human Rights Settlement Reached with Toronto District School Board," Ontario Human Rights Commission, Backgrounder, November 14, 2005.

Tribunal of Ontario.[5] Therefore, affirming the Commission's ability to pursue systemic complaints is an important mechanism for protection of vulnerable applicants like special education students. The failure, however, to maintain the Commission's investigative powers in relation to these claims seriously undermines its role as overseer of systemic discrimination. The Commission already possesses valuable expertise in investigating and substantiating systemic claims, including the ability to recognize, refine or confine its investigation to the discovery of relevant documents and records. Accordingly, we submit that the proposed legislation accord the Human Rights Commission the explicit right to investigate systemic matters and appropriate powers, such as reasonable inspection and inquiry.

4. Training of Ontario Human Rights Tribunal Members

Submission VII: ***JFCY submits that members of the Ontario Human Rights Tribunal should be provided with sufficient expert resources to assist in education matters that may come before the Tribunal.***

JFCY is aware of how lengthy hearings can be when the Tribunal is dealing with education matters. The complexity of education systems and how they work, specifically as to special education cases, necessitates the instruction of these human rights decision-makers on such matters as IPRC[6] procedures or what a "placement" is under the *Education Act*. With that in mind, JFCY recommends that the Tribunal have appropriate expert resources available for its members, so as to ensure efficient and good decision-making in regards to education matters. Furthermore, we submit that new tribunal members be selected by a strict screening process which ensures that members are highly familiar with or sensitive to education issues and a children's rights perspective.

5. Disability Rights Secretariat

Submission VIII: ***JFCY recommends that the Disability Secretariat within the Ontario Human Rights Commission contain a specialized unit for disseminating public information on disabilities within the education system.***

JFCY heralds the creation of a Disability Rights Secretariat under the new human rights regime. Under *section 31(4)*, at the direction of the Chief Commissioner, the Secretariat would undertake, direct and encourage research, make recommendations and facilitate the development of programs of public information and education to promote the elimination of discriminatory practices that infringe rights under the *Code*. With the implementation of a direct access model, however, JFCY anticipates

[5] These autism complaints against various Government of Ontario ministries, including education, allege discrimination on the basis of disability in accessing services. Ontario Human Rights Commission, news release, March 2, 2004.

[6] Identification, Placement and Review Committee.

that the Tribunal will be inundated by special education cases, where applicants will claim discrimination on the basis of educational disabilities and a lack of adequate accommodation.[7] In light of the Secretariat's foreseeable exposure to these issues, and given its mandate to reduce discrimination through the non-litigious method of public education, it is our submission that the Secretariat should contain a specialized unit with an acute understanding of disability within the education system.

6. Concurrent Civil Proceedings and Application Time Lines

Submission IX: ***JFCY recommends that human rights applications dealing with children and educational matters should be fast-tracked through the human rights system, and that the Bill be amended to ensure that children and youth who file an application with the Tribunal will be assured a hearing within 60 days of filing or given priority in scheduling.***

Submission X: ***JFCY proposes that the Bill be amended so as to ensure that applications are not barred from the Tribunal where civil or administrative proceedings have already been commenced.***

Section 35(5) of the legislation bars a human rights application before the Tribunal if a civil proceeding has been commenced in a court and until appeal rights have expired. As observed by Mary Cornish, this particular provision could cause significant delay "that would be measured in years." [8] The complexity of education cases magnifies this concern regarding timely access to justice. More so than with adult applicants, justice delayed for a child in human rights proceedings can be justice denied.[9] As such, there is a need to facilitate dual processes, or at least, expedite cases involving children and youth. Special education cases, in particular, involve a dynamic where child applicants are attempting to challenge the lack of accommodation and educational services without too much prejudice or disruption to their academic advancement, social network or learning. Therefore, it is our submission that cases dealing with a child's right to education or access to

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[7] Education is a service which must be provided in a manner that is non-discriminatory under the Ontario Human Rights Code. With respect to students with disabilities, for example, this means that rule-breaking that could lead to suspension or expulsion for a student without a disability cannot be applied in the same way to a student with a disability if the misconduct is related to the disability. Thus it is discrimination to suspend a student with Tourette Syndrome for swearing at a teacher. The student must be accommodated to the point of undue hardship.

[8] Mary Cornish and Fay Faraday, "Responding to Bill 107 – Issues to Consider," (May 5, 2006) Cavalluzzo Hayes Hilton McIntyre & Cornish, LLP, at p.34.

[9] The Ontario Court of Appeals has recognized that there is a particular need to conclude youth court proceedings without unreasonable delay, as the ability of a young person to appreciate the connection between behaviour and its consequences is less developed than an adult's and the "effect of time may be distorted." See, *R. v. M. (G.C.)* [1991] O.J. No. 885, at p. 230, affirmed in *R. v. R.(T.)* [2005] O.J. No. 2150, at p. 650-651. See also, subsection 3(1)(b)(v) of the *Youth Criminal Justice Act*.

appropriate educational programs and services should be fast-tracked within the human rights system and not barred from appropriate parallel proceedings.[10]

Children suffering the deleterious effects of discrimination or lack of accommodation within the school system may not be well-served by those provisions of the legislation that bar applications where there are concurrent civil proceedings.[11] Human rights complaints have been a necessary compliment to the pursuit of those administrative and civil proceedings available under the *Education Act*, whether an appeal to the Ontario Special Education Tribunal or an application for judicial review before the Divisional Court.[12] First, remedies available at a judicial review, like mandamus, cannot address to any satisfaction any damage to human dignity. Second, it is not clear to us that accommodation issues can be properly raised before an education tribunal, where programs and services are typically not considered by the school board at a special education tribunal. On appeal, it is strictly the province of a human rights complaint.[13] Third, we find it has been hard to raise human rights issues at school board hearings, observing in the past a reluctance on the part of boards and trustees hearing education appeals to address any human rights issues that may arise in a special education or school discipline case.[14]Some of that reluctance

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[10] Concerns about the use in civil proceedings of evidence obtained through the human rights investigative and hearings process can be adequately addressed through section 13 of the Charter of Rights and Freedoms and the granting of derivative use immunity in civil proceedings. See, e.g., *Belanger v. Caughell* (1995), 22 O.R. (3d) 741 (Ont. Gen. Div.)

[11] Additionally, while Bill 107 may not automatically bar applications to the Tribunal where concurrent claims are made before other administrative tribunals, the potential for delay is there. Sections 40 and 41 allow the Tribunal to defer its processes or dismiss such an application if it finds that the other administrative tribunal has appropriately dealt with the substance of the human rights claim. Proposed subsection 41(1)(g) carves out for the Tribunal a much more limited right to dismiss claims that may arise before different adjudicative bodies, and appears to provide both the applicants and the Tribunal with greater flexibility in determining how to proceed where tribunals may have overlapping jurisdiction. The legislation directs the Tribunal to look at how the human rights issue was, in fact, dealt with on the merits. Thus, even though our experience leaves us with the opinion that education tribunals do not lend themselves to the exploration of a student's human rights complaint, the Tribunal is directed to entertain such a claim where the education tribunal has ignored any human rights issues.

[12] It has been our experience that increasing numbers of students, identified or otherwise, have been denied access to or excluded from school under section 306 of the *Education Act*, a provision that affords no appeal rights upon its imposition. The only recourse for students seeking review of these exclusions, if there are allegations of discrimination and lack of fairness, is either through the initiation of a civil proceeding by way of judicial review or a human rights complaint. See, *K.B. and T.M.*. Case No. 55/06, Divisional Court, Ontario Superior Court of Justice, where two high school students are proceeding on an application for judicial review of a decision by the principal and TDSB to exclude and transfer these students under subsection 265(1) and subsequently section 305 of the *Education Act* R.S.O. 1990 c. E.2. While the underlying incident occurred in December 2005, the students have not yet returned to school and while proceedings were initiated at the Commission, nothing is going forward at this point.

[13] Section 26(1) of O.Reg. 181/98 provides for parent appeals of IPRC decisions on placement but not on IPRC recommendations on special education programs and services.

[14] The school boards do not have any expertise in human rights enforcement, although a recent decision from the Supreme Court of Canada clarifies that an administrative tribunal like the Special Education

could be attributed to the fact that school board tribunals sit in judgment of their own policies and staff.

Limiting the avenues for redress or the timely access to justice is not the solution. Proceeding sequentially on human rights claims is essentially a denial of accessibility for child applicants. At the least, what is needed is an expedited human rights complaint process for children. Therefore, amendments to Bill 107 should ensure that children and youth who file a discrimination application seeking direct access to a hearing before the Tribunal will be assured one within 60 days of filing their application or given priority in scheduling. To that end, the legislation should also impose enforceable timelines for major steps in the Tribunal proceedings.

Tribunal has the authority to decide whether there has been a breach of the Ontario Human Rights Code. See, *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14.

Summary of Recommendations by Justice for Children and Youth

I. *Justice for Children and Youth supports an **adequately-funded** direct access model for Ontario's human rights system.*

II. *JFCY recommends that the Bill be amended so as to require the Ontario Human Rights Tribunal to provide reasons for dismissal of any applications.*

III. *Publicly-funded legal assistance should be provided to all human rights applicants regardless of means, and recommends that the Bill be amended so that the Human Rights Legal Support Centre is established and enshrined directly within the legislation.*

IV. *Standing before the Ontario Human Rights Tribunal should be accorded to all individuals whose human rights have been infringed, including older children and those children who are able to communicate their wishes, needs and views.*

V. *Bill 107 should be amended so as to allow for representative and group applications to the Tribunal.*

VI. *JFCY supports the role designated to the Ontario Human Rights Commission as an originator of systemic applications, but recommends that the Bill be amended so as to provide the Commission with accompanying investigative powers.*

VII. *Members of the Ontario Human Rights Tribunal should be provided with sufficient expert resources to assist in education matters that may come before the Tribunal.*

VIII. *The Disability Secretariat within the Ontario Human Rights Commission should contain a specialized unit for disseminating public information on disabilities within the education system.*

IX. *Human rights applications dealing with children and educational matters should be fast-tracked through the human rights system, and the Bill should be amended to ensure that children and youth who file an application with the Tribunal will be assured a hearing within 60 days of filing or given priority in scheduling.*

X. *Bill 107 should be amended so as to ensure that applications are not barred from the Tribunal where civil or administrative proceedings have already been commenced.*