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B.C. Human Rights Tribunal Changes – Will They Be Enough?

On August 26, 2011, the B.C. Human Rights Tribunal reached out to its stakeholders for feedback and recommendations with respect to any issues or concerns. A broad invitation[1] indeed. However, the invitation is in the context of a request – it is not clear from whom – that the Tribunal "undertake a broad review of its policies, procedures and practices with a view to assessing and improving its process from a variety of perspectives". While any review designed to improve the Tribunal's processes is welcomed, the employer community might well be concerned, given what has occurred over the last year, that hoped-for amendments to the *Human Rights Code* may end here, with a review of Tribunal processes.

In the spring of 2010, there was growing dissatisfaction within some segments of the employer community regarding the work of the Tribunal. Views ranged from a concern that the Tribunal's employment related decisions were not reflective of the realities of the workplace and did not sufficiently take the employer's interests into account, to a more extreme view that the Tribunal generally approached employment discrimination complaints from an anti-employer perspective. There were some in the employer community who argued for the non-reappointment of then Chair of the Tribunal, Heather MacNaughton, while others supported the work of Chair MacNaughton and the Tribunal generally, but agreed that there were problems with forum-shopping and overlapping jurisdiction that required a legislative fix.

In June 2010, the Ministry of Labour asked the British Columbia Law Institute to undertake a brief study of the merits of establishing a "Workplace Tribunal for British Columbia" that would adjudicate all employment related disputes. While the concept put forward by the Ministry was that a single tribunal might be created to deal with all disputes adjudicated by the Labour Relations Board, the Employment Standards Tribunal, and the Human Rights Tribunal, the impetus of the idea was clearly employer concerns relating to the Human Rights Tribunal and its adjudication of employment related complaints.

The BC Law Institute began a consultation process over the summer and early fall; a consultation process that was highly criticized by human rights advocates and trade union counsel as being inadequate.

Concerns raised by those advocating for a super tribunal were founded on the following arguments:

- Greater integration of workplace decision-making;
- Avoiding duplication of proceedings, enhancing consistency of decision-making, eliminating the overlap in jurisdiction between tribunals;
- The efficiency of dispute resolutions;
- Timeliness of remedies;
- Appropriate expertise;
- Independence and quality of adjudication;
- A more affordable Tribunal system.

When the Law Institute study got underway, there was no clear view as to whether the idea of a Workplace Tribunal was something the Government was seriously interested in or whether the study was a way to, temporarily at least, put the issue on the back burner. The uncertainty around

[1] http://www.bchrt.bc.ca/news/policy-procedure-review.pdf

the Government's intentions was heightened in early July 2010 when it announced that it would not reappoint Heather MacNaughton whose term as Chair expired on July 31, 2010. The Government posted an ad on its Resource and Development Office website seeking a *part-time* Chair, a move that fuelled speculation that the Government might well remove workplace human rights disputes from the jurisdiction of the Tribunal. On July 22, 2010, Bernd Walter was appointed *Acting Chair* for a six month term effective August 1, 2010, which was later extended to a twelve month term. Again, the speculation was that Mr. Walter, who had no background in human rights adjudication, was appointed to a caretaker role, while the Government awaited the Workplace Tribunal study.

Meanwhile, the Law Institute's work continued. In a comprehensive report[2] dated October 31, 2010, the Law Institute canvassed the current workplace dispute resolution system in British Columbia and compared it to other Tribunal structures in the United Kingdom, Germany, Sweden, the European Union, New Zealand and Australia as well as in other provinces of Canada.

In the end, the Law Institute made no recommendation for change and concluded that there were significant issues in the detail of how a Workplace Tribunal would operate that would require further analysis. For example, what body would have jurisdiction over workplace human rights matters where the union was alleged to be violating the human rights of an individual member, or where the collective agreement itself was alleged to be discriminatory? What would be the grounds of review? The report concluded by saying that:

> "The further exploration of any reform should ideally succeed or be embedded within a process that involves first an investigation of the problems with the existing system…Any significant legislative change in the institutional structure for the resolution of workplace disputes should not be undertaken without full, open, and informed public consultation."

However, despite not making a recommendation for change, the Law Institute clearly articulated the concern, repeated over and over by the employer community, that workplace disputes in a unionized context should be resolved exclusively by grievance arbitration and that the existing overlap in jurisdiction between labour arbitration and the Human Rights Tribunal should be eliminated. The argument for eliminating overlapping jurisdiction was based not only on the cost and efficiency of dispute resolution but also, more substantively, on the different ideological underpinnings of human rights and labour relations.

The *Human Rights Code* defines and protects individual rights, whereas labour relations are founded on collective rights. Where those ideologies intersect, a labour arbitrator has the recognized expertise to exercise exclusive jurisdiction to resolve the dispute. This position is well supported by judicial authority. The Courts have adopted a highly deferential standard of review to labour arbitration decisions. The expertise of Human Rights Tribunals is not given the same judicial recognition, in part because of a lack of a strong privative clause in the *Human Rights Code*. The idea of exclusive jurisdiction in labour arbitrators to resolve all disputes arising from a collective agreement was firmly established by the Supreme Court of Canada in *Weber v. Ontario Hydro* [1995] 2 SCR 929. The Supreme Court of Canada has also recognized a labour arbitrator's expertise to apply human rights legislation, the substance of which is

[2] http://www.bcli.org/sites/default/files/BCLI_Workplace_Dispute_Resolution_Report.pdf

implied into every collective agreement: *Parry Sound (District) Social Services Administration Board v. OPSEU, Local 324* [2003] 2 SCR 157. Thus, the Courts have recognized the exclusive jurisdiction of labour arbitrators over employment disputes, including human rights complaints, in a unionized workplace. For the Courts, there is no issue of whether to defer or not. There is no overlap in jurisdiction.

Similarly, under the *Employment Standards Act*, where a collective agreement is in place, all issues arising out of the application of the *Act* in a unionized workplace must be resolved by the grievance arbitration process. Again, there is no question of overlapping jurisdiction or any possibility of forum shopping. Yet in the area of human rights, as between a labour arbitrator and the Human Rights Tribunal, the possibility of forum shopping prevails and shared jurisdiction remains.

While it is true that section 27 of the *Human Rights Code* empowers the Tribunal to defer to other proceedings that are underway, such a deferral requires that an application be made, usually by the employer, and the Tribunal's decisions indicate that it will generally defer only where a grievance is actually filed and grievance proceedings are underway. Once the grievance procedure has been completed with an arbitration decision, a further application is then required to request that the Tribunal declare that proceeding with its own process would be unnecessary because the "the substance of the complaint" has already been "appropriately dealt with in another proceeding". Why should an employer be put to the expense of two applications, which involve the preparation of affidavits describing the parallel proceedings, and why should the Tribunal have any jurisdiction to determine whether or not the arbitration proceedings provided an adequate remedy?

The very existence of a grievance procedure, with the attendant exclusive jurisdiction of an arbitrator to consider all matters arising from the collective agreement (*Weber*) including human rights issues (*Parry Sound*) leads to the obvious conclusion that the *Human Rights Cod*e should be amended to preclude access to the Tribunal where a collective agreement is in effect.

The report of the Law Institute acknowledged that the concerns over overlapping jurisdiction and forum shopping could be addressed by legislative reform short of establishing a "workplace Tribunal":

> "If the problem is purely the overlap in jurisdiction, regardless of duplication of proceedings, there are a number of alternatives to the proposed model that would address overlap, such as legislative reform that either granted arbitrators exclusive jurisdiction over workplace human rights disputes in the unionized sector, or rules that require parties to elect a forum and effectively choose between pursuing a discrimination claim through the Human Rights Tribunal or a labour arbitrator. Both of these options could be accomplished with less complex reform to the current workplace dispute resolution framework than is required to implement the proposed model. Further research and analysis is required to properly consider these options, which met mixed responses from stakeholders."

Legislative reform to grant arbitrators exclusive jurisdiction over workplace human rights disputes is clearly the preferred result. Unionized employees do not have an election to seek redress in the Courts, or to have the Employment Standards Branch adjudicate their complaints. Labour arbi-

trators have exclusive jurisdiction over disputes arising from the collective agreement. There is no logical reason why an arbitrator's exclusive jurisdiction should not be recognized where a workplace human rights dispute arises.

It is clear that the Government has no intention, at this time, of creating a Workplace Tribunal. Its appointment of Bernd Walter from Acting Chair to Chair on July 22, 2011 is perhaps the clearest statement of that intent. Less certain is whether the Government would be prepared to amend the *Human Rights Code* to place exclusive jurisdiction over human rights disputes concerning unionized employees with a labour arbitrator. The Government has recently appointed as members to the Tribunal, Norm Trerise and, more recently Bob Blasina, both of whom have extensive experience in labour relations, perhaps intending to quell some of the concerns employers raised in the BC Law Institute study. It may be that these appointments and the recent call for submissions relating to the Tribunal's policies and procedures signal that Government does not intend to amend the *Code* to eliminate the problem of overlapping jurisdiction, or at least not before an election.

From a business perspective, the case for eliminating duplicate jurisdiction and forum shopping is well supported judicially and fiscally. The Supreme Court of Canada has unequivocally ruled on both the expertise and the jurisdiction of a labour arbitrator to deal with all matters arising under a collective agreement including human rights. The economic savings of taking human rights complaints made by unionized employees out of the jurisdiction of the Tribunal are obvious. Whether the Government is prepared to fix the problem remains to be seen.

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