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**IAVGO'S Submission on the Ministry of Labour's
Consultation Paper on a New Tribunal For Ontario's Workplaces**

Introduction

The Industrial Accident Victims Group of Ontario (IAVGO) is a non-profit community legal clinic located in Toronto, but providing service to workers throughout Ontario. We have been assisting injured workers since 1975, and therefore are well acquainted with the legislation, policy and appeals systems in workers' compensation over the last quarter century.

The Ministry's consultation process

At the outset, we wish to clearly state our strong opposition to the Ministry's proposal in its present form. Our disagreement with it arises from both procedural issues related to the Consultation Paper and in-person consultations, and from substantive issues which we have only highlighted in this submission, due to the short time frame set by the Ministry.

First, the Ministry's proposal is a drastic change to the administrative justice system in Ontario. This type of change demands that the problems and solutions be studied by independent experts, including administrative law experts. Instead we have been presented with a general, but radical proposal for change to which we are expected to respond in an extremely short time frame. Further, we have been advised by the Ministry that the legislation is to be tabled in June 2001, with no further opportunity for input prior to first reading. The only conclusion available, is that the Ministry has no sincere interest in improving administrative justice for Ontarians; rather it is being directed by the government's political agenda.

Second, the proposals set out in the Consultation Paper are so vague as to be meaningless. This lack of specificity makes it impossible for stakeholders to understand the impact, both positive and negative, on administrative justice for Ontario. One example of this phenomenon is evidenced by the Minister's public statements at the consultation meeting attended by representatives of our legal clinic on March 28, 2001

in Toronto. At that meeting, Minister Stockwell indicated that in order to avoid delays in accessing a Unified Tribunal that the Ministry “may do away with” the Human Rights Commission. Further he stated that he has asked the agency to speed up decision-making, but that it may require legislation “along the lines of the employment standards order”. It is clear that the proposal is a moving target, and the stakeholders have been blindfolded by the complete lack of transparency in this proposal.

As a result of our grave concerns regarding the process currently underway, IAVGO is demanding that prior to the introduction of any legislation, an independent expert commission study the idea of merging these tribunals, and that this commission provide for full, open public hearings.

Substantive problems with Unified Tribunal

Purported benefits are illusory

The Consultation paper refers to a number the reasons for the proposal, yet there is no clear evidence of most of these problems. Even if we accept that all the purported problems exist, the proposed Unified Tribunal would not solve them, and would in fact add to the existing delays in appeals.

- *Reducing Uncertainty* - The workers with whom we come into contact, do not “confusion” as a concern. While there may be some employers or workers who are unsure of which agency handles which issues, our experience is that they are quickly referred to the appropriate agency. Furthermore, if any confusion exists it is only at the level of initial adjudication, **not** about where to appeal. Each agency must spell out in writing its appeal procedures, hence confusion is most unlikely. The Unified Tribunal is only a merger at the appeal level, not at the initial adjudication level, thus any uncertainty at the initial stage remains under this proposal.
- *More Consistent Labour Adjudication* - We are not aware of any concerns with respect to inconsistent adjudication of labour issues. Each of areas of law at issue, labour relations, workplace safety and insurance, human rights and employment standards, have different legislative purposes. Although decisions under these different statutes with different remedies may appear to outsiders as “inconsistent”, they are entirely consistent with the specialized jurisprudence which has developed over years. The Ministry’s proposed Tribunal will continue to have to apply this jurisprudence under the separate statutory regimes which would continue to exist.
- *Limit Forum Shopping* - There is very little overlap between the current tribunals: the main area of overlap on workplace disputes is with private grievance arbitration which is not addressed. In those few cases where there is overlap, most tribunals handle these through the deferral and referral process. The

Ontario Law Reform Commission's 1995 report entitled "Report on Avoiding Delay and Multiple Proceedings in the Adjudication of Workplace Disputes" endorses the current referral and deferral process, and **rejects** the merger of workplace tribunals because of the loss of expertise which would inevitably result. The Ministry of Labour's proposal is in direct contradiction to the Commission's clear and well-reasoned recommendation regarding this very issue.

- *Timeliness* - The proposal asserts that there will be less delays with a Unified Tribunal. However, it is clear to us that the delays experienced in some of the tribunals now will be much worse under a Unified Tribunal. First, under the present law, a worker filing an employment standards claim and a workplace safety and insurance claim will reach the initial adjudication and appeal processes at different times. If they are to be dealt with together as the proposal indicates, the claim resolved first will have to await the resolution of the claim in the slower process. Second, with the addition of new areas of law to be dealt with in one appeal, the length of hearings is certain to grow. Right now, the majority of WSIAT hearings are only half day hearings, while at the OLRB and the Board of Inquiry typical cases involve multiple days of hearing. Again matters currently quickly heard, will have to await the completion of the slowest hearing process. Third, because the numerous statutory regimes under a Unified Tribunal's jurisdiction would involve different jurisprudence and remedies, the adjudicators will need more time to hear and decide how these interact.

Access to justice is impeded

Despite the claim asserted in the Consultation paper that the proposed Tribunal will enhance access to justice, our experience with representing low income Ontarians is that several parts of this proposal will have the exact opposite effect.

- *Financial barriers* - The introduction of application fees (a.k.a. user fees) and the awarding of costs is a sure way to cut down on the number of appeals filed by low income individuals. Notably, in the Consultation Paper's section entitled "access to justice", there is no discussion of the impact of the imposition of fees or cost awards on workers' access to justice. With respect to workplace safety and insurance, employment standards, pay equity, and human rights, imposing costs for claimants in social benefits schemes is completely contrary to the purposes of the legislation. Any such initiative will act as a barrier to access to justice.
- *Loss of expertise* - Although the Consultation Paper asserts that expertise will continue in a Unified Tribunal, the logistics of how this is possible are never spelled out. Indeed, with over twenty different statutes that could apply in a hearing before the Unified Tribunal, it is highly improbable that the adjudicators will be experts on all issues before them. One of the main reasons each of these

tribunals came into existence was to enhance the specialized adjudication required under the relevant statutory regime. With the inherent dilution of expertise in a Unified Tribunal, there will be less finality in adjudication, more review by the court, and a loss of predictability for stakeholders and increasing costs for all in the system.

- *Independence of Tribunal* - The Minister has stated that he does not anticipate that the appointees to the new Tribunal would come primarily from the current members of the existing tribunals. Yet exactly how the appointees will be selected is left unstated, leaving many of us very concerned about the reason for this purging of the existing pool of expert and experienced adjudicators. This government's record to date on the handling of adjudicative appointments is poor (i.e. *Hewat v. Ontario* (1998) 51 O.R. (3d) 161 (C.A.); *C.U.P.E. v. Ontario* (2000), 51 O.R. (3d) 417 (C.A.)), which makes the appointment process for this proposal very suspect. Any attempt to make "political" appointments rather than those based on expertise and experience will thwart access to justice for obvious reasons; poor adjudication and the lack of legitimacy of the Tribunal.
- *Increased complexity of hearings* - The move to a Unified Tribunal modelled on the OLRB, and expanded to cover human rights and all areas of labour law, will mean an increase in the formality and complexity of appeals. At present, many workers and employers are quite able to represent themselves capably in simple matters regarding employment standards or workplace safety and insurance. This will no longer be the case: to properly present their case, involving more statutes, and more formal procedures, parties will have to hire lawyers, a costly endeavour, which will act as a barrier to many workers and small employers.

Problems specific to Workplace Safety and Insurance matters

- *Expertise on legal, medical and insurance issues will be compromised.* In the average appeal case, two of the three of these issues will arise. Furthermore, at the WSIAT adjudicators require knowledge of four different versions of the Act, depending on the accident date. Furthermore, each later Act amends in part an earlier Act or Acts, thus the interactions among these Acts is part of the required expertise in each case. This need for expertise in this area of law was one of the key reasons for the establishment of the WCAT in 1985. Notably, before introducing the legislation (Bill 101) the government at that time took several years to study the issue, including an independent study by an expert in the field and a very thorough White Paper. Removing the experience and expertise in this area of law, will certainly impede access to justice and impair the quality of decision-making for the stakeholders.
- *Inquisitorial method of adjudication is essential.* The inquisitorial method employed by the WSIAT is tailored to the highly complex issues in appeals. Issues of adequacy of medical evidence and applicability of Board policy are

common at the WSIAT, and it is frequently the adjudicators who raise these issues. The adversarial method of adjudication upon which the other tribunals rely, is incompatible with the nature of evidence and law in workplace safety and insurance. The "one size fits all" approach in a Unified Tribunal will not work for appeals from the WSIB.

- *OWA should not be eliminated.* The Office of the Worker Adviser is an essential service for non-unionized injured workers. The OWA's experience and expertise is well-recognized. In 2000, 15% of workers were represented by Worker Advisers from the OWA at the WSIAT alone. The OWA on average represents approximately 3,000 workers each year. As well, outside of the greater Toronto area, the many regional OWA offices are often the only local resource for workers.
- *OWA and OEA should remain independent of WSIB.* Finally, any attempt to return to the "bad old days" where Advisers were part of the Workplace Safety and Insurance Board is foolish. There is an inherent conflict of interest for representatives of workers or employers to be employed and managed by the very same organization whose decisions an adviser is attempting to overturn.

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