

**COURT ORDERS REGISTRAR OF HUMAN RIGHTS COMMISSION TO SUBMIT TO
EXAMINATION REGARDING COMMISSION DECISION**

Payne and Ontario Human Rights Commission
An Unreported Decision of the Ontario Court of Appeal in a Matter
Heard on September 8, 1999

Facts

Ms Payne made an anti-Semitic remark during a television interview. She apologized publicly for her statement, but refused to apologize to her co-workers. Her refusal to apologize to her coworkers created tension in the workplace.

Eleven months after Payne made the remark, she was dismissed from her employment. She complained to the Human Rights Commission that she was discriminated against on a variety of grounds, including that she was a black woman.

The Human Rights Commission investigated the complaint and decided not to refer it to a Board of Inquiry.

Payne initiated judicial review proceedings of the Commission's decision, during the course of which she sought to examine the Registrar of the Commission. The Divisional Court upheld a Motions Court decision preventing her from examining the Registrar.

Payne appealed the Divisional Court's ruling.

Court of Appeal

The majority of the Court of Appeal held that Payne should be permitted to examine the Commission's Registrar pursuant to Rule 39.03 of the Rules of Civil Procedure. However, the scope of the examination was restricted.

Under Rule 39.03, witnesses may be examined before the hearing of an application. The Court held that a party to an application for judicial review is entitled to adduce evidence by way of examination provided that:

1. the examination is not being used for an ulterior or improper purpose and does not constitute an abuse of the Court's process;
2. the evidence is not specifically excluded by statute or other legal principle; and
3. the evidence is relevant to an issue properly raised on the application.

1. Ulterior Purpose

It would constitute an ulterior purpose and an abuse of the Court's process to use Rule 39.03 simply to conduct a general discovery, since neither the Rules of Civil Procedure nor the *Judicial Review Procedures Act* provide for examinations for discovery on Applications for Judicial Review. In the Payne case, the Court of Appeal concluded that the proposed scope of the examination constituted an attempt to obtain general discovery. Nonetheless, the Court concluded that a more focused examination should be permitted.

2. Limiting Legal Principle or Statute

The principle of deliberative secrecy requires that an examination not be used to delve into the actual decision making process of the Tribunal. Deliberative secrecy protects Tribunal members from unduly burdensome examinations, protects the need for finality, and protects the process of debate, discussion and compromise. With respect to the Payne case, the Court noted that the Commission's process does not include a discrete deliberative phase. Accordingly, it is difficult to determine the extent to which the Commission can shelter its process from disclosure.

The Court found no statutory limitation on the right to conduct a Rule 39.03 examination in the Payne case. The *Human Rights Code* only protects from disclosure "information obtained in the course of an investigation under this Act". It does not generally prohibit examinations of members of the Commission.

3. Relevance

In order to conduct a Rule 39.03 examination, the applicant must demonstrate that the examination focuses on facts relevant to an issue properly raised by way of judicial review. Where the deliberative secrecy of the decision maker is at issue, the necessary factual basis for an examination will be a clearly articulated and objectively reasonable concern that a relevant legal right may have been infringed. Examinations based on conjecture or mere speculation will not override the importance of the principle of deliberative secrecy. However, the principle of deliberative secrecy will be overridden where valid reasons are presented for believing that the process followed did not comply with the rules of natural justice.

In the Payne case, the Court found that there was a valid reason to believe that the Tribunal's process violated Payne's right to natural justice. In particular, an affidavit introduced before the Court raised concerns that the following violations may have occurred:

- Although the Commission has discretion to refuse to proceed with a complaint, the only legitimate factor the Commission can consider in exercising its discretion is whether or not there is merit to the complaint. In the Payne case, Senior Staff allegedly urged the Commission to base its decisions on irrelevant factors such as strategic concerns.
- In advance of the Commission's meeting, which the complainant is not entitled to attend, the complainant is given the Case Analysis Report that will be put before the Commissioners. In response to the Case Analysis Report, the parties are entitled to make written submissions. In the Payne case, Senior Commission Staff allegedly put a different

recommendation to the Commission than the recommendation in the Case Analysis Report. The parties had no opportunity to respond to this recommendation.

- The complainant has a statutory right to be given the Commission's reasons for refusing to proceed with the complaint or refusing to refer it to a Board of Inquiry. This right requires the complainant to be advised of the real reasons for the Commission's decision. In the Payne case, the parties were allegedly not told the real reasons for the decision.
- The Superior Court's inherent powers of judicial review entitle the Court to have a full and accurate record of what went on before a Tribunal whose decision is under review. In the Payne case, the Commission allegedly failed to provide a full and complete record for the purposes of judicial review.

Accordingly, the Court allowed the appeal to enable Payne to conduct a Rule 39.03 examination. The examination was limited to facts relevant to the grounds for judicial review. Specifically, Payne could examine the Registrar as to what documents, facts, considerations or recommendations not already revealed by the Record filed on judicial review were before the Commissioners, to inquire as to whether strategic factors formed a basis for the Commissioners' decision, and to inquire whether there were any reasons for the determination that were not revealed in the reasons given to Payne.