The Law Society of Upper Canada | Barreau du Haut-Canada

Best Practices for Paralegals Appearing Before the Human Rights Tribunal of Ontario

Chaired by:
Grace Vaccarelli
Counsel,
Human Rights Legal Support Centre

September 27, 2010

Continuing Professional Development
The Law Society of Upper Canada/Barreau du Haut-Canada

This work appears as part of the Law Society of Upper Canada's initiatives in Continuing Professional Development (CPD). It aims to provide information and opinion, which will assist lawyers in maintaining and enhancing their competence. It does not, however, represent or embody any official position of, or statement by, the Society, except where this may be specifically indicated; nor does it attempt to set forth definitive practice standards or to provide legal advice. Precedents and other material contained herein is intended to be used thoughtfully, as nothing in the work relieves readers of their responsibility to consider it in the light of their own professional skill and judgment.

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Best Practices for Paralegals Appearing Before the Human Rights Tribunal of Ontario

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Chaired by: **Grace Vaccarelli**
Counsel, *Human Rights Legal Support Centre*

September 27, 2010
9:00 a.m. – 12:30 p.m.

Donald Lamont Learning Centre
The Law Society of Upper Canada
Toronto, ON

SKU# CLE10-01704

Schedule of Events

9:00 a.m. - 9:10 a.m. **Welcome and Opening Remarks**

Grace Vaccarelli
Counsel, *Human Rights Legal Support Centre*

9:10 a.m. - 9:40 a.m. **Update from the Interim Chair**

David Wright
Interim Chair, *Human Rights Tribunal of Ontario*

9:40 a.m. - 10:10 a.m.	**Substantive Overview of the Ontario Human Rights Code and Life of an Application**

Adriana Greenblatt
Staff Lawyer, *Human Rights Legal Support Centre*

Clara Ho
Staff Lawyer, *Human Rights Legal Support Centre*

- Social Area
- Grounds
- Exemptions
- Stages of an Application

10:10 a.m. - 10:45 a.m.	**Guide to Successful Representation Before the Human Rights Tribunal of Ontario**

- Before Filing an Application
- Compelling Pleadings
- Interim Remedies
- Expedited Hearings
- Mediation
- Preparing for a Hearing

Dijana Simonovic
Counsel, *Human Rights Legal Support Centre*

Katherine Ford
Sherrard Kuzz LLP

Jay Sengupta
Vice Chair, *Human Rights Tribunal of Ontario*

10:45 a.m. - 11:00 a.m.	**Coffee Break**

11:00 a.m. - 11:30 a.m.	**Civility in a Tribunal Setting**

- Maintaining (and promoting) civility
- Benefits of civility

Shannon Moldaver
Counsel, Professional Development and Competence
The Law Society of Upper Canada

11:30 a.m. - 12:00 p.m.	**Impact of Other Proceedings -- Deferrals and Dismissals** Bay Ryley Counsel, *Human Rights Legal Support Centre* Amanda J. Hunter *Hicks Morley*
12:00 p.m. - 12:30 p.m.	**Remedies** • Monetary Compensation • Non-monetary Remedies • Remedies for Future Compliance (Public Interest Remedies) • Trends Lori Mishibinijima Staff Lawyer, *Human Rights Legal Support Centre* Paula M. Rusak *Mathews, Dinsdale & Clark LLP*
12:30 p.m.	**Program Ends**

Biographical Summaries of Speakers

(In Alphabetical Order)

Best Practices for Paralegals Appearing Before the Human Rights Tribunal of Ontario

The Law Society of Upper Canada | Barreau du Haut-Canada

Continuing Professional Development

GRACE VACCARELLI

Called to the Bar in 2001. L.L.B., Queens University. Grace is Senior Counsel and Manager of Legal Services at the Human Rights Legal Support Centre. Previously, Grace practised for many years in the community legal clinic system including working at the Advocacy Centre for Tenants Ontario, Kensington-Bellwoods Community Legal Services, Neighbourhood Legal Services, and Tenant Duty Counsel. In those positions, Grace provided direct services to clients with a focus on housing and human rights issues. Grace has also held a number of start-up policy positions including in the Clinic Resource Office of Legal Aid Ontario in 2000, and at the Human Rights Tribunal of Ontario in 2008, during the transition to the current direct access model.

Grace is also the President of the Davenport-Perth Neighbourhood Centre.

Katherine Ford is a lawyer with Sherrard Kuzz LLP and represents employers in all aspects of the employment relationship. She assists employers during the hiring and termination process, with employment contracts as well as with workplace training and education. Katherine is also experienced in litigating before the Courts, the Human Rights Tribunal of Ontario, the Labour Relations Board and before labour arbitrators. She deals extensively with human rights related matters, including issues of workplace accommodation and disability.

Katherine is a Member-at-Large of the National Labour and Employment Section of the Canadian Bar Association, and a member of the Ontario Bar Association. She is called to the Bar in both Ontario and British Columbia.

Katherine has written and lectured for and at industry and client seminars on a variety of employment and labour issues. She is a graduate of the University of British Columbia Law School and holds a Bachelor of Arts, Honours Degree, in Psychology from Queen's University.

ADRIANA GREENBLATT
Staff Lawyer, Human Rights Legal Support Centre

Adriana Greenblatt was called to the bar of Ontario in 2008. She earned her B.A. in International Development/Spanish with Honours from Dalhousie University and her LL.B./B.C.L. from McGill Law School in 2006. During her studies, Adriana completed her legal clinic training at the Montreal Native Friendship Centre and organized numerous human rights workshops as an active member of the McGill Human Rights Working Group. Adriana summered at Project Genesis, a non-profit organization specializing in housing rights and social welfare in Montreal.

Adriana completed her articles at Klippensteins, specializing in public interest litigation. Her work was primarily with Spanish-speaking clients and she was actively involved in developing strategies and drafting pleadings for complex international litigation, as well as working on Ontario Energy Board and Landlord Tenant Board cases.

In the summer of 2008, Adriana joined the Human Rights Legal Support Centre and is currently employed as a Staff Lawyer. Her work at the Centre includes regular appearances in mediations and hearings before the Human Rights Tribunal of Ontario. Adriana is fluent in English, French and Spanish and regularly provides advice to her clients at the Centre in all three languages.

CLARA HO graduated from Queen's Law School in June of 2000 and completed her articles with the United Nations High Commission for Refugees (UNCHR) in Geneva, Switzerland and with a small union-side labour firm in Toronto. She was called to the Ontario Bar in February of 2002.

Clara has worked as a Staff Lawyer at the Metro Toronto Chinese and Southeast Asian Legal Clinic practicing immigration law and other types of clinic law.

In June of 2006, she joined METRAC (the Metropolitan Action Committee on Violence Against Women and Children) as the Legal Director where she delivered workshops and trainings to front line staff at agencies across Toronto working with women and children who have experienced violence. She has done presentations on various legal topics for George Brown College, OAITH (Ontario Association of Interval and Transition Houses), OCASI (Ontario Council of Agencies Serving Immigrants), the Metropolis conference and at other events.

Clara left METRAC in at the end of 2007 and to pursue an opportunity in the Investigations and Hearings Department at the College of Nurses of Ontario. In February 2010, she joined the Human Rights Legal Support Centre as a Staff Lawyer where she represents clients before the Human Rights Tribunal of Ontario in mediations and hearings.

HUMAN RESOURCES
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Amanda Hunter advises clients in both private and public sectors on all labour, employment and human rights issues. She has a particular expertise in the application of the Ontario *Employment Standards Act* and minimum standards legislation in other provinces and under the *Canada Labour Code.* Amanda provides advice on sales of business and other transactions. She also represents employers before the courts, labour arbitrators, the Ontario Labour Relations Board and the Human Rights Tribunal of Ontario.

AREAS OF PRACTICE

Labour Relations, Employment Law, Litigation, Human Rights, Client Training, Universities, Colleges, Education – School Boards, Healthcare, Municipal, Financial Services, Manufacturing, Retail Operations, Media, Technology, Hospitality, Transportation/Automotive, Gaming

RECENT DECISIONS

- *Orr v. Magna Entertainment Corp.,* 2009 ONCA 776 (CanLII)
- *Trent University Faculty Assn. v. Trent University (Yee Grievance),* [2009] O.L.A.A. No. 478
- *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474 (C.A.)
- *CEP, Local 353 v. Atlantic Packaging Products Ltd.,* [2006] O.L.A.A. No. 696
- *Toronto District School Board v. CUPE Local 4400*, [2007] O.L.A.A. No. 399
- *Toronto Transit Commission*, [2008] O.L.R.B. rep. Sept/Oct. 695
- *Brampton Public Library Board v. CUPE, Local 1776*, [2008] O.L.A.A. No. 147
- *Signature Aluminum Canada Inc. v. United Steelworkers, Local 2784*, [2008] O.L.A.A. No. 416

PUBLICATIONS

- "Amendments Made to Temporary Help Agency Bill", *FTR Now*, April 24, 2009
- "Changing a Term of Employment? Notice May Not Be Enough", *FTR Quarterly*, Summer 2008
- "Unbundling the Duty to Accommodate: Is an Employer Required to Bundle Together Work to Create a Position for a Disabled Employee?", 6 Minute Labour Lawyer 2003

YEAR OF CALL

- 1999

EDUCATION

- University of Manitoba, LL.B.
- University of Toronto, B.A.

Lori Mishibinijima
Staff Lawyer
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Lori Mishibinijima is Ojibway-Odawa from Wikwemikong Unceded Indian Reserve, Ontario. Lori obtained her LLB from Osgoode Hall Law School in 2007, and was called to the bar in 2008. She completed the Intensive Program in Aboriginal Lands, Resources & Governments where she was placed at Native Women's Association Canada. Lori completed her articles at Aboriginal Legal Services of Toronto. Currently she is a staff lawyer with the Human Rights Legal Support Centre, where she provides legal advice and assistance to individuals respecting matters of discrimination under the *Ontario Human Rights Code*. Lori sits on the Board of Directors at Native Men's Residence. For the last six years, she has also been a member of the Community Council, a criminal diversion program at Aboriginal Legal Services of Toronto.

Shannon Moldaver is Counsel in the Professional Development & Competence department at the Law Society of Upper Canada. She is responsible for program planning for continuing professional development with a specific focus on civil litigation. Previously, Shannon was Counsel in the Complaints Resolution Department, investigating and mediating disputes arising out of complaints against lawyers in Ontario. Prior to joining the Law Society in 2002, Shannon practised in the areas of civil litigation and employment law in a boutique law firm in downtown Toronto and subsequently went on to run her own practice. Shannon holds a Master's degree in international relations and an LL.B. from Osgoode Hall Law School.

Shannon has lectured on behalf of the Law Society on issues related to professionalism, civility, client service and communication.

MATHEWS DINSDALE

PAULA M. RUSAK

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Practice Areas

Labour Relations
Human Rights
Collective Agreement Negotiation and Administration
Grievances and Arbitration
Employment Standards

Industry/Sector Experience

Social Agencies (Women's Shelters, Housing and Community Living Agencies)
Municipal Government
Manufacturing
Warehousing and Distribution
Hospital, Long Term Care and Medical Services
Airport Authorities

Education

Sir George Williams University, Montreal, Quebec, B.A. (Hons.)
McGill University Law School, Montreal, Quebec, B.C.L.
McGill University Law School, Montreal, Quebec, LL.B.

Bar Admission

Law Society of Upper Canada (Ontario), 1980

Professional Affiliations

Canadian Bar Association
Ontario Bar Association
Labour Law Specialty Committee, Law Society of Upper Canada, Founding Member, Committee Member, 2004

Biography

Paula provides advice on a full range of employment related matters to employers and regularly appears before various Administrative Tribunals. Paula is regularly involved, either in an advisory capacity or as a spokesperson, for employers in collective bargaining with Unions.

Paula also conducts independent third party investigations of human rights complaints and provides proactive training to employers, supervisors and employees with regards to accommodation and other Human Rights issues as well as disciplinary matters and other issues arising from the implementation of the Collective Agreement.

Paula is currently one of the Employer Representatives on the Human Rights Tribunal of Ontario Practice Advisory Group. In that capacity, meetings are held with the Tribunal Chair and other stakeholders to review various issues arising from and relating to the amendments to the *Ontario Human Rights Code.*

Paula is recognized as one of the leading labour relations lawyers in Canada by the *Best Lawyers in Canada*.

Bay Ryley

Bay Ryley is counsel at the Human Rights Legal Support Centre, where she represents applicants with their cases before the Human Rights Tribunal of Ontario. She has also practised in the area of human rights as Counsel at the Ontario Human Rights Commission and the Constitutional Law Branch (Ministry of the Attorney General of Ontario). Her public law experience also includes involvement with public inquiries, including the Walkerton Inquiry and the Toronto Computer Leasing (MFP) Inquiry.

Jay Sengupta

Ms. Sengupta holds an LL.B. from Osgoode Hall Law School. She has worked extensively in Ontario's community legal clinic system, providing advice and representation to members of low-income communities on matters involving social assistance, housing, criminal injuries compensation, immigration, workers' compensation, human rights, and employment law.

Ms. Sengupta has also engaged in community development, law reform and public legal education initiatives on behalf of the communities for whom she has worked. Her community involvement has included serving on the boards of the Hamilton Social Planning and Research Council and the Threshold School of Building.

BIOGRAPHY

Dijana Simonovic
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Background

Dijana Simonovic attended the University of Manitoba prior to moving to Ontario to undertake her legal studies at Osgoode Hall Law School at York University in Toronto. She was called to the Bar of Ontario in 2002.

Areas of Practice

In her current position, Ms. Simonovic is senior legal counsel at the Human Rights Legal Support Centre where she assists Applicants throughout all stages of the human rights Application process, including representing Applicants at mediations and hearings before the Human Rights Tribunal of Ontario.

Professional Experience

After articling at Green & Chercover, a union-side labour law firm, and working in-house at the Canadian Autoworkers Union (CAW-Canada), Ms. Simonovic joined the boutique law firm of Sanson & Hart where she practised employment and human rights law for several years. Ms. Simonovic returned to Green & Chercover in 2005 where her practice centred on the representation of trade unions, associations and individual workers in the areas of labour, employment, human rights, civil and criminal law. Ms. Simonovic has regularly appeared before arbitration boards, labour boards, human rights tribunals, professional discipline hearings and other administrative tribunals.

Professional Activities

Ms. Simonovic is a past member of the Association of Human Rights Lawyers and past Program Coordinator for the Constitutional, Civil Liberties and Human Rights Section of the Ontario Bar Association. She has spoken with regularity to community groups, professionals, and law students about labour, employment and human rights law in Canada.

David A. Wright has been the Interim Chair of the Human Rights Tribunal of Ontario since November of 2009, and a Vice-Chair at the Tribunal since 2007. He completed his B.A. in History at the University of Windsor in 1994 and his LL.B. and B.C.L. at the Faculty of Law of McGill University in 1998. At McGill, he received the Aimé Geoffrion National Programme Gold Medal for the highest average in the graduating class. Mr. Wright articled as law clerk to Madame Justice Claire L'Heureux-Dubé of the Supreme Court of Canada in 1998-99. He completed his LL.M. at New York University in 2000. From 2001-07, he practiced labour, administrative, human rights law, and civil litigation at a Toronto law firm. He taught administrative law at Osgoode Hall Law School as an adjunct professor in 2002. He is the author of several law journal articles on administrative, labour, and constitutional law and speaks frequently on issues of human rights, administrative, and labour law. Mr. Wright is the past Chair of the Constitutional, Civil Liberties and Human Rights section of the Ontario Bar Association.

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Adriana Greenblatt
Staff Lawyer, *Human Rights Legal Support Centre*

Clara Ho
Staff Lawyer, *Human Rights Legal Support Centre*

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Dijana Simonovic
Counsel, *Human Rights Legal Support Centre*

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Katherine Ford
Sherrard Kuzz LLP

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Shannon Moldaver
Counsel, Professional Development and Competence
The Law Society of Upper Canada

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Co-Written and Co-Presented by:

Bay Ryley
Counsel, *Human Rights Legal Support Centre*

Amanda J. Hunter
Hicks Morley

Co-written by:

Julie-Anne Cardinal
Student-at-Law
Hicks Morley

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Lori Mishibinijima
Staff Lawyer, *Human Rights Legal Support Centre*

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Paula M. Rusak
Mathews, Dinsdale & Clark LLP

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TAB 1

Useful Documents on the HRTO Website

Cases on the Obligations of Legal Representatives

David Wright
Interim Chair, *Human Rights Tribunal of Ontario*

Best Practices for Paralegals Appearing Before the Human Rights Tribunal of Ontario

The Law Society of Upper Canada | Barreau du Haut-Canada

Continuing Professional Development

USEFUL DOCUMENTS ON THE HRTO WEBSITE (ALL UNDER THE TAB "RESOURCES")

David Wright
Interim Chair, *Human Rights Tribunal of Ontario*

Practice Directions:

- Practice Direction on Applications on Behalf of Another Person
- Practice Direction on Communicating with the Human Rights Tribunal of Ontario
- Practice Direction on Electronic Filing by Licensed Representatives
- Practice Direction on Hearings
- Practice Direction on Hearings in Regional Centres
- Practice Direction on Naming Respondents
- Practice Direction on Reconsideration
- Practice Direction on Recording Hearings
- Practice Direction on Requests for Language Interpretation
- Practice Direction on Requests to Expedite an Application and Requests for an Interim Remedy
- Practice Direction on Scheduling of Hearings and Mediations, Rescheduling Requests, and Requests for Adjournments
- Practice Direction on Summary Hearing Requests

Policies

- Policy on Accessibility and Accommodation
- Policy on Representation before the HRTO
- Policy on Public Complaints

Guides

- Applicant's Guide
- Respondent's Guide

- Plain Language Guide

- Guide to Preparing for a Hearing Before the HRTO

CASES ON THE OBLIGATIONS OF LEGAL REPRESENTATIVES

Smith v. Menzier Chrysler Incorporated, 2008 HRTO 37 (CanLII)

Edward v. Moda at Home, 2009 HRTO 1010 (CanLII)

Romanchook v. Garda Ontario, 2009 HRTO 1077 (CanLII)

Sharras v. Rouge Valley Health System, 2009 HRTO 1146 (CanLII)

Okunbor v. Hopewell Logistics, 2009 HRTO 2124 (CanLII)

Hansen v. Toronto (City), 2010 HRTO 13 (CanLII)

Cochrane v. Workplace Safety and Insurance Board, 2010 HRTO 913 (CanLII)

Race v. General Motors of Canada, 2010 HRTO 1403 (CanLII)

State of the Tribunal
(PowerPoint)

David Wright
Interim Chair, *Human Rights Tribunal of Ontario*

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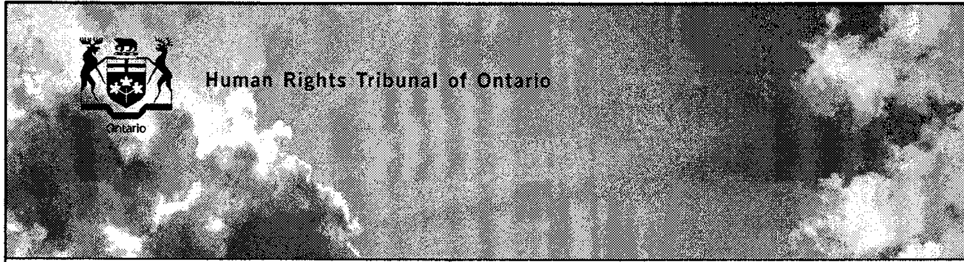
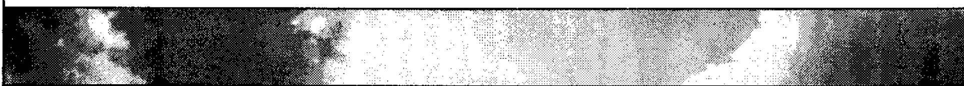
Continuing Professional Development



State of the Tribunal

September 2010



Where we are

- Who we are
- What we've done
- The Process: Then & Now
- What we've seen
- Developing Trends
- Consultation

Who we are

Our mandate is to resolve applications brought under the *Ontario Human Rights Code.*

Core values inform our approach:

- Accessibility, both physically and functionally:
  - Physically: everything from our hearing rooms to our publications and information will be designed in a way which does not create barriers to people who seek to participate effectively in the Tribunal's processes.
  - Functionally: all people, whether involved as claimants, respondents or other interests, should feel that the process is understandable, fair and relevant to their own experience, whether or not they are represented by a lawyer.
- Fairness: the process will ensure that decisions are based on the facts, the law and the merits of the case.

Who we are

Core values (continued):

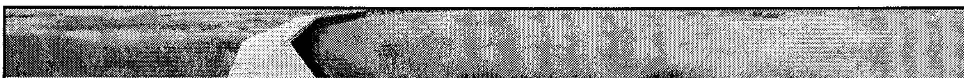
- Transparency: Tribunal procedures will be clearly established and decisions will be made in an open way, with substantive reasons that are clear, concise and understandable.
- Timeliness: resolutions will be reached and decisions made in a timely way, so that delays do not frustrate the objects of the *Code* - to prevent discrimination and if a violation is found, to provide effective, meaningful remedies.
- The Opportunity to be Heard: a complaint that is within the jurisdiction of the Tribunal will not be finally determined without giving the parties an opportunity to make oral submissions.

Who we are

Our mission

The Tribunal will:

- Play its role in the human rights system by providing expeditious and accessible processes to assist the parties to resolve complaints where the parties are unable to resolve them.
- Be activist to seek a fair, just and expeditious resolution of the merits of an application.
- Provide and promote meaningful and effective public interest remedies in appropriate cases.
- Not bar settlements where parties freely desire to resolve their dispute.



Who we are

Our mission (continued)

The Tribunal will

- Seek to maintain the highest standards of integrity and quality of work.
- Strive for consistency to enhance the parties' reasonable expectations of Tribunal policy and process, but will remain responsive to differing cases and party needs, and to an evolving understanding of human rights and discrimination.
- Strive to promote a clear understanding of the Tribunal's work among the general public.
- Will work to be responsive to the needs of its stakeholder communities.

What we've done

Restructuring

- From:
  - 3 full-time and 6-8 part-time adjudicators
  - 8 staff
- To:
  - Approximately 50 staff
  - Vice-chairs and members:
    - 22 full-time
    - 23 part-time

Human Rights Tribunal of Ontario

7

The Process - Then

- At a hearing at the Tribunal, the Commission was a party together with the Complainant(s) and the Respondent(s)
- The Tribunal mediated and conducted hearings *de novo* – the Commission's investigation and recommendation was not binding

Human Rights Tribunal of Ontario

8

The Process - Now

- Applications are filed directly with the Tribunal
- Tribunal reviews for completeness, jurisdiction and deferral, serves application on Respondent
- Respondent has 35 days to file response

The Process - Now

- Active Triage: considers the application and response. What is the most "fair, just and expeditious" way to proceed?
- We provide the parties an opportunity to engage in voluntary mediation
- Where the parties do not choose mediation or mediation does not result in a settlement, a hearing is scheduled

The Process - Now

Applicants should know:

- All applications are reviewed for completeness and jurisdiction before Respondents are served
- Incomplete applications are returned with an explanation, Applicants have 20 days to provide the missing information
- Applicants must complete all applicable sections of application and supplemental forms

The Process - Now

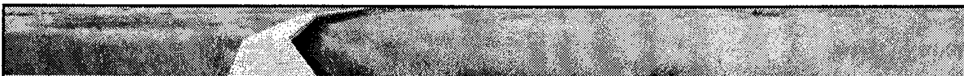
Applicants should know (continued)

- Where the subject matter of the application is being dealt with in another proceeding the Tribunal will propose that the human rights application be deferred until the other proceeding is concluded
- Where the Tribunal raises an issue of lack of jurisdiction, the Tribunal will ask the Applicant to explain how they believe the claim is one that falls under the provisions of the *Code*
  - The Applicant has 30 days to provide a response
- The Human Rights Legal Support Centre provides advice and assistance regarding the infringement of rights, legal services for making applications at the Tribunal, proceedings before the Tribunal and related matters

The Process - Now

Respondents should know:

- You may raise preliminary or procedural issues, but except in limited circumstances, you must file a complete response:
  - Where the same claim is the subject of a court proceeding, was a complaint at the commission, was previously settled
  - Where there is an issue of federal/provincial jurisdiction
- Where you have jurisdictional, procedural or other objections, you should identify them in your response
- The Tribunal will review the application and response and determine when and how to deal with any preliminary or procedural issues, based on what would ensure a fair and expeditious resolution on the merits



The Process - Now

Mediation

- Is voluntary: parties are asked whether they wish to engage in mediation as a way to resolve the dispute
- Where parties do not indicate, Tribunal may follow up to explore mediation as an option, but it remains voluntary
- Is conducted in a structured way with a "listening component" where parties have an opportunity to tell their stories and have an opportunity to be heard
- Conducted by a Tribunal Vice-chair or member who has expertise in human rights

The Process - Now

Mediation (continued)

- Role of Tribunal is to "facilitate the parties' efforts in reaching a settlement"
- The Tribunal does not "approve" settlements
- The Vice-chair or member may provide information on likely outcomes if the case does not settle, or what outcomes have been reached in other similar cases
- Settlements are voluntary and require the agreement of both parties

The Process - Now

Pre-hearing requirements

- Where mediation has not resulted in a settlement or the parties did not opt for mediation, the Tribunal will issue a Confirmation of Hearing notice
- The notice:
  - Triggers the obligation to exchange all "arguably relevant documents" within 21 days
  - Sets the hearing dates
- 45 days before the hearing, the parties must deliver to one another, and file with the Tribunal:
  - All documents they intend to rely upon at the hearing
  - A list of witnesses they intend to call at the hearing
  - A brief summary of the anticipated testimony of each witness they intend to call

The Process - Now

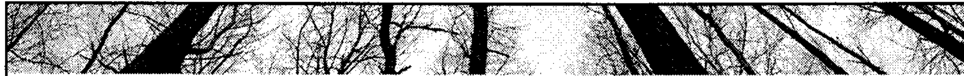
Case Assessment Direction

- Prior to the hearing the Tribunal may issue a Case Assessment Direction
- The Direction:
  - Will assist the parties with preparing for the hearing
  - May provide directions to the parties on things to do before the hearing
  - May identify things parties need to be prepared for at the commencement of the hearing:
    - Require additional production
    - Identify facts that do not appear in dispute
    - What witnesses will be necessary to attend at the commencement of the hearing
    - Which legal or procedural issues the parties will have to address at the start of the hearing, including issues the parties may have raised
- The Case Assessment Direction is a decision of the Tribunal. The parties must comply with the directions, and be prepared to address each issue identified

The Process - Now

Hearings:

- On the merits, generally in-person unless parties waive their right to an oral hearing – held all over Ontario
- Procedural and preliminary matters may be heard by conference call, in writing, or in person
- Decisions in writing – from 3 pages to more than 100



The Process - Now

Hearings: the Tribunal's approach

- The Adjudicator plays an active role in the hearing process, the procedure used in each hearing may vary
- The Rules of Procedure allow the Adjudicator to adopt non-traditional methods of adjudication in order to best focus on the human rights issues in dispute and reach a decision about whether the *Code* has been violated
- The Adjudicator has the power to question witnesses, parties or representatives, receive testimony not taken under oath, limit the evidence or submissions on any issue or limit a party from presenting multiple witnesses to testify about the same facts in issue
- At the same time, however, the Adjudicator is a neutral decision-maker and cannot take responsibility for identifying and leading evidence
- The Adjudicator will adopt the approach which facilitates the fair, just and expeditious resolution of the merits of the application

Human Rights Tribunal of Ontario

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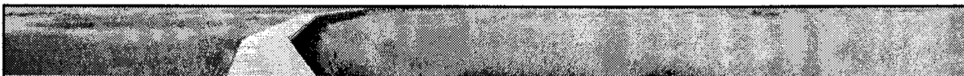

What we've seen

- Feedback, although largely anecdotal, has been extremely positive
- Individuals, including self-represented parties seem to be able to navigate the system and participate in the process

Human Rights Tribunal of Ontario

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Developing Trends

Deferrals

- The Tribunal will generally defer an application where the same subject matter is being dealt with in another proceeding
- Where the same facts are being determined in another proceeding
- Where the same human rights claim is being advanced in a Court proceeding it's not a deferral issue – Tribunal has no jurisdiction
- Timing may be a factor, but generally is not

Human Rights Tribunal of Ontario 21

Developing Trends

Deferrals (continued)

- The goal is to avoid multiple proceedings dealing with the same issue
- Parties are asked for their positions before the Tribunal will decide to defer
- If the Tribunal defers, the Applicant has 60 days to bring the application back on once the other proceeding has concluded

Human Rights Tribunal of Ontario 22

Developing Trends

Section 45.1:

The Tribunal may dismiss an application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application.

- Recognizes that other tribunals and decision makers have the power (and obligation) to apply the *Code* in proceedings before them

Human Rights Tribunal of Ontario

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Developing Trends

Principles

- Tribunal does not act as an appellate body for decisions of other tribunals
- Will look at whether other decision-making process was a "proceeding," (operated under the principles of natural justice, was impartial, provided an opportunity to be heard)
- Whether the "pith and substance" of the human rights claim were dealt with in the other decision
- Will ensure that the other decision maker applied human rights principles

Human Rights Tribunal of Ontario

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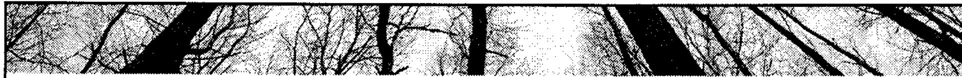
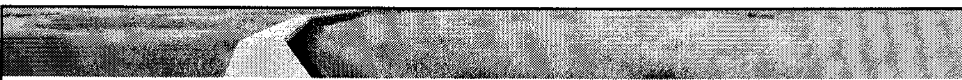


Consultation

- Practice Advisory Committee
- Consultation on privacy issues
- Further fine tuning of forms and Rules



Learn more

www.hrto.ca

News – Forms & Guides – *Code* – Policies & Practice Directions – Decisions

TAB 2

Ontario's Human Rights Code and the Human rights system
(PowerPoint)

Adriana Greenblatt
Staff Lawyer, *Human Rights Legal Support Centre*

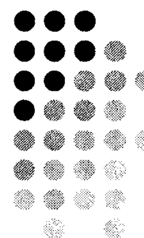
Clara Ho
Staff Lawyer, *Human Rights Legal Support Centre*

Best Practices for Paralegals Appearing Before the Human Rights Tribunal of Ontario

The Law Society of Upper Canada | Barreau du Haut-Canada

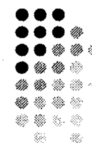
Continuing Professional Development

Ontario's *Human Rights Code and the human rights* system

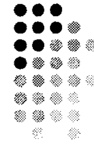


Adriana Greenblatt and Clara Ho
Human Rights Legal Support Centre
Best Practices for Paralegals Appearing Before the HRTO
Law Society of Upper Canada
September 27, 2010

Ontario's *Human Rights Code*

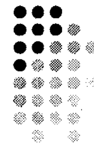


- Recognizes the "inherent dignity and the equal and inalienable rights of all members of the human family"
- Recognizes "the dignity and worth of every person and to provide for equal rights and opportunities without discrimination"
- Aims to create "a climate of understanding and mutual respect for the dignity and worth of each person"



Human Rights basics

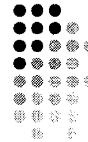
- Ontario's *Human Rights Code* has supremacy over other laws and protects people from discrimination in employment, services and housing
- The law is enforced by the Human Rights Tribunal of Ontario – they can award money for pain and suffering and lost wages ("damages") and order changes to the way people practice business



Where does the Code apply?

- Employment
- Housing
- Services, goods and facilities
- Contracts
- Membership - Associations (e.g. unions, professional associations)

Prohibited Grounds of Discrimination



- Race, colour
- Ancestry
- Place of origin
- Citizenship
- Ethnic origin
- Creed (religion)
- Receipt of social assistance (housing only)
- Sexual orientation
- Marital status
- Family status
- Record of offenses (employment only, must have been pardoned)
- Age
- Disability
- Sex (includes being pregnant, sexual harassment and gender identify)

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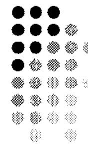
Examples



- Employment (83% of cases fall here)
  - "You're pregnant? You're fired."
  - "Hey honey, let's have a hug and you can have your promotion."
  - "You've been off sick too long, you're fired."
  - "Have a mental illness? You're fired."
- Housing
  - "You're too young, we want mature residents."
  - "No people on welfare allowed to rent here."
  - "No kids"
- Services
  - "We don't want people like you in this store – speak English or go back where you came from."
  - "No dogs, we don't care if your doctor says you need it"

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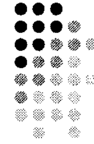
What is Discrimination?



- Differential treatment, deny a benefit, exclude, impose obligations, disadvantage, etc. because of a characteristic or perceived characteristic
- Intent is not necessary
- Discriminatory factor may be one of many factors

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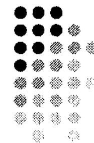
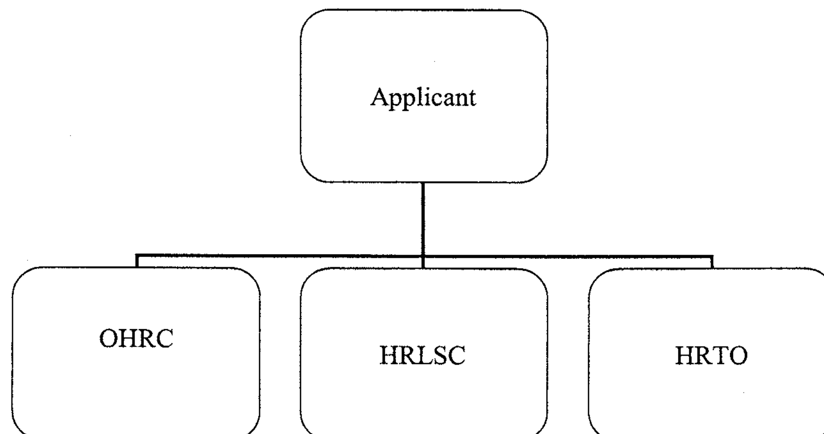
Ontario's human rights system





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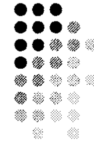
The Human Rights Legal Support Centre (HRLSC)



- Opened its doors on June 30, 2008
- The Human Rights Legal Support Centre was created to provide legal help to people who were discriminated against and are filing a human rights application at the Tribunal
- The Centre only provides legal assistance to applicants
- No income testing
- The Centre provides services to people across Ontario.
- No fees for services.

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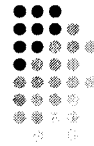
Human Rights Tribunal of Ontario



- The Human Rights Tribunal of Ontario deals with all claims of discrimination filed under the Ontario *Human Rights Code*. The Tribunal resolves applications through mediation or adjudication. Contact the Tribunal for procedural questions – they cannot give legal advice. The Tribunal can help you with:
- Application form to make a claim of discrimination
- Guide to completing an Application form about your experience of discrimination
- Information about the process for bringing an Application about discriminatory treatment
- Information about an Application that you have made to the Tribunal about discrimination.

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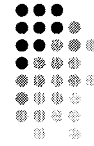
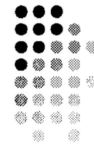
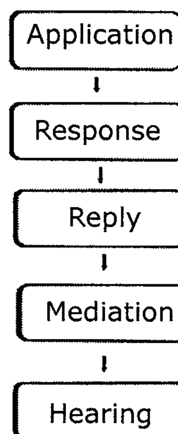
The Ontario Human Rights Commission



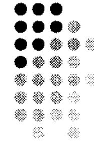
- Public education, awareness and policies
- Research and make recommendations to prevent and eliminate discriminatory practices (including reviews of legislation and policies)
- Initiate inquiries into discriminatory practices in communities, workplaces and make recommendations to prevent such practices

Process of Human Rights Application





Process of Human Rights Application - continued



- **Application:** The form that starts the legal process. The person who believes they were discriminated against ("Applicant") can complete an application to the Human Rights Tribunal of Ontario to explain what happened to them and ask the HRTO to award a remedy.
- **Response:** ("Respondent") The person who is alleged to be responsible for the discrimination has the opportunity to respond to each allegation set out in the application. (Respondent must file a Form 2 no later then 35 days after a copy of the application was received.)
- **Reply**: The Applicant can file a reply only if new matters were raise in the response. (The Applicant must file a Form 3 no later then 14 days after the Response was received.)

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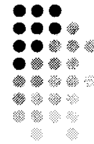
Application – Limitation Period



- Under the *Code* (s. 34.1), a person must file an application with the HRTO within:
  - one y ear after the incident to which the application relates; or
  - If there was a series of incidents, within one year after the last incident

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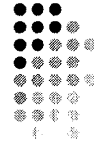
Mediation



- Mediation is one of the ways the Tribunal tries to resolve disputes.
- Mediation is voluntary (i.e. both parties agree to it)
- Adjudicators have a lot of leeway in how they will conduct mediation and in what order issues will be discussed
- All discussions during mediation are confidential and cannot be discussed, including at a later hearing, unless the person specifically consents (without prejudice)
- a different adjudicator will hear the case if it is not resolved at mediation

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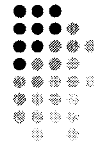
Hearing



- If parties to a human rights application do not agree to mediation, or if no settlement is reached through mediation, an application will proceed to a hearing.
- Hearing is fair, just and expeditious
- Applicant is required to prove the allegations set out in the application
- A hearing will be able to determine the merits of an application, considering the facts and the relevant legal principles.

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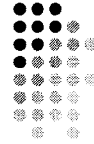
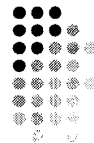
An Example of Exceptions: Special interest organizations



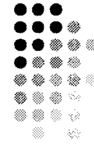
- Programs designed to address disadvantage of individuals/groups protected by a prohibited ground of discrimination not in violation of the *Code*
- E.g. housing that is restricted to Aboriginal people.
- Restrictions must relate to addressing disadvantage.

HRLSC Contact Information



Human Rights Legal Support Centre
Tel: (416) 314-6266
Toll Free: 1-866—625-5179
TTY: (416) 314-6651
TTY Toll Free: 1-866 612-8627

www.hrlsc.on.ca



HRTO Contact Information

Human Rights Tribunal of Ontario
655 Bay Street, 14th Floor
Toronto, ON M7A 2A3
Tel: (416) 326-1312
Toll Free: 1-866-598-0322
TTY: (416) 326-2027
TTY Toll Free: 1-866-607-1240
www.hrto.ca

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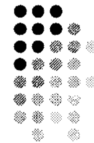

Ontario Human Rights Commission

www.ohrc.on.ca

A wide range of background documents to help you understand your rights under the *Human Rights Code*

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TAB 3

Guide to Successful Representation before the Human Rights Tribunal of Ontario
(PowerPoint)

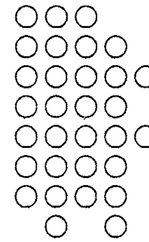
Dijana Simonovic
Counsel, *Human Rights Legal Support Centre*

Best Practices for Paralegals Appearing Before the Human Rights Tribunal of Ontario

The Law Society of Upper Canada | Barreau du Haut-Canada

Continuing Professional Development

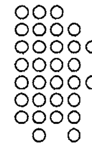
HUMAN RIGHTS LEGAL SUPPORT CENTRE



Guide to Successful Representation before the Human Rights Tribunal of Ontario

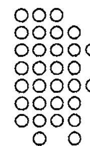
Compiled by: Dijana Simonovic
Legal Counsel

Before Filing an Application



- **Consider early intervention.**
- Immediate action in appropriate cases may include:
  - Telephone call to the potential Respondent;
  - Demand letter to the potential Respondent;
  - Follow-up negotiation.
- At the HRLSC each week 10-12 inquiries are referred for early intervention. About 50% of early intervention cases are resolved without filing an Application.

Filing an Application



- If early intervention is unsuccessful or inappropriate in the circumstances, before filing an Application with the Human Rights Tribunal of Ontario read:
  - the *Human Rights Code*
  - the Tribunal's Rules of Procedure
  - the Tribunal's Practice Directions / Plain Language Guides

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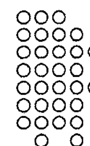
Filing an Application, cont.



- **Limitation period**
  - pursuant to **s. 34(1)** of the *Code* a person can file an Application with the Tribunal within:

    - **one year** after the incident to which the application relates; or
    - if there was a series of incidents, within one year after the last incident in the series

  - **s. 34(2) Test:** a person may file after the expiry of the time limit if the Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay

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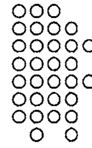
Filing an Application, cont.



- **Application barred**

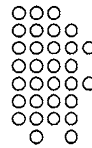
  Pursuant to **s. 34(11)** of the *Code*:

  - A person who believes that one of his or her rights under Part I has been infringed may **not** make an application under subsection (1) with respect to that right if,

    (a) a civil proceeding has been commenced in a court in which the person is seeking an order under section 46.1 with respect to the alleged infringement and the proceeding has not been finally determined or withdrawn; or

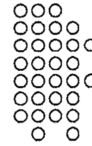
    (b) a court has finally determined the issue of whether the right has been infringed or the matter has been settled.

Filing an Application, cont.



- A person may also be **barred** from filing a new Application with the Tribunal if he/she previously filed a complaint directly with the Ontario Human Rights Commission prior to June 30, 2008 based on the same facts. (refer to the Transitional Provisions found at Part VI of the *Code*)

Filing an Application, cont.



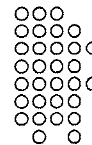
- **Multiple Proceedings**

In the event that the complaint being raised in the Application is also part of another proceeding (other than a civil court proceeding), an Application **may** still be filed with the Tribunal, however:

- A copy of the document that started the other proceeding must be attached to the Tribunal Application.
- Depending on the circumstances, the Tribunal may decide to defer or dismiss the Application.

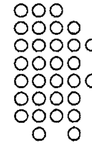
Some examples of other proceedings:
- a grievance arbitration
- a hearing before the Employment Insurance Board of Referees, Workplace Safety and Insurance Appeals Tribunal or the Landlord and Tenant Board.

Filing an Application, cont.



- The Application is the "originating process", therefore when drafting:
  - Ensure the pleadings are as compelling and as complete as possible (addressing the questions: who, what, when, where).
  - Pay particular attention to sections 8, 9 and 10 of the Application Form 1.
  - Outline the details of every incident of discrimination that will be raised in the hearing in section 8.
  - Be mindful of the fact that the details provided in section 9 will form the basis upon which the Tribunal will assess how much, if any, award will be made to the Applicant to compensate him/her for injury to dignity, hurt feelings, self-respect (general damages) .
  - Be creative and thorough when setting out the remedies sought in section 10.

Filing an Application, cont.



Financial Remedies

The Tribunal can order two types of financial compensation:

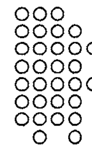
- money to compensate generally for the loss of the right to be free from discrimination, including the insult to dignity, feelings, and self-respect ("**general damages**")
- money to compensate for any special financial costs experienced because of the discrimination ("**special damages**")

The Tribunal may also order **pre-judgment** and **post-judgment** interest on any amount of money that is awarded.

Examples of Special Damages

- Lost income/wages
- Lost benefits
- Lost bonuses or commission
- Out of pocket expenses (job search costs/relocation expenses)
- the rental deposit that was paid to the landlord who discriminated
- moving expenses if the Applicant was forced to move because of discrimination and/or harassment

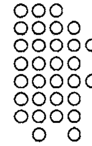
Filing an Application, cont.



Examples of Non-Financial Remedies

- reinstatement
- a promotion
- an offer of employment
- the removal of a harasser from the work environment
- letters of assurance of future compliance with the *Code*
- a letter of reference
- apology/letter of regret

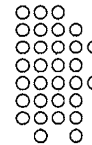
Filing an Application, cont.



Examples of Public Interest Remedies

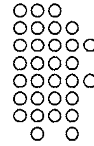
- develop non-discriminatory policies and procedures
- develop internal human rights complaint procedures
- implement pro-active measures (such as a recruitment policy aimed at eliminating barriers for racial minorities)
- implement education and training programs (such as having all staff receive training on a human rights policy)
- post the *Human Rights Code* in the workplace
- make a donation to charity

Tribunal Process



- Once an Application is accepted as complete by the Tribunal, it is delivered to the named Respondent(s) by the Tribunal.
- The Respondent has 35 days to file a Response. An Applicant has a right to file a Reply (not later than 14 days after the Response was sent to the Applicant).
- If both parties agree, mediation happens within 4 to 5 months of the Application being filed.
- If mediation is unsuccessful or does not occur, a hearing is scheduled within 4 to 5 months of mediation or the close of written submissions (the Reply).
- The Tribunal has a stated goal of achieving a final disposition of most proceedings within 1 year of the Application being filed.

Expedited Hearings

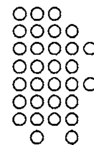


- **Rule 21.1** of the Tribunal's Rules of Procedure provides that:

  An Applicant may request that the Tribunal deal with an Application on an expedited basis in circumstances which require an urgent resolution of the issues in dispute

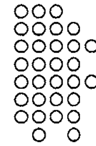
- A Request to Expedite an Application must be made by filling out a copy of Form 14 and must be filed with the Application Form 1.
- *Weerawardane v. 2152458 Ontario Ltd.,* 2008 HRTO 53 (CanLII): for a request to expedite to be granted, the Applicant must demonstrate that the circumstances are truly urgent, requiring the resolution of the human rights dispute in a particularly rapid manner as compared with the time required to complete the Tribunal's regular process.
- *Ebrahimi v. Durham District School Board*, 2009 HRTO 1062 (CanLII): a request to expedite may be granted where refusal to expedite will render the remedy for the alleged human rights breach moot or unavailable.

Expedited Hearings, cont.



- **High Threshold** - Requires an Applicant to identify the urgent circumstances that may affect the fair and just resolution of the merits of the Application and the harm that would result if the request is denied.
- Will only be granted in exceptional circumstances - For example, financial pressures, emotional and psychological stress have been held **not** to be sufficient.
- Some factors that the Tribunal has referred to when it has (rarely) allowed a request to expedite include:
  - Very ill health
  - A drastic change in personal circumstances
  - Needing immediate accommodation (a change in the work environment) because of pregnancy, where the pregnancy obviously has a finite time frame

Expedited Hearings, cont.



- It is extremely important to provide good documentation to support a request for an expedited hearing. For example, if the request is made for medical reasons, supporting medical documentation from a registered medical practitioner should be provided.

- In *Banghart v. Elgin Condominium Corporation No. 1*, 2009 HRTO 13 (CanLII) the Applicant requested an Expedited Hearing on the basis of his age – he was 88. The Request to Expedite was denied as he did not provide any explanation for why his age created an urgency that warranted an expedited proceeding. Following 3 days of hearing, the Vice Chair reserved her decision. The Applicant subsequently passed away before the decision was released.

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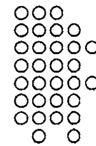
Interim Remedies



- **Rule 23.2** of the Tribunal's Rules provides that the Tribunal may grant an interim remedy where it is satisfied that:

  (1) the Application appears to have merit,
  (2) the balance of harm or convenience favours granting the interim remedy requested, and
  (3) it is just and appropriate in the circumstances to do so.

- A Request for an Interim Remedy must be made by filling out a copy of Form 16.

- Decisions setting out test: *T.A. v. 60 Montclair Ltd. et al.*, 2009 HRTO 369 (CanLII); see also *Griffiths v. Toronto District School Board* 2009 HRTO 545 (CanLII).

- Onus is on the Applicant to establish why the interim remedy requested would be just and appropriate in the circumstances.

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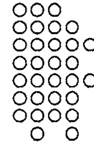
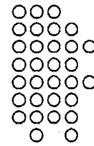
Interim Remedies, cont.



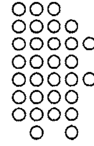
- Interim Remedies will, in most cases, be sought where there is an ongoing relationship between the parties.
- In *Anderson v. Carleton Condominium Corporation #8,* 2010 HRTO 1761 (CanLII) – the Tribunal granted the interim order in part to address the state of conflict existing between the parties that were in an ongoing relationship. The Tribunal also noted that the Applicant had taken a balanced approach to the request by seeking relief from the Condominium Rule being challenged in the main Application subject to some limitations that took into consideration the Respondent's concerns.

Mediations at the Tribunal



- The Tribunal has Mediation Centres in Toronto, Kingston, London, North Bay, Ottawa, Sarnia, Sault Ste. Marie, Sudbury, Timmins, Thunder Bay and Windsor
- Mediations are either scheduled for full or half days
- Mediations at the Tribunal are conducted by the Vice Chairs
- Usually the parties do not know the mediator assigned until the mediation day
- If the matter does not settle and it proceeds to a hearing, the Vice Chair who conducted the mediation will not preside over the hearing

Mediations, cont.



Before the Mediation Date

- Consider whether your client may require an interpreter – the Tribunal has a Practice Direction on Requests for Language Interpretation
- Consider whether your client may need accommodation – the Tribunal has a Policy on Accessibility and Accommodation – accommodation requests must be *Code* related
- Make all requests as early as possible, in writing; and follow up with the Tribunal to confirm the request

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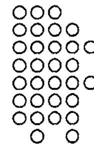
Mediations, cont.



Mediation Process

- **Introductions** – Mediator will explain his/her role, confidentiality of process, voluntariness of process and nature of process (typically the mediator will shuttle back and forth between Applicant and Respondent(s))
- If your client does not wish to be in the same room as the Respondent at any point during the mediation (for ex. sexual harassment case) make the mediator aware of this at the beginning of the mediation
- Generally opening statements by the parties are not done and can be detrimental to the process
- **Breaking Out and Caucusing** – following the introductions, the Applicant and counsel will be separated from the Respondent(s) and counsel in a separate room and the mediator will go back and forth between the parties to facilitate a settlement

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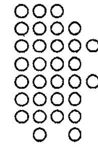
Mediations, cont.



- The mediator will usually speak to the Applicant first and will then speak to the Respondent
- Be prepared to speak about the strengths and weaknesses of your client's case during the course of the mediation
- Also be prepared to justify the type of financial and other remedies being sought – consider bringing case law
- Be aware that information shared with a mediator will usually be shared with the other side unless you specifically tell the mediator not to do so (applies equally to documents)

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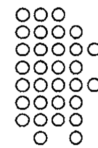
Mediations, cont.



Preparing Your Case For Mediation

- Obtain and make copies of documents that are relevant to settlement and bring them to the mediation
- Research the legal issues raised by your opponent in their pleadings
- It is often useful to bring case law justifying the remedies you are seeking (average general damage awards)
- Do the calculations ahead of time (ex. your client's wage loss subtracting any income earned during mitigation)

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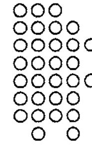

Mediations, cont.

Preparing Your Client for Mediation

- Location, directions, time and place to meet (and dress code if client asks)
- Describe in detail the mediation process so your client can feel comfortable knowing what to expect (voluntariness, confidentiality, role of mediator, mediator styles, who is expected to be there from the opposing side, minutes of settlement and release, the possibility of no settlement being reached)
- If your client wishes to bring a support person along to the mediation, discuss the role of that person as "silent observer" and that all instructions must come from the client directly
- Inform your client that they may request to speak with you in private without the mediator at any time during the mediation and may also request health breaks as needed (bathroom, food, water, stress reduction, etc.)

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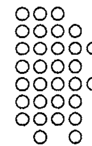

Mediations, cont.

- Go over in detail the strengths and weaknesses of your client's case and assess what a reasonable settlement may be
- Prior to the mediation, advise your client of the chances of success—should the matter proceed to a hearing—so that they may use this information to assess any settlement offers being put forward
- Inform your client that any settlement reached at mediation requires some compromise in relation to the best case scenario

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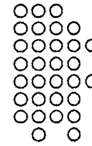

Mediations, cont.

Settlement

- Most Vice Chairs will provide you with standard wording for Minutes of Settlement
- Ensure that financial damages are structured and named appropriately (general damages will usually avoid tax consequences)
- Specify deadlines/timeframes for completion of matters agreed to in the Minutes including the date by which settlement funds will be received
- Confidentiality Clause – usually benefits both sides – ensure your client understands what it means and that they must not breach this term of the settlement
- Full and Final Release – ensure your client understands what this means
- All parties will be asked to sign a Form 25 in addition to the Minutes of Settlement and Release – the form indicates that the parties have reached a settlement, are waiving their right to make oral submissions to the Tribunal and that the file is being closed by the Tribunal

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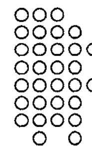

Mediations, cont.

No Settlement Reached

- If no settlement is reached at mediation, at the end of the mediation the mediator will complete a Case Management Checklist with the parties which canvasses:
  - The number of days estimated for the hearing
  - Number of proposed witnesses
  - Proposed intervenors
  - Dates that the parties are NOT available for hearing
- The Case Management Checklist is a guide used by the Tribunal for scheduling purposes. The parties are not bound by the information provided.
- Cases that do not settle at mediation often times settle prior to the hearing.

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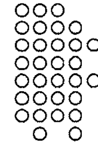
Hearings at the Tribunal



Important Deadlines (see Rules 16 and 17 of the Tribunal's Rules)

- The Tribunal will send you a notice setting out the dates, time and place for the hearing – called a **Confirmation of Hearing**
- No later than ***21 days after*** the Tribunal sends a Confirmation of Hearing the parties are required to deliver, to each other, a list and copy of all the documents that are "arguably relevant"
- No later than ***45 days before*** the first scheduled hearing day, the parties are required to deliver to the Tribunal, and every other party, a list and copy of all the documents they "will be relying on" at hearing
- Also, no later than ***45 days before*** the first scheduled hearing day, the parties must send a witness list to all other parties and submit it to the Tribunal. The parties must also deliver and submit a brief statement summarizing each witness' expected evidence

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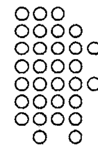
Hearings, cont.



Before the Hearing Day

- As with mediation, consider whether your client will need language interpretation or any special accessibility accommodations and request these in writing well in advance of the hearing. Follow up with the Tribunal prior to the hearing date to confirm your request.

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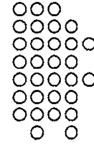
Hearings, cont.



Hearing Process

- Each Vice Chair has a lot of options in the way he/she runs a hearing.
- Be prepared for the Tribunal to canvass any last minute interest of the parties to engage in settlement talks on the day of hearing. Another Vice Chair not presiding over the hearing may be called in to attempt pre-hearing negotiations or the assigned Vice Chair may conduct a med-arb.
- Some Vice Chairs dispense with the need for Opening Statements entirely and proceed directly into the evidence being called.
- The Vice Chair may also ask questions directly of the parties or witnesses throughout the hearing.
- In most cases, the Tribunal will reserve their decision. It can take several months to receive a decision.

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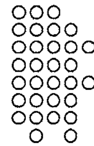
Hearings, cont.



Researching the Law

- All of the decisions released by the Tribunal after January 1, 2000 can be accessed free of charge on the Canadian Legal Information Institute's website at: http://www.canlii.org/

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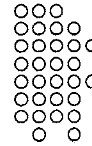
Hearings, cont.



Preparing Your Evidence

- In deciding what evidence may be ***relevant***, keep in mind that an Applicant must prove:

  1) That the Respondent(s) violated the *Code* by discriminating against the Applicant; and
  2) That, as a result of the violation of the *Code* and the discrimination, the Applicant suffered some loss or consequence.

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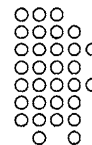
Hearings, cont.



Practice Tips

1) The Tribunal must consider an Ontario Human Rights Commission Policy at a hearing if a party to the proceeding, or an intervenor, requests that it do so. (s. 45.5(2) of the *Code*)
2) Tribunal hearings are not recorded, so if you want something to be "on the record" consider utilizing a Request for Order During Proceedings. (Form 10)
3) Prepare your client and witnesses for the eventuality that the hearing may proceed in a non-conventional fashion.
4) Remember to call evidence regarding remedies.
5) Be strategic about the amount of detail you include in your witness statements. Detailed witness statements may foster further settlement talks; however, ensure your client will testify to all of the information in the witness statements. Be aware that witness statements may be used to challenge a witnesses' credibility at a hearing if the information in them does not coincide with the evidence given on the stand.

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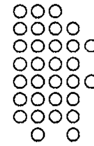
Appendix



1) Human Rights Legal Support Centre Information Sheet #5 - *Requesting an Expedited Hearing at the Human Rights Tribunal*

2) Human Rights Legal Support Centre Information Sheet #6 - *What Do I Need To Know About Mediation?*

3) Human Rights Legal Support Centre - *Applicant's Guide To Preparing For Mediation At The Human Rights Tribunal of Ontario*

COMING SOON:

- Check the Human Rights Legal Support Centre's website at: http://www.hrlsc.on.ca for the *Applicant's Guide to Getting Ready for a Hearing at the Tribunal*

Requesting an Expedited Hearing at the Human Rights Tribunal Information Sheet #5

Dijana Simonovic
Counsel, *Human Rights Legal Support Centre*

Best Practices for Paralegals Appearing Before the Human Rights Tribunal of Ontario

The Law Society of Upper Canada | Barreau du Haut-Canada

Continuing Professional Development

HUMAN RIGHTS LEGAL SUPPORT CENTRE

Information Sheet #5
October 2009

REQUESTING AN EXPEDITED HEARING AT THE HUMAN RIGHTS TRIBUNAL

This is general information only. It is not legal advice about your situation. This publication is not a substitute for a lawyer's research, analysis and judgment.

Introduction

An ***expedited hearing*** is one that occurs more quickly than under the Human Rights Tribunal of Ontario's (Tribunal) normal timelines. An expedited hearing is rarely granted and only in circumstances that are truly urgent.

Rule 21 of the Tribunal's *Rules of Procedure* (*Rules*) deals with "Expedited Proceedings." The Tribunal *Rules* can be found Rules of Procedure on their web site.

When does a hearing normally occur?

It will normally take up to one year to have your application dealt with at a hearing before the Human Rights Tribunal of Ontario. The Tribunal's Information Bulletin called *Scheduling of Hearings and Mediations, Rescheduling Requests, and Requests for Adjournment* sets out the intended timelines for the scheduling of hearings. It states that hearings are expected to be held:

- Where mediation will be attempted: The mediation will be held within 4 to 5 months after the application is filed, and the hearing is expected to occur within 4 to 5 months of the date of mediation;

- Where mediation is not attempted: The hearing is expected to occur 4 to 5 months after the expiry of the time for filing a Reply.

What if I want my hearing to happen faster?

Almost all cases will go ahead according to the normal timelines. The Tribunal will only speed up its process in exceptional circumstances, where the circumstances "***require*** [emphasis added] an urgent resolution of the issues in dispute." (Rule 21.1 of the Tribunal's *Rules*).

If you believe that your case presents exceptional circumstances, you need to file a request for an expedited hearing.

How do I request an expedited hearing?

A *Request to Expedite an Application* must be made by filling out a copy of Form 14. The Form 14 is available at Request to Expedite Proceedings. You need to fill out the Form 14 and file the Form 14 together with your application to the Tribunal.

What information do I need to include in my request to expedite my hearing?

A request to expedite an application must describe:

- the urgent circumstances that you believe are so exceptional that not dealing with the application faster would jeopardize the possibility of a just resolution to your human rights issue

- the harm that would result to you or others if your request for a faster hearing is denied; and

- whether the other parties consent to the request.

As a first step, it is a good idea to contact the person or company responding to your application (the Respondent) to explain why you need an expedited hearing. Although the respondent may consent to your request this does not mean that the Tribunal will automatically grant your request.

What factors will the Tribunal consider in deciding whether to give me an expedited hearing?

The Tribunal must find that the matter is "truly urgent" such that it needs to be decided in a particularly rapid manner. Some of the factors that the Tribunal will consider include:

- Whether there are any circumstances which would undermine the Tribunal's ability to fairly adjudicate the human rights claim without speeding up the application;

- Whether there are any exceptional circumstances, such as where you or a witness is gravely ill, or might not be available if the application is processed in the normal timeline; and

- Whether a requested and appropriate remedy will be unavailable, without expediting the application

You must keep in mind that what you consider "urgent" and what the Tribunal considers "urgent" may not be the same. For example, your financial circumstances may be very difficult, but the Tribunal has rarely found that an expedited hearing is required because of that reason. Even if you have lost your job and have no income, the Tribunal would not find that an "exceptional" circumstance as many people are facing the same situation.

Some factors that the Tribunal has referred to when they deny a request to expedite include:

- the delay between the discrimination you experienced and the filing of your application;
- financial hardship as the only reason given; and
- where the harm you have outlined in your application is based on concerns about what *might* happen in the future

Some factors that the Tribunal has referred to when they have (rarely) allowed a request to expedite include:

- very ill health
- a drastic change in personal circumstances; and
- needing immediate accommodation (a change in your work environment) because of pregnancy, where the pregnancy obviously has a finite time frame

Note: It also important to make sure that you provide good documentation to support your request for an expedited hearing. For example, if the reason you are requesting an expedited hearing is because of medical reasons then you should provide very good supporting medical documentation.

What happens after I request an expedited hearing?

The respondent will have an opportunity to reply to your request. They have to do that within **seven (7) days** after the request was sent, or as the Tribunal directs. The Tribunal will not make a decision until after it receives the response.

Once the decision is made, the Tribunal will advise you and the respondent of the decision and what the next steps are. This will include scheduling dates and setting special timelines to ensure that all steps in the process get done in time for the hearing.

How can I find out the Tribunal decisions on expediting hearings?

If you would like to do some research to see the Tribunal's decisions about expedited applications, you could go to the Canadian Legal Information Institute web site and search Human Rights Tribunal of Ontario decisions by the word "expedite".

Where can I get more information?

HUMAN RIGHTS TRIBUNAL OF ONTARIO

Contact the **Human Rights Tribunal of Ontario** to get a copy of the **application form** to make a discrimination claim. You can also go to the Human Rights Tribunal website at to get a copy of the Applicant's Guide to filling out the application form and information about Tribunal procedures, policies and practices.

Human Rights Tribunal of Ontario
655 Bay Street, 14th floor
Toronto, ON M7A 2A3
Local : (416) 326-1312
Toll Free : 1-866-598-0322
TTY (Local): (416) 326-2027
TTY (Toll Free): 1-866-607-1240
Fax: (416) 326-2199
Fax (Toll Free): 1-866-355-6099
Human Rights Tribunal of Ontario web site.

HUMAN RIGHTS LEGAL SUPPORT CENTRE

Contact the **Human Rights Legal Support Centre** if you have experienced discrimination and you would like legal assistance in completing an application to the Tribunal or legal advice about how to address the discrimination that you experienced.

The first step is to telephone our information/advice lines:

Human Rights Legal Support Centre
Tel: (416) 314-6266
Toll Free: 1-866—625-5179
TTY: (416) 314-6651
TTY Toll Free: 1-866 612-8627
Human Rights Legal Support Centre web site.

ONTARIO HUMAN RIGHTS COMMISSION

You can also contact the **Ontario Human Rights Commission.** Their website provides general information about the *Human Rights Code*.
Ontario Human Rights Commission web site.

You can see the Human Rights Code at the government's e-Laws web site.

What do I Need to Know About Mediation?
Information Sheet #6

Dijana Simonovic
Counsel, *Human Rights Legal Support Centre*

Best Practices for Paralegals Appearing Before the Human Rights Tribunal of Ontario

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Continuing Professional Development

HUMAN RIGHTS
LEGAL SUPPORT CENTRE

HUMAN RIGHTS LEGAL SUPPORT CENTRE

Information Sheet #6
October 2009

WHAT DO I NEED TO KNOW ABOUT MEDIATION?

This is general information only. It is not legal advice about your situation. This publication is not a substitute for a lawyer's research, analysis and judgment.

Introduction

Everyone who submits an application to the Human Rights Tribunal of Ontario (Tribunal) is asked if they want to participate in mediation to try to resolve the human rights issue. Where you (*the Applicant*) and the person, organization or company who will be responding to your application (the R*espondent*) agree, the Tribunal will schedule a mediation session.

Mediation is an opportunity for you and the respondent to sit down and try to settle your application before it goes to a hearing. Any settlement must be accepted by both you and the respondent. If the mediation works, you will all sign an agreement and the Tribunal will issue an order saying the matter has been resolved and will close the file.

Where does the Tribunal schedule mediations?

The Tribunal holds mediations and hearings in: Toronto, Kingston, London, North Bay, Ottawa, Sarnia, Sault Ste. Marie, Sudbury, Timmins, Thunder Bay and Windsor.

The Tribunal may hold hearings in locations other than the ones listed above to accommodate *Ontario Human Rights Code (Code)*-related or other special needs of the parties or their witnesses. Any request for a change in location should be in writing and made to the Tribunal's Registrar as soon as possible. For contact information about the Tribunal's Registrar you can visit the Tribunal's website at HRTO contact information.

Do I have to go to mediation?

No. Mediation is voluntary. If you do not attend mediation or if you cannot come to an agreement during mediation, a hearing will be scheduled.

How does mediation get scheduled?

Where both parties have agreed to participate in mediation, the Tribunal will generally issue a *Notice of Mediation*. The Notice of Mediation will indicate the date, location and time of the mediation.

If you or the respondent does not indicate a willingness to participate in mediation, the Tribunal will still determine whether mediation may offer an opportunity to resolve the application. If so, the Tribunal will contact you and the respondent to discuss the possibility of mediation. The decision to mediate remains voluntary.

How long does it take to get a date for mediation?

The Tribunal tries to schedule mediations within six (6) months of a completed application having been accepted. In addition, the Tribunal attempts to schedule hearings to be completed within one (1) year of the application having been accepted, but complicated hearings may require a longer time to complete.

What if I cannot go on the date set for mediation?

The *Notice of Mediation* tells you about how to reschedule a mediation if you cannot attend on the date set by the Tribunal. The Tribunal will reschedule a mediation hearing where a party or their representative is unavailable for a valid reason (such as being out of the province or country, a previously arranged appointment that cannot be changed, or a previously scheduled court or tribunal appearance). In general, mediations will not be rescheduled merely because the date is inconvenient for the parties or their representatives.

How do I request a new date for mediation?

If you are unavailable, you must contact the Tribunal Registrar, by phone, fax or email, within five (5) days of receiving the Notice of Mediation and provide five (5) alternative dates for the mediation.

If you are requesting a new date *after* the date set out in the Notice of Mediation, the five alternative dates must fall between eight (8) and twelve (12) weeks after the date of the Notice of Mediation. The Tribunal will contact the other parties with the proposed alternative dates. If the parties are unable to agree on an alternative date, the Tribunal may set the date for mediation without the parties' agreement.

(If you are requesting a new date *before* the date set out in the *Notice of Mediation*, it is your responsibility to communicate with the respondent and agree on dates. Once you have done this you must contact the Tribunal's Registrar with the proposed dates. The Tribunal will consider your request.)

What if I need accommodation from the Tribunal?

If you need accommodation (meaning special needs because of your disability or religion, for instance) from the Tribunal, you should contact the Tribunal before your mediation date.

For example, if you need a translator or an interpreter to be able to participate in the mediation, you should call and write to the Tribunal to tell them that. The Tribunal has also issued a *Practice Direction on Language Interpretation Services* which is available on the Tribunal website at Practice Directions or by phone.

For more information about accommodation, the Tribunal has a *Policy on Accessibility and Accommodation* available on the Internet in their policies section. They also have accessible formats including Braille, audio and large print.

Who runs the mediation?

A Tribunal member will run the mediation. All the Tribunal mediators are also Tribunal adjudicators – they run both hearings and mediations. Tribunal members are human rights experts.

Do I have to pay for mediation?

No. As with all of the Tribunal's services, the mediation is free.

Do I need a lawyer or paralegal to represent me?

No. Mediation at the Tribunal has been designed for people who do not have a lawyer. Many applicants participate in mediation at the Tribunal without a lawyer. This is known as "self-representation".

If you choose to have representation, you may be represented by a lawyer or paralegal licensed by the Law Society of Upper Canada (LSUC). You may also be represented by an unlicensed person if that person falls within a category the LSUC has exempted from its licensing requirements

The exemptions allow an unpaid friend or family member, an employee or volunteer from a trade union, and students, volunteers and employees of Legal Aid clinics, among others, to act as a representative. See the LSUC's website at www.lsuc.on.ca for a complete list of the approved exemptions.

How does mediation work?

Unless you have specifically stated that you do not want to be in the same room as the respondent, you will probably all start out in the same room with the mediator.

By way of introduction, the mediator will explain the general process to you, including that the process is voluntary and confidential. The mediator will also let you know that you should tell them when you need a break from the mediation.

Then the mediator will usually explain their mediation plan and make sure that this is agreeable to both of you. For example, they could say: "I plan to spend 45 minutes with the applicant, than 45 minutes with the respondent and see where we get to at that point. If we need to go back and forth again I will probably spend a shorter amount of time with each of you again."

The mediator may then review the application with you and the respondent together before splitting you into two separate rooms. Sometimes the mediator may ask you or the respondent to clarify some things on the application or response.

Then the mediator will usually ask you whether the plan makes sense to both of you and ask if you have any questions or comments.

You will have a chance to tell the Tribunal mediator in private what happened to you and what you want to see done about it. The mediator will ask you and the respondent questions to help the mediator figure out what would be a fair resolution of the matter. You will also have plenty of time to think about whether you are ready to sign an agreement.

What does the mediator do?

The mediator will consider what you and respondent have said and will look at any documents provided. The mediator will occasionally make suggestions about how to move ahead. For instance, the mediator might say to you: "The respondent is not willing to say they will fire the employee who did this to you, but they are willing to make sure that employee and all the others at the company get human rights training, and they are willing to give you money for pain and suffering. Would you be willing to consider that?"

The mediator can also clarify human rights law. For instance, it might be the respondent's position that having a baby is your choice and has nothing to do with human rights and nothing to do with the fact they can't promote you because you can't always work evenings. The mediator can point out that the ground of "family status" is in the *Code* precisely because employers cannot discriminate against employees where the employee has a family/child relationship that comes with certain responsibilities.

What if I do not want to be in the same room with the respondent in the application?

You should ask the Tribunal in advance of your mediation date and explain why you do not want to be in the same room with the respondent. Then from the start of the mediation you will be in separate rooms. The mediator will go back and forth to each room, trying to tell each of you what the other's position is while trying to get you to reach an agreement.

Will it look bad if I decide that the mediation is not working and I want a hearing?

No. You have a right to a hearing at the Tribunal. If you are not satisfied with the settlement that is being offered to you by the respondent and the respondent won't change their mind, then a hearing will have to be scheduled. This does not mean that your hearing will be successful.

What if I want to tell something to the mediator that I don't want the respondent to know about?

If there is something that you want to talk to about the mediator privately, you should talk to them when you are alone in the room with them and explain that you want to tell them something that you don't want the respondent to know.

The mediator will respect your privacy. For instance, you might want to tell them that it is important for you to get compensation quickly if the respondent agrees to pay, but you don't want that information to influence whether the respondent will agree to your terms and conditions of settlement.

How many applications are settled through mediation?

Many applications to the Tribunal settle at the mediation stage of the proceedings. The Tribunal is hoping to settle about 70% of applications at mediation.

Is the mediation confidential?

Yes, the details of the mediation are confidential, unless you and the respondent agree that you would like to both speak publicly about the result, for instance as a way to educate the public about human rights.

After the mediation is over (whether it is successful or not), the record of the mediation will not be shared with any person other than your mediator. If your mediation is unsuccessful you will have a different Tribunal member for your hearing. If your mediation is successful, you and the respondent will sign an agreement, which may contain a confidentiality clause.

Can my friend come with me to support me?

Yes. Before the mediation date, it would be best if you tell your friend exactly what you want him or her to do during the day. For example, you could say that you want him or her to signal to you that you are really upset and need a break.

Remember that if you have a friend attend the mediation, your friend also has to agree to keep the details of what happened in the mediation confidential.

If I am represented by a lawyer or paralegal, does that mean I can't say anything?

No. Your and your lawyer will want to work out a way to let each other know who will speak about the different issues that will come up in mediation. For example, if the Tribunal mediator asks how the discrimination made you feel, it is most appropriate for you to explain that directly yourself. On the other hand, if the mediator asks under what section of the *Code* the landlord's rental application policies discriminate, this would be something your lawyer will want to answer.

What does a settlement agreement look like?

There is a standard settlement agreement used at the Tribunal that can be changed depending on what you and the respondent might agree to.

A standard agreement says that you are not withdrawing your allegations about the discrimination and that the respondent is not admitting to the discrimination. This does not mean that the discrimination did not take place - it simply means that the parties are not agreeing to put in writing that the respondent is responsible.

Part of a settlement agreement might look like this:

THEREFORE THE PARTIES AGREE AS FOLLOWS:

1. The Respondent, [name of company], shall pay the Applicant $ [Amount] in general damages to the Applicant [your name].

2. The Respondent shall make sure that all employees receive human rights training by a professional organization with expertise in human rights. This training is to be completed by [insert date].

3. The settlement does not constitute an admission of liability by the Respondent or withdrawal of the allegations by the Applicant.

If the mediation does not work out, when will my hearing be?

It depends on the Tribunal schedule and how flexible you and the respondent are about your availability. In general, you could expect to have your hearing within about three (3) months.

Where can I get more information?

HUMAN RIGHTS TRIBUNAL OF ONTARIO

Contact the **Human Rights Tribunal of Ontario** to get a copy of the **application form** to make a discrimination claim. You can also go to the Human Rights Tribunal website at to get a copy of the Applicant's Guide to filling out the application form and_information about Tribunal procedures, policies and practices.

Human Rights Tribunal of Ontario
655 Bay Street, 14th floor
Toronto, ON M7A 2A3
Local : (416) 326-1312
Toll Free : 1-866-598-0322
TTY (Local): (416) 326-2027
TTY (Toll Free): 1-866-607-1240
Fax: (416) 326-2199
Fax (Toll Free): 1-866-355-6099
Human Rights Tribunal of Ontario web site.

HUMAN RIGHTS LEGAL SUPPORT CENTRE

Contact the **Human Rights Legal Support Centre** if you have experienced discrimination and you would like legal assistance in completing an application to the Tribunal or legal advice about how to address the discrimination that you experienced.

The first step is to telephone our information/advice lines:

Human Rights Legal Support Centre
Tel: (416) 314-6266
Toll Free: 1-866—625-5179
TTY: (416) 314-6651
TTY Toll Free: 1-866 612-8627
Human Rights Legal Support Centre web site.

ONTARIO HUMAN RIGHTS COMMISSION

You can also contact the **Ontario Human Rights Commission.** Their website provides general information about the *Human Rights Code*.
Ontario Human Rights Commission web site.

You can see the Human Rights Code at the government's e-Laws web site.

Applicant's Guide to Preparing for Mediation at the Human Rights Tribunal of Ontario

Dijana Simonovic
Counsel, *Human Rights Legal Support Centre*

Best Practices for Paralegals Appearing Before the Human Rights Tribunal of Ontario

The Law Society of Upper Canada | Barreau du Haut-Canada

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HUMAN RIGHTS LEGAL SUPPORT CENTRE

June 2010

APPLICANT'S GUIDE TO PREPARING FOR MEDIATION AT THE HUMAN RIGHTS TRIBUNAL OF ONTARIO

This is general information only. It is not legal advice about your situation. This publication is not a substitute for a lawyer's research, analysis and judgment.

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INTRODUCTION

The Human Rights Tribunal of Ontario (the Tribunal) asks every party (the person making the human rights claim, the Applicant, and the people or companies responding to the Application, called the Respondent) if they would like to participate in mediation in order to resolve the issues raised in the application without going to a hearing.

Historically, about two thirds of the applications filed at the Tribunal settle at mediation.

SOME IMPORTANT TERMINOLOGY TO GET YOU STARTED

Any legal proceeding uses words and terms that you may not be familiar with and can be hard to understand. The Tribunal process is no exception and it uses some very particular language to describe the process. However, the Tribunal process is also designed to be accessible and understandable to applicants who do not have lawyers.

The following are some terms that you will come across in the guidebook and in your dealings with the Tribunal. As you go through this guidebook, you will see that other common terms are also defined for you.

Application: The initial document that begins the Tribunal's process. The Application is where you explain what happened to you, why you believe it is discrimination and what you want the Tribunal to order against the person or organization who was responsible for the discrimination.

Applicant: The person who files the application and who is claiming that his or her rights under the *Ontario Human Rights Code* have been violated.

Confirmation of Hearing: The notice sent out by the Tribunal to the Applicant and Respondent(s) (the parties) that sets out dates for the hearing and tells the parties when they have to share their documents and witness information with the other parties. The Tribunal has specific deadlines for requesting a change of hearing date: see "What if I need to reschedule a hearing?" in the guidebook called *Applicant's Guide to Preparing for a Hearing at the Human Rights Tribunal of Tribunal,* available at http://www.hrlsc.on.ca/en/index.htm.

Hearing: The legal proceeding where you will present your case in front of the decision maker, called the adjudicator (a member of the Tribunal who acts like a "judge" in your matter). It is similar to a trial in court, although not as formal.

Human Rights Code: Ontario's *Human Rights Code* (*Code*) protects people from discrimination and harassment at work, in housing, in the receipt and delivery of goods, facilities, services, and contracts, and with regard to membership in unions, trade or vocational associations.

The *Code* prohibits discrimination and harassment on any of the following grounds (or characteristics): race, colour, ancestry, place of origin (where you were born), ethnic background, citizenship, creed (religion), sex (including pregnancy), disability, sexual orientation, age, marital or family status, receipt of public assistance (in relation to housing only), or record of offences (in relation to employment only). You can find the *Code* at the government of Ontario's e-laws web site:
http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90h19_e.htm

Human Rights Tribunal of Ontario: The adjudicative body that enforces the *Code*. It consists of staff as well as a group of Tribunal members, called adjudicators, who are appointed to be the "judges" of human rights applications. The Tribunal's purpose is to resolve, through either mediation or adjudication, applications brought under the *Code*. The Tribunal adjudicators (also called Vice-Chairs and Members) conduct both mediations and hearings.

Mediation-Adjudication: A mediation conducted by the same Tribunal member who would be deciding the case at a hearing. In order for this to happen, all parties must consent.

Notice of Mediation: The notice sent out by the Tribunal to the Applicant and Respondent(s) setting out the date scheduled for the mediation. The Tribunal has specific deadlines for requesting a change of mediation date: see "*What if I need to reschedule the mediation?*" below.

Party: Any person or organization entitled to participate in a proceeding. Sometimes, that could include the Ontario Human Rights Commission, your union and a person or organization added as a party by the Tribunal.

Reply: The Applicant's reply (if any) to the Respondent's answer to the Application. The reply is intended to deal only with new matters that are raised in the response. If a reply is necessary, it must be filed within fourteen (14) days after a copy of the Response has been sent to the applicant by the Tribunal.

Respondent: The party that is responding to the application. Respondents can be both corporate entities and individuals.

Response: The Respondent's answer to the application. A Response must be filed within thirty-five (35) days after a copy of the application has been sent to the Respondent by the Tribunal. The response is filed with the Tribunal and the Tribunal will then mail it to you.

Rules of Procedure: The Tribunal rules that govern *Code* applications. The purpose of the rules is to provide a fair, open process and to allow for fair and just proceedings.

WHAT IS MEDIATION?

Mediation is an opportunity for you and the Respondent(s) to meet in person, with a Tribunal member, to try to settle your Application before it goes to a hearing. A settlement is a voluntary agreement to resolve the matter on specified terms.

A Tribunal member will run the mediation. All the Tribunal mediators are also Tribunal adjudicators – they run both hearings and mediations. Tribunal members are human rights experts.

Mediation is *voluntary*. In order for it to take place, all parties to the application must agree to participate in mediation. As with all of the Tribunal's services, the mediation is free of charge.

Even if the Applicant or Respondent does not indicate a willingness to participate in mediation, the Tribunal will still determine whether mediation appears to offer an opportunity to resolve the application. If so, the Tribunal will contact the parties and discuss the possibility of engaging in mediation. The decision to mediate remains voluntary.

If you do not attend mediation, or if you cannot come to an agreement with the respondent(s) during the mediation, a hearing will be scheduled before the Tribunal.

Any settlement must be accepted by both you and the Respondent(s). If you reach an agreement, you will all sign a document setting out the terms of the agreement and a Tribunal form confirming that a settlement occurred at mediation. The Tribunal will issue an order saying the matter has been resolved and will close the file.

Confidentiality

The details of the mediation may be confidential, unless you and the Respondent agree that you would like to both speak publicly about the result, for instance as a way to educate the public about human rights.

After the mediation is over (whether it is successful or not), the record of the mediation will not be shared with any person other than your mediator.

If your mediation is unsuccessful you will have a different Tribunal member for your hearing.

HOW ARE MEDIATIONS SCHEDULED?

The Tribunal holds mediations and hearings at designated "regional centres" in Ontario - Toronto; Kingston; London; North Bay; Ottawa; Sarnia; Sault Ste. Marie; Sudbury; Timmins; Thunder Bay; and Windsor.

The Tribunal may also hold hearings in locations other than the ones listed above in order to accommodate any *Code*-related or other needs of the parties or their witnesses (e.g. disability or family related matters that make it difficult or impossible for you to travel). Any request for a change in location should be in writing and made to the Tribunal's Registrar as soon as possible. For contact information of the Tribunal's Registrar you can visit the Tribunal's website at http://www.hrto.ca. Also see the section below called *"Contact the Tribunal about any accommodation needs."*

Where both parties have indicated a willingness to participate in mediation, the Tribunal will issue a *Notice of Mediation*. The *Notice of Mediation* will indicate the date, location and time of the mediation.

The Tribunal tries to schedule mediations within six (6) months of a completed Application having been accepted. In addition, the Tribunal attempts to schedule hearings so that they will be completed within one (1) year of the completed application having been accepted, but some particularly complex hearings may require a longer period to complete.

Mediations are normally scheduled for a half day, either for the morning or the afternoon. If a matter is particularly complex, or involves a large number of parties, a full day may be provided. If you believe this is needed for your case, you should let the Tribunal know this as soon as possible, either before the mediation is scheduled, or immediately when you receive notice of the date has been set by the Tribunal.

WHAT IF I NEED TO RESCHEDULE THE MEDIATION?

The *Notice of Mediation* advises the parties on the procedure for rescheduling a mediation hearing if they are unavailable on the date set by the Tribunal. The Tribunal's rules about this are set out in its *Information Bulletin: Scheduling of Hearings and Mediations, Rescheduling Requests, and Requests for Adjournments*. This policy is available on the Tribunal's website at www.hrto.ca.

The Tribunal will reschedule a mediation where a party or their representative (e.g. lawyer or paralegal) is unavailable for a good reason (such as being out of the province or country, a previously arranged appointment that cannot be changed, or a previously scheduled court or tribunal appearance). In general, mediations will not be rescheduled merely because the scheduled date is inconvenient for parties, representatives, or witnesses.

If a party is genuinely unavailable, they must contact the Tribunal Registrar, by phone, fax or email, within five (5) days of receiving the *Notice of Mediation*. They must explain the reason that they are unavailable and provide five (5) alternative dates for the mediation.

If you are requesting a new date *after* the date set out in the *Notice of Mediation*, the five alternative *dates must fall between eight (8) and twelve (12) weeks after the date of the Notice of Mediation*. The Tribunal will contact the other parties with the proposed alternative dates. If the parties are unable to agree on an alternative date, the Tribunal may set the date for mediation without the parties' agreement.

If you are requesting a new date before the date set out in the *Notice of Mediation* you must communicate with the Respondent and agree on proposed dates. Once you have done this you should contact the Tribunal's Registrar with the proposed dates. The Tribunal will consider your request.

DO I NEED A LAWYER OR PARALEGAL AT MEDIATION?

No. It is not necessary for you to have a lawyer or paralegal represent you at mediation. Mediation at the Tribunal has been designed for people who do not have a lawyer. Many applicants participate in mediation at the Tribunal without a lawyer. This is known as "self-representation".

If you choose to have representation, you may be represented by a lawyer from the Human Rights Legal Support Centre, or a lawyer or paralegal licensed by the Law Society of Upper Canada (LSUC). You may only be represented by an unlicensed person if that person falls within a category the LSUC has exempted from its licensing requirements. The current exemptions permit an unpaid friend or family member, an employee or volunteer from a trade union, and students, volunteers and employees of Legal Aid clinics, among others, to act as a representative. See the Tribunal's *Policy on Representation before the HRTO* available on the website at www.hrto.ca.

HOW CAN I GET READY BEFORE MY MEDIATION?

Think about what you would like to achieve at mediation

The purpose of the mediation is to resolve the case without having a hearing, where possible and where both parties are reasonable.

In order to have a successful mediation, you will need to go in with a good understanding of what range of outcomes you would be willing to accept. Remember that in order to reach an agreement both sides will have to compromise. It is unlikely that you will be able to settle on the basis of getting everything that you would ideally like.

You should think about what your "best case" and "worst case" scenarios would be. The best case is what you would be able to achieve by going to a hearing, and the worst case would be getting nothing after going through a hearing and losing (having the Tribunal decide against you). You need to consider the minimum offer that you would be willing to settle for, in order to avoid the risk of losing at a hearing, and to have the comfort of the matter being concluded.

You should also think about any other alternative remedies that you would like, but did not list on your application, including ones that you might not even get at a hearing. For example, maybe you would be willing to take less money than you originally asked for in your application, if you could receive a positive letter of recommendation from your employer. The employer might be willing to provide this, in order to settle the matter, even though the Tribunal might not award it at a hearing.

The mediator will be able to provide you some guidance and advice throughout the mediation process on whether s/he thinks the offers being made are appropriate or reasonable. However, it is your decision to accept or reject an offer, and you can always choose to continue on to a hearing if the offers being made are not reasonable.

Decide if you want to bring someone with you for support.

Whether or not you have a lawyer or paralegal, you can bring a family member, friend or anyone else for personal support. You should prepare that individual for the mediation. Tell that person exactly what you want him or her to do during the day. For example, you could say that you want him or her to signal to the Tribunal member or your representative that you are really upset and need a break. On the day of the mediation the mediator will want some explanation of whom the person is and why they are there.

Contact the Tribunal about any accommodation needs.

If you need accommodation (see our information sheet *Your Right to Accommodation under Ontario's Human Rights Code at* www.hrlsc.on.ca) from the Tribunal, you should contact the Tribunal Registrar before your mediation date. For example, if you have particular needs because of a disability, or need

an interpreter to be able to participate in the mediation, you should call and write to the Tribunal to tell them that. The Tribunal has also issued a *Practice Direction on Requests for Language Interpretation* which is available on the Tribunal website at http://www.hrto.ca.

For more information, the Tribunal has a *Policy on Accessibility and Accommodation* available at www.hrto.ca and in various accessible formats including Braille, audio and large print.

Information about how to contact the Tribunal is available in the section called "*Accessibility*" below.

Contact the Tribunal if you do not want to be in the same room as the respondent.

Mediation often involves a meeting of all parties in the same room. This is not a requirement, however, and the Tribunal will not require it if it makes you uncomfortable. Advise the Tribunal in advance of your mediation date and explain why you do not want to be in the same room with the Respondent. Then from the start of the mediation you will be placed in separate rooms. The mediator will go back and forth to each room, communicating to each of you what the other's position is while trying to get you to reach an agreement.

WHAT CAN I EXPECT ON THE DAY OF MEDIATION?

Unless you have specifically stated that you do not want to be in the same room as the respondent, the parties will probably all start out in the same room with the mediator.

The mediator will begin by explaining the process to the parties, including such matters as:

- the process is voluntary;
- all parties are expected to be respectful toward one another; and
- the goal is to have a signed agreement by the end of the day.

After this the mediator will usually explain their mediation plan and make sure that it is agreeable with you and the Respondent(s). S/he might suggest beginning with a joint session, in which both sides sit together for a discussion of the case. Alternatively, s/he might suggest starting with separate discussions. For example, s/he might say something like: "I plan to spend 45 minutes with the applicant, followed by 45 minutes with the respondent, and see where we get to at that point. If we need to go back and forth again, I will probably spend a shorter amount of time with each of you again." You can ask for clarification of the plan, or to change it, at any time.

The mediator may review the Application with you and the Respondent, either together, or after splitting you into two separate rooms. S/he will likely have questions about what you have written in your Application, either for clarification or to get more information. The purpose of this is to make sure that s/he understands the parties' positions.

You will have a chance to tell the mediator, in private, what happened to you and what you want to see done about it. The questions asked by the mediator will help him or her figure out what would be a fair resolution of the matter. You will have the chance to propose settlement options and to respond to options presented by the Respondent(s).

If there is a key document that you would be relying upon to prove your case at a hearing, it would be useful to bring it. It is not normally necessary or appropriate to bring witnesses to a mediation, however it is helpful to know what witnesses you would bring if a hearing went forward. This information will help the mediator to understand and assess the strength of your case.

You can ask for a break if you need it at any time, and for time to think about whether you feel comfortable with the settlement that has been offered by the other side. Remember, however, that you only have a half day for the mediation, and it will pass surprisingly quickly.

What does the mediator do?

The mediator will consider what you and the Respondent(s) have said and will look at any documents provided. The mediator will present the proposals and counter-proposals made by each side to the other, and my even have some of his or her own suggestions. For instance, the mediator might say to you: "The Respondent is not willing to say they will fire the employee who did this to you, but they are willing to make sure that employee and all the others at the company get human rights training, and they are willing to give you money for pain and suffering. Would you be willing to consider that?"

The mediator can also clarify human rights law. For instance, it might be the Respondent's position that having a baby is your choice and has nothing to do with human rights and with the fact they can not promote you because you can not always work evenings. The mediator can point out that the ground of "family status" is in the *Code* precisely because employers cannot discriminate against employees where the employee has a family/child relationship that comes with certain responsibilities. The mediator will not usually give an opinion on how your case would be decided, but can give you an idea of its strengths and weaknesses.

What should I call the Mediator?

You should call the Mediator "Vice-Chair __(last name)__."

What if I want to tell something to the mediator that I don't want the respondent to know about?

Generally the mediator will presume that anything you say can be revealed to the other side *unless* you tell them otherwise. If there is something that you want to be kept confidential, you should talk to them when you are alone in the room with them and explain to them that you want to tell them something that you don't want the respondent to know. The mediator will respect your privacy.

As an example, you might want to tell them that it is very important for you to get any money the respondent may agree to pay quickly, but you don't want that information to influence whether the Respondent will agree to your terms and conditions of settlement.

Will it look bad if I decide that the mediation is not working and I want a hearing?

No. You have a right to a hearing at the Tribunal. If you are not satisfied with the settlement that is being offered to you by the Respondent and the Respondent will not change their mind, then a hearing will have to be scheduled. The offers made and rejected at mediation will not be revealed and cannot be used against you. The hearing will be decided based on the evidence presented and the applicable legal principles.

What happens if no settlement is reached?

If the mediation does not result in an agreement the mediator will advise the Tribunal Registrar and a hearing date will be scheduled. In general, the Tribunal tries to have your hearing within about three (3) months of the mediation date. If you are not available for the scheduled hearing date you must follow the Tribunal's Policy regarding scheduling of hearings and mediations.

Before the mediation ends the mediator will ask you some questions about what is likely to occur at the hearing. S/he will want to know how many witnesses are expected to be called by each side, and how long the hearing might take. You should think about the answers to these questions in advance of the mediation day.

HOW LONG WILL IT TAKE TO GET A RESULT?

The mediation is expected to be completed within the amount of time that is allocated, which is usually a half day. This is not a lot of time, so you need to prepare ahead of time as much as you can. The mediator may be able to stay a little bit longer than scheduled, to provide further assistance, if things are progressing well. In exceptional cases they may be available following the mediation day, but this is very unusual.

WHAT DOES A SETTLEMENT AGREEMENT LOOK LIKE?

While all of the precise elements of a settlement will vary from one case to another, there are some terms that are considered "standard". For example:

- It will usually state that the applicant is not withdrawing the allegations about the discrimination and the respondent is not admitting to the discrimination. This does not mean that the discrimination did not take place - it simply means that the parties are not agreeing to put in writing that the respondent is responsible.

- If money is being paid as lost "income", it will state that the amount you receive will be reduced by "all applicable statutory deductions" (which means the income tax, Canada Pension Plan and Employment Insurance deductions normally found on your income statement);

- If money is being paid as damages for pain and suffering it will state that if the Canada Revenue Agency ultimately requires tax or other statutory deductions (which will not be taken off by the respondent), you will be responsible for paying them.

These points might be presented in terms such as the following:

THE PARTIES AGREE AS FOLLOWS:

1. The Respondent, [name of company], shall pay the Applicant $[Amount] in general damages to the Applicant [your name].

2. The Respondent shall make sure that all employees receive human rights training by a professional organization with expertise in human rights. This training is to be completed by [insert date].

3. The settlement does not constitute an admission of liability by the Respondent or withdrawal of the allegations by the Applicant.

IS THERE ONLY ONE CHANCE AT MEDIATION?

The Tribunal will only schedule one half day of mediation. If that mediation is not successful, your case will be scheduled for a hearing.

Occasionally a second mediation may take place. For example, if it is a complex case and all the parties advise the Tribunal that they are interested in a second mediation, a joint request might be granted.

Also, the first day of hearing is sometimes used for mediation. This may happen if the Tribunal member assigned to hear the case thinks feels that a settlement should be viable, or if the parties advise, at the beginning of the hearing, that they believe a settlement discussions would be useful.

When a mediation occurs at the beginning of a hearing, the Tribunal member scheduled to hear the case may also conduct the mediation, but only if all the parties agree to this. A written agreement called a "mediation-adjudication agreement" must be signed by everyone.

It is up to you whether you want to have the same person do the mediation and hear the case. It can be a helpful way to familiarize the Tribunal member with the issues, and to possibly reduce the amount of time needed for a hearing. On the other hand, some parties are not comfortable speaking freely with the person who will be conducting their hearing.

If the parties would prefer to have a different Tribunal member conduct the mediation, the Tribunal member assigned to hear the case may be able to find another Tribunal member to do the mediation. This will only be the case if there is someone free, however, so it will not necessarily be possible.

WHAT ELSE SHOULD I KNOW?

Confidentiality

The information you supply in your Application, and other information about your case can become public, especially if your case progresses to a hearing and also if a decision is written for your case.

Additionally, under the law, if the Ontario Human Rights Commission requests to see your application, or any filed responses, the Tribunal must share it with them. The Tribunal may also have to share your application in response to a request to the Tribunal through the *Freedom of Information and Protection of Privacy Act.*

The Tribunal has policies for responding to requests for information, as well as requests to keep information private. The Tribunal's responses are based on

balancing privacy interests with the public interest in having a transparent legal process.

Language Interpretation

The Tribunal is obligated to provide language interpretation or sign language interpretation to the parties in a case if they need such services in order to participate fully in a hearing or mediation. These interpreters will attend the hearing and/or mediation.

In order to request interpretation services you should contact the Registrar's office at the Tribunal as soon as possible.

Accessibility

The Tribunal will accommodate any party or witness according to their *Policy on Accessibility and Accommodation.*

If you need any accommodation to partake in any process related to the Tribunal, you will need to contact the Tribunal's Registrar.

WHERE CAN I GET MORE INFORMATION?

HUMAN RIGHTS TRIBUNAL OF ONTARIO

Contact the **Human Rights Tribunal of Ontario** to get a copy of the **application form** to make a discrimination claim. You can also go to the Human Rights Tribunal website to get a copy of the Applicant's Guide to filling out the application form and information about Tribunal procedures, policies and practices.

Human Rights Tribunal of Ontario
655 Bay Street, 14th floor
Toronto, ON M7A 2A3
Local : (416) 326-1312
Toll Free : 1-866-598-0322
TTY (Local): (416) 326-2027
TTY (Toll Free): 1-866-607-1240
Fax: (416) 326-2199
Fax (Toll Free): 1-866-355-6099
www.hrto.ca

HUMAN RIGHTS LEGAL SUPPORT CENTRE

Contact the **Human Rights Legal Support Centre** if you have experienced discrimination and you would like legal assistance in completing an application to the Tribunal or legal advice about how to address the discrimination that you experienced.

The first step is to telephone our information/advice lines:

Human Rights Legal Support Centre
Tel: (416) 314-6266
Toll Free: 1-866-625-5179
TTY: (416) 314-6651
TTY Toll Free: 1-866 612-8627
www.hrlsc.on.ca

ONTARIO HUMAN RIGHTS COMMISSION

You can also contact the **Ontario Human Rights Commission.** Their website provides general information about the *Human Rights Code*. www.ohrc.on.ca

You can see the *Code* on line at e-laws: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90h19_e.htm

Representation of Respondents Before the Human Rights Tribunal of Ontario

Katherine Ford
Sherrard Kuzz LLP

Best Practices for Paralegals Appearing Before the Human Rights Tribunal of Ontario

The Law Society of Upper Canada | Barreau du Haut-Canada

Continuing Professional Development

Representation of Respondents Before the Human Rights Tribunal of Ontario

Katherine E. Ford, Sherrard Kuzz LLP

With the changes to Ontario's human rights system in 2008, there has been an increase in the number of human rights complaints filed and certainly the number of complaints (now called "applications") going to mediation and/or hearing before the Human Rights Tribunal of Ontario (the "Tribunal"). Applicants under the new system may be able to access the Human Rights Legal Support Centre for representation. However, respondents who wish to have legal representation will generally be required to retain a paralegal or a lawyer. The purpose of this paper is to provide some practical tips to paralegals on effective representation of respondents before the Tribunal.

STEP ONE: FILING THE RESPONSE

Once an application has been filed with the Tribunal, it will generally be forwarded to the respondent(s) with express instructions as to the timeline for the filing of the response and what is to be included with the response. The response needs to be filed **thirty five (35)** calendar days after receipt of the application. The date on which the "clock starts running" on the filing of a response will be set out in the covering letter to the response. The response is filed with the Tribunal directly, who will then circulate it to other parties.

Preliminary Considerations

There are some specific considerations that may impact on the response filed and that you should consider at the outset of receiving the application. They include:

1. **Are you being retained by one respondent only or by all respondents?**

In employment-related human rights files, it is very common to see not only the corporate employer named, but also individual employees named as personal respondents to the application. Before you commence filing anything, you should ensure that you understand clearly who you are being retained by and the nature of that retainer.

2. **Is a complete response to the allegations required at this point in time?**

The Tribunal's Rules of Procedure set out limited circumstances under which a respondent does not have to file a substantive response to the allegations set out in the application. They are (1) where the applicant has signed a release that addresses human rights claims; (2) where there is a civil claim (e.g. a wrongful dismissal claim) in which the applicant is seeking damages for a violation of the *Human Rights Code* (the "*Code*"); (3) where there has been a complaint filed with the Ontario Human Rights Commission; and (4) where the application falls under federal jurisdiction.

In these limited circumstances, the respondent need only attach the applicable documentation (e.g. the release, the claim, or the Commission complaint) and make full submissions relating to why the application should be dismissed. They do not need to respond to the actual substance of the application until the Tribunal has made a ruling on whether or not the application is dismissed.

3. **Is there another proceeding that has appropriately dealt with the substance of the application?**

In the employment arena, there may often be a number of venues in which an employee may bring a complaint relating to an alleged human rights violation. For example, a unionized employee may have a grievance filed by his or her union alleging a violation of the *Code*. Similarly, an employee may file a complaint with the Employment Standards Branch alleging discriminatory treatment as a result of a pregnancy or parental leave. Again, this would be an issue that the Tribunal could consider, but can also be the subject of a claim under the *Employment Standards Act*.

In situations where an applicant has filed a complaint through another proceeding that deals with the same allegations or allegations similar to those raised in the application, the respondent may wish to request that the Tribunal to defer the application under Rule 14 pending the outcome of the other proceeding.

It should be noted in that this request may be made in the response and/or in a separate Request for an Order During Proceedings (discussed in more detail below). However, in such situations the respondent is **still** required to provide a response on the merits of the application.

If the Tribunal does decide to defer dealing with the application until the other proceeding has concluded, what they will be looking at is whether the human right issues have been adequately addressed by the other adjudicative body. If they were, the application will be dismissed. However, if the Tribunal concludes that the other proceeding did not adequately addressed the alleged human rights concerns, the application may re-commence once the other proceeding has concluded.

Responding on the Merits

The first step in preparing a response is to get a good understanding from your client of the facts and their position. The response is your client's opportunity not only to respond to the allegations made, but to paint a picture for the Tribunal of what the respondent says actually occurred.

Remember that, as a component of the response, a brief witness list and list of "key" documents is required. This is a good opportunity to start thinking about the type of evidence your client will need to call in the event that the application does proceed to a hearing. You do not need to attach the "key" documents, save for any documents that the Tribunal specifically requires (such as the respondent's anti-harassment/anti-discrimination policies, any written complaints received, etc.). The documents the Tribunal requires are clearly set out on the Form 2-Response Form.

Once your response has been filed, the applicant has the opportunity to file a reply to the response. In the normal course, the next step is usually mediation. However, you may consider whether your client(s) might benefit from any orders being made in advance of the mediation. The next section will discuss the use of the "Request for An Order During Proceedings".

STEP TWO: MAKING A REQUEST FOR AN ORDER DURING PROCEEDINGS

Pursuant to Rule 19, any party may make a Request for an Order During Proceedings, and this may be done by oral submission or written request. In the case of a written request, a Form 10 must be filed and delivered to all other parties.

This is an effective tool in having the Tribunal address certain issues on a preliminary basis. The following are some common orders that respondents request:

1. **Request for the Removal of Personal Respondents**

The Tribunal's jurisprudence is clear that it discourages the unnecessary naming of personal respondents to human rights applications. In *Sigrist and Carson v. London District Catholic School Board et al.,* 2008 HRTO 14 the Tribunal set out its view on the naming of personal respondents at paragraph 42, stating:

> The unnecessary naming of personal respondents is a practice to be discouraged, as this serves to unnecessarily add to the complexity of proceedings and can often operate as a roadblock to resolution. Pursuant to section 45(1) of the Code, a corporation is deemed to be liable for "any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent". Where there is no issue as to the ability of a corporate respondent to respond to or remedy an alleged Code infringement and no issue raised as to a corporate respondent's deemed or vicarious liability for the actions of an individual who is sought to be added as a personal respondent, then in my view the individual ought not be added as a personal respondent in the absence of some compelling juridical reason. A compelling juridical reason may exist, for example, where it is the individual conduct of a proposed personal respondent that is a central issue as opposed to actions which are more in the nature of following organizational practices or policies or where the nature of the alleged conduct of a proposed personal respondent may make it appropriate to award a remedy specifically against that individual if an infringement is found.

In *Persaud v. Toronto District School Board,* 2008 HRTO 31 the Tribunal identified the following five (5) factors as relevant to the consideration of whether to remove a personal respondent from the Application:

(a) Is there is a corporate respondent in the proceeding that also is alleged to be liable for the same conduct?

(b) Is there any issue raised as to the corporate respondent's deemed or vicarious liability for the conduct of the personal respondent who [is] sought to be removed?

(c) Is there is any issue as to the ability of the corporate respondent to respond to or remedy the alleged Code infringement?

(d) Does any compelling reason exist to continue the proceeding as against the personal respondent, such as where it is the individual conduct of the personal respondent that is a central issue or where the nature of the alleged conduct of the personal respondent may make it appropriate to award a remedy specifically against that individual if an infringement is found?

(e) Would any prejudice be caused to any party as a result of removing the personal respondent?

In many applications, particularly discrimination-based complaints, the personal respondents named may have been acting in the course of their employment and the corporate respondent may be deemed to be liable for their conduct in accordance with Section 46.3(1) of the *Code* such that there is no "compelling judicial reason" to keep them on the record as a respondent. In these cases, you may be able to have the personal respondents removed as parties to the application on a preliminary basis and prior to mediation and/or any hearing.

2. Request for Dismissal on a *Prima Facie* Basis

The Tribunal may dismiss an application that fails to disclose a *prima facie* case. A *prima facie* case is made out where the allegations, if true, would justify a finding of discrimination or harassment in the absence of any answer from the respondent.

Generally speaking, the Tribunal will be reluctant to dismiss a complaint on a *prima facie* basis without having provided the applicant the opportunity to call evidence. However, there have been decisions from the Tribunal that have held that an application may be dismissed at a preliminary stage and prior to evidence being called where the allegations made out in the application do not disclose a *prima facie* case: see *Arias v. Centre for Spanish Speaking Peoples*, 2009 HRTO 1025.

It may be that, with the advent of the new summary hearing process, these types of Requests will be less common, and instead this may be addressed more effectively through a summary hearing, pursuant to Rule 19A. However this is still an option open to respondents where the application filed fails to demonstrate a *prima facie* case.

3. Request for Deferral

As discussed above, a respondent may request that an application be deferred on the basis that the substance of the application is being addressed before another proceeding (e.g. arbitration or Employment Standards hearing). A Request for An Order may be used for this purpose, filed contemporaneously or after the filing of the response.

4. Request for Dismissal of an Application Outside the Tribunal's Jurisdiction

Pursuant to Rule 13 of the *Rules*, a respondent may also file a Request for an Order seeking dismissal on the basis that the allegations set out in the application fall outside of the Tribunal's jurisdiction. There are limited circumstances where a respondent may make an argument that the Tribunal does not have the jurisdiction to address an application (for example, if the application deals with the exercise of prosecutorial discretion). Note this is different than making an argument that the application falls within the federal jurisdiction (e.g. if the respondent is a bank or a telecommunications company). In those cases, as discussed above, the respondent may ask to have the application dismissed prior to filing a response on the substance of the application itself.

STEP THREE: ATTENDING MEDIATION

Both the application and the response form ask whether the parties are prepared to consent to mediation. Mediation at the Tribunal is conducted by a Vice-Chair. The Vice-Chair who conducts the mediation will not ultimately preside over the hearing in the event that mediation is unsuccessful. The mediation notes are not shared by the Vice-Chair with any other Tribunal Member. Mediation is an opportunity for the parties to come to the Tribunal to determine whether the application can be settled "without prejudice" to the positions taken in the proceeding.

Prior to attending at mediation, it is useful to discuss the mediation process with your client so they understand what they will be doing at the Tribunal. You should also make sure that the person that is attending at the mediation has reviewed the confidentiality agreement, understands it, and has authority to settle on your client's behalf.

In order to effectively represent your client, you should have a good understanding of the facts of the case and what your client's position is with respect to the issues in dispute. You should also have a realistic conversation with your client prior to mediation about their probability of success if they proceed to the Tribunal and what the potential damages and legal costs could be if they do proceed.

STEP FOUR: ATTENDING AT THE HEARING

Pre-Hearing Considerations

In the event that a matter doesn't settle at mediation, it will proceed to a hearing with dates scheduled by the Tribunal. There is no "pre-trial conference" or any other form of settlement discussion (other than between parties) in advance of the hearing itself. If the parties do wish to engage in further mediation, a request to do so can be made either at the commencement of the hearing or at any point in time after the hearing has commenced. The Vice-Chair hearing the matter will attempt to find another Vice-Chair to mediate. However, if another Vice-Chair is not available, the parties can sign off on having the presiding Vice-Chair act as both mediator and adjudicator.

Prior to the hearing, there are timelines established for the disclosure of documents, witness lists and brief witness statements. These are set out in Rules 16 and 17 of the Tribunal's Rules of Procedure. Failure to comply with these timelines may result in your client being unable to call the witness or the document, so you should ensure that these dates are diarized as soon as you receive the Confirmation of Hearing from the Tribunal.

With respect to document disclosure, it is important to remember that the initial document disclosure obligation is to produce all "arguably relevant documents". Your client should understand that this means *all* documents, and not only those documents that may be relied on by your client at the hearing or may be helpful to their case.

Notwithstanding that documents are produced to the Tribunal and the other parties prior to the hearing, it may be useful to prepare a book of documents (and a book of authorities) for the hearing itself. This will ensure that all of the parties have the documents easily available to them when you wish to call evidence relating to a specific document. The hearing itself will take place at the Tribunal in one of the hearing rooms. Clients should be made aware that (in most cases) the hearing will be public, which means that there may be spectators at the back of the hearing room listening to the proceedings.

Witness Preparation

In preparing your witnesses for hearing, you may want to talk to them about what the Tribunal room looks like, where they will be sitting to give evidence and they type of questions they may be asked. They should have an opportunity to review and documents they will be providing evidence on in advance of the hearing.

Witnesses should be prepared for their direct questions and should understand the type of questions that they may be asked on cross-examination. They should also understand that the Vice-Chair may ask questions as well and may direct the witness to specific areas on which they wish them to provide evidence. The Tribunal has broad discretion over how a hearing is conducted and may ultimately advise the parties that there are certain witnesses that the Vice Chair wishes to hear from and others from whom they do not feel it is necessary to hear evidence.

Witnesses are often nervous so it is a good idea to talk to them about the process so that they are as familiar with it as possible. You may also want to remind them to speak SLOWLY- a nervous witness can speed through a sentence and the Vice-Chair presiding over the hearing may have difficulty capturing all of the evidence (as there is no court reporter) if the witness speaks too fast.

If you do plan on bringing a number of witnesses to the hearing, they may be well advised to bring reading material or something to keep them occupied as the Tribunal will generally exclude witnesses from the proceeding until they have testified.

Opening and Closing Statements

Opening and closing statements are prepared in the same manner as they would be for any other proceeding. The opening statement should be a relatively brief overview of the issues and what your client's position will be. You may wish to briefly explain who you intend to call as witnesses and what they are expected to testify about. The closing argument is your opportunity to frame the evidence in the relevant case law, and you should ensure that you have the case law prepared and ready to hand up to both the Vice-Chair and the opposing counsel. In some cases, the parties will have made arrangements to exchange case law in advance or to prepare a joint book of authorities. Recent human rights decisions from the Tribunal can be found at www.canlii.org (a free site). There are also various fee-based reporters (such as Canadian Human Rights Reporter) that report on human rights cases across the country.

After the Hearing

Once the hearing has concluded, the Tribunal will issue a written decision. This decision will be publicly available on the internet. Your client should also be aware that the Tribunal currently does not have the discretion to award legal costs to any party. As such, even if they are successful they will be solely responsible for any legal fees incurred in the process.

The information contained in this paper is provided for general information purposes only and does not constitute legal or other professional advice. Reading this presentation does not create a lawyer-client relationship with Sherrard Kuzz LLP.

TAB 4

Making a Case for Civility:
The Art of Being Persuasive and Polite

Link to Treasurer's Report on the Civility Forum

Shannon Moldaver
Counsel, Professional Development and Competence
The Law Society of Upper Canada

Best Practices for Paralegals Appearing Before the Human Rights Tribunal of Ontario

The Law Society of Upper Canada | Barreau du Haut-Canada

Continuing Professional Development

MAKING A CASE FOR CIVILITY:

THE ART OF BEING PERSUASIVE AND POLITE

Shannon Moldaver, ***The Law Society of Upper Canada***

Lawyers and paralegals alike are increasingly struggling with civility issues. The temptation to be aggressive is at times overwhelming when confronted by hostile, rude, unsympathetic, or ill-informed people. The challenge to maintain a high level of professionalism is formidable yet worthwhile in the long run. The following lists outline some myths about the benefits of incivility, counter-arguments to debunk them, and ideas for solving the current problem of declining civility within the profession.

Myths About the Efficacy of Incivility

- **Myth #1-** Being rude and forceful is persuasive. You will have a better chance of achieving your intended result if you are aggressive.
- **Myth #2-**Creating efficiency in the system mandates a departure from etiquette. If we wait for the system to work, nothing would ever get done.
- **Myth #3-**Impressing your clients often requires adopting the image of his or her personal fighter-defender. Fighting for rights is inconsistent with being polite. Litigation is not a tea party. Paralegals are the people's representatives.
- **Myth #4-** Carving out a good reputation in law necessitates that you act like a bulldog. Apart from the ethical issues, there is the business side of law to consider.

Reasons Why Civility Works

- Court staff, judges, adjudicators, arbitrators, and decision-makers talk to each other. The impression you leave will not be contained within the four corners of the hearing room. Your reputation will precede you and follow you.
- Measured, diplomatic approaches can be forceful. This strategy will likely attract more credibility to your case in the eyes of the decision-maker.
- The kindergarten rule of working well with others endures in all aspects of life, professional and otherwise. Less drama will translate into less stress for you.
- Civility promotes efficiency in the system and saves precious judicial resources such as time and money. Numerous studies in Canada and abroad have identified the adversarial nature of litigation as the key factor contributing to cost and delay in the justice system. Increasing access to justice to the people of Ontario by cutting down delays is a key function of your job as a paralegal.
- Better results can be extracted by using a calm approach. Someone who may have been unintentionally bias against you may come around when they are faced with a courteous and respectful person with well-thought-out arguments.
- Judges become distracted by incivility. Therefore you may be depriving your client of proper access to justice by removing the spotlight from the facts and focusing attention on disrespectful conduct.
- Clients are impressed by methodical, strong, purposeful resolve aided by civility.

- Reserving forceful behaviour for appropriate situations is on the whole more persuasive. Demonstrating civility most of the time lends more credence to any suitable pressure tactics you might need to use to advance your case. Avoid “the boy who cried wolf” syndrome.

How to fix the current problem

- Look to the courts, the government, and your governing body to discipline uncivil behaviour and create strategies for change. However, remember it is most important to look at yourself with a sober awareness of what is working and what is not working.
- Find a mentor to help you on your journey, or mentor others in need of help.
- Seek education to help you and others with the self-improvement.
- Carve out time for yourself so that you do not fall victim to stress and irrational conduct.
- Ensure time to prepare to avoid feeling pressured, vulnerable, defensive, and self-defeating.
- Lead by example. Change your ways, and others are sure to follow.

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Additional Resource

Link to *Treasurer's Report on the Civility Forum*
(Report to Convocation, May 27, 2010)
http://www.lsuc.on.ca/media/convmay10_treasuers_report.pdf

TAB 5

Dismissals and Deferrals before the Human Rights Tribunal of Ontario

Co-Written and Co-Presented by:

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Best Practices for Paralegals Appearing Before the Human Rights Tribunal of Ontario

The Law Society of Upper Canada | Barreau du Haut-Canada

Continuing Professional Development

Dismissals and Deferrals before the Human Rights Tribunal of Ontario

By Julie-Anne Cardinal, Amanda Hunter and Bay Ryley

1) Introduction

In June 2008, the amended *Human Rights Code*[1] (the "*Code*") came into effect. The goal of the new legislation was to provide Ontarians with direct access to the Human Rights Tribunal of Ontario (the "Tribunal"). Prior to these amendments, the Ontario Human Rights Commission was the "gatekeeper" with the power to determine which complaints were referred to the Tribunal.

The impact of the amendments to the *Code* in 2008, combined with the Supreme Court of Canada's decision in ***Tranchemontagne v. Ontario (Director, Disability Support Program)***[2], is that when human rights issues arise there may be a variety of forums in which these rights may be pursued. In *Tranchemontagne*, the Court held that human rights tribunals do not have exclusive jurisdiction to apply the *Code*, but on the contrary, all tribunals are required to take the *Code* into account when deciding issues before them.

Before deciding which forum(s) to choose to assert their rights under the *Code*, individuals should consider what form of resolution or remedy they are seeking. The Tribunal may award monetary awards and public interest remedies that other forums cannot. The Landlord Tenant Board and the Ontario Labour Relations Board, on the other hand, cannot award damages for discrimination under the *Code*.

Human rights claimants must be aware that pursuing one road of redress could disqualify them from pursuing another based on the *Code* amendments related to dismissal and deferral. The new, more accessible human rights system has respondents on the lookout for "forum-shopping" by applicants who, by pursuing more than one forum, attempt to expedite recovery, put pressure on the opposing party to settle, or increase chances of success. In this new system, the Tribunal is

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[1] *Ontario Human Rights Code*, R.S.O. 1990, c. H.19 [*Code*].

[2] *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14 (CanLII).

concerned with an overlap in proceedings in terms of the use of its resources, as well as problems arising from inconsistent findings between different judicial or quasi-judicial proceedings.

This paper examines the new rules for dismissals and deferrals before the Human Rights Tribunal, specifically addressing situations where issues have already been – or are concurrently being – adjudicated before a second adjudicative forum. We will outline the Tribunal's criteria for granting deferrals and dismissals with respect to the following:

- grievance arbitrations under collective agreements;
- investigations under the *Employment Standards Act, 2000*[3];
- applications before the Ontario Labour Relations Board ("OLRB");
- applications before the Workplace Safety & Insurance Board ("WSIB");
- complaints before the Ontario Civilian Commission on Police Services ("OCCPS");
- applications before the Landlord Tenant Board ("LTB");
- applications before the Special Education Tribunal ("SET");
- minutes of settlement;
- civil proceedings;
- criminal proceedings
- failure to establish a *prima facie* case;
- summary hearings; and
- federal rather than provincial jurisdiction.

[3] *Employment Standards Act*, 2000, S.O. 2000, c. 41 [*ESA*].

2) <u>The Applicable Sections of the *Code* and Rules of the Tribunal</u>

(a) Dismissals

Dismissals for Tribunal applications generally are regulated by s.45.1 of the *Human Rights Code*[4]:

> **Section 45.1** The Tribunal may dismiss an application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application.

Dismissals for reasons of competing civil proceedings specifically fall under a different provision of the *Code*, namely s.34(11):[5]

> **Section s.34(11)** A person who believes that one of his or her rights under Part I has been infringed may not make an application under subsection (1) with respect to that right if,
>
> > (a) a civil proceeding has been commenced in a court in which the person is seeking an order under section 46.1 with respect to the alleged infringement and the proceeding has not been finally determined or withdrawn; or
> >
> > (b) a court has finally determined the issue of whether the right has been infringed or the matter has been settled.
>
> (12) For the purpose of subsection (11), a proceeding or issue has not been finally determined if a right of appeal exists and the time for appealing has not expired.

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[4] *Code*, *supra* note 1, s.45.1.

[5] *Ibid.*, s.34(11).

(b) Deferrals

The *Code* gives the Tribunal authority to defer applications under s.45, although the governing process is addressed in the Tribunal's *Rules of Procedure*[6]. These are:

> **Rule 14.1** The Tribunal may defer consideration of an Application, on such terms as it may determine, on its own initiative at the request of an Applicant under Rule 7, or at the request of any party.
>
> **Rule 14.2** Where the Tribunal intends to defer consideration of an Application under Rule 14.1, it will first give the parties, any identified trade union or occupational or professional organization and any identified affected persons, notice of its intention to consider deferral of the Application and an opportunity to make submissions.
>
> **Rule 14.5** The Tribunal may, on its own motion, require a deferred Application to proceed in appropriate circumstances.

(c) Requests for Dismissals in Practice

The leading decision on the interpretation of s. 45.1 is ***Campbell v. Toronto District School Board***[7], a matter that went to the Tribunal following an unsatisfactory resolution (in the applicant's view) of the same issue before the Special Education Tribunal (the "SET"). ***Campbell*** (which is discussed further below) unpacks s.45.1 into a two-part test. This test is now applied to all dismissal applications before the Tribunal.

i) <u>Was there another "proceeding" within the meaning of s.45.1</u>? The Tribunal has held that a "proceeding" under this section includes all administrative Tribunals that fall

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[6] *Human Rights Tribunal of Ontario Rules of Procedure*, <online: Human Rights Tribunal of Ontario website, http://www.tribunal.ca/tribunal/?q=en/node/46>.

[7] *Campbell v. Toronto District School Board*, 2008 HRTO 62 (CanLII) [*Campbell*].

under the Statutory Powers Procedures Act[8] ("*SPPA*"), grievance arbitrations arising under collective agreements, and complaints before the Ontario Civilian Commission on Police Services ("OCCPS").

Hearings that are unlikely to qualify as proceedings within the meaning of s.45.1 include internal employer investigations. A good example is provided in ***Maurer v. Metroland Media Group***[9]. In that case, an employee filed a complaint with the Tribunal alleging sexual harassment by a co-worker, and discrimination by both the employer and her representative union in their response to her complaints. The union made an application to the Tribunal under s.45.1 to have the matter dismissed, contending that the employer had already conducted an internal investigation into the matter and resolved it to the satisfaction of the employee.

In ruling that the employer's internal investigative measures did not constitute a "proceeding" within the meaning of s.45.1, the Tribunal noted: "[a] purely private, internal process established by an employer without formal guarantees of procedural fairness, impartiality or independence, cannot deprive the applicant of the right to pursue a remedy under the *Code*…"[10]

ii) <u>If so, did the proceeding "appropriately deal with" the substance of the application</u>? The Tribunal has held that the alternate proceeding must have made at least a preliminary finding, if not a final determination, on the same matter before it will consider dismissing a human rights complaint.[11] The use of the past tense is thus quite significant in s.45.1.

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[8] *Statutory Powers Procedure Act*, R.S.O. 1990, c. s.22 [*SPPA*].

[9] *Maurer v. Metroland Media Group*, 2009 HRTO 200 (CanLII) [*Maurer*].

[10] *Ibid.*, at para. 11.

[11] *Castellanos v. Guise Street Housing Co-operative*, 2009 HRTO 1174 at para. 6 (CanLII) [*Castellanos*].

It follows from this rule – and the Tribunal has confirmed – that it will not grant a dismissal simply because some other forum would be more appropriate.[12] The process must have begun in a tangible way.

Finally, as to the substantive aspect to the words "appropriately dealt with", the Tribunal has ruled that this does not require it to be satisfied with the substantive findings of the alternate forum. In other words, the analysis is one of procedure, not merit.[13]

3) Requests for Deferrals in Practice

Requests for deferrals in Tribunal decisions are also sometimes referred to as "adjournments." The leading case on deferrals is ***Baghdasserians v. 674460 Ontario***[14]. In that case, the Tribunal ruled that the intent of Rule 14 was to ensure "proceedings dealing with the same issues do not run concurrently, thereby raising the possibility of inconsistent decisions on facts or law."[15] As a result, the factors the Tribunal considers in making deferral rulings are:

- the subject matter of the proceeding;
- the nature of the other proceeding;
- the types of remedies available in the other proceeding; and
- whether it would be fair overall to the parties to defer the Application, having regard to the status of each proceeding and the steps already taken to pursue them.[16]

Thus, dismissal is available when another forum has issued a decision on the merits for substantially the same matter before the Tribunal. Deferrals on the other hand, are granted to avoid concurrent adjudications and the future possibility of inconsistent findings.

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[12] *Maurer*, *supra* note 9 at para. 12 (CanLII).

[13] *Campbell*, *supra* note 7 at para. 68.

[14] *Baghdasserians v. 674460 Ontario*, 2008 HRTO 404 (CanLII).

[15] *Ibid.*, at para. 18.

[16] *Vonella v. Blake Jarrett and Company*, 2010 HRTO 1206 at para. 6 (CanLII) [*Vonella*].

Each of these standards is consistently applied in the Tribunal's decisions since June 2008, but the analysis may vary slightly depending on the nature of the alternate forum. These are compared and contrasted further below.

(4) What Kinds of Cases Will Give Rise to Requests for Deferrals and Dismissals?

(a) Grievance Arbitrations

The Supreme Court of Canada has ruled that arbitrators have exclusive jurisdiction to deal with matters that fall within the four corners of a collective agreement. The Court has also ruled that grievance arbitrators not only have the power but also the responsibility to implement and enforce the substantive rights and obligations of the *Code*, as if these were part of the collective agreement, when arbitrating disputes.[17] As such, the Tribunal's custom is to defer in favour of a grievance arbitration before proceeding on a Tribunal claim.

If a grievance arbitration has already dealt with the substance of the matter before the Tribunal and rendered a decision, the Tribunal is very likely to dismiss the complaint so long as the issues and facts alleged in the complaint are substantially the same as those that went before the arbitrator.

Deferrals, on the other hand, are typically granted where the grievance arbitration process is underway but not yet complete, or where hearings have yet to be scheduled. An adjournment will not be granted if the substance of the issues for adjudication in both forums is different. For example, consider a workplace incident involving accommodation where an employee has pursued a grievance. Assuming the grievance includes allegations of discrimination, or a failure to accommodate, the arbitrator has the power to interpret and apply the provisions of the *Code*, and therefore the Tribunal is likely to defer. If, however, the grievance did not include an alleged breach of the *Code*, but is based on the same workplace incident, the Tribunal may deny the dismissal request and hear the human rights claim on its own merits.

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[17] *Parry Sound Social Services Administration Board v. O.P.S.E.U., Local 342*, 2003 SCC 42 (CanLII).

In ***Baldwin v. Thames Valley District School Board***[18], an employee alleged discrimination and harassment on the basis of disability after being transferred to a new position. A grievance was filed and a settlement reached during mediation. Subsequently, the employee filed a complaint with the Tribunal making the same allegations as were in her grievance.

The employer filed a preliminary motion to have the Tribunal application dismissed. The employer argued the grievance had appropriately dealt with the substance of the human rights complaint. Although the original grievance did not specifically plead or argue a violation of the *Code* and the minutes of settlement concluding the arbitral process did not reference the *Code*, the Tribunal agreed with the employer and dismissed Baldwin's complaint.

In its reasons, the Tribunal noted that the same facts and issues were raised in both proceedings. Further, the Tribunal ruled that failure of the grievance and minutes of settlement to specifically address the *Code* was not fatal to the deferral application, as the collective agreement addressed the *Code* in its discrimination provisions. Finally, that the complainant had not physically signed the minutes of settlement was inconsequential: the Tribunal was satisfied based on submissions of the parties that the grievance had fully dealt with the substance of the applicant's complaint.

See also:

Bradshaw v. Complex Services, 2010 HRTO 1215 (CanLII).

Dunbar v. Haley Industries Limited, 2010 HRTO 272 (CanLII).

McKay v. Villa Forum, 2010 HRTO 1409 (CanLII).

Parsons v. York (Regional Municipality), 2009 HRTO 1997 (CanLII).

Savard v. Toronto (City), 2010 HRTO 1337(CanLII).

[18] *Baldwin v. Thames Valley District School Board,* 2010 HRTO 1784 (CanLII).

(b) Complaints before the Ontario Labour Relations Board ("OLRB")

As with grievance arbitrations, the Tribunal will also dismiss a complaint already adjudicated before the OLRB if the substance of the matter is substantially the same. Where they differ – or where the underlying facts may be the same in both forums but the nuances of the human rights complaint are different – deferral will not be granted on the specific human rights issues alleged in the complaint.

A good example of this is ***Baylet v. Universal Workers Union***[19]. In that case, the OLRB ruled against an employee who had pursued two unfair labour practice complaints against his representative union. Unhappy with the outcome of those proceedings, the employee then filed a complaint with the Tribunal alleging disability-based harassment by his employer and failure of the union to represent him fairly. Both applications referenced the same incidents, parties and facts. The Tribunal held that the OLRB was a "proceeding" under s.45.1, but the complaint could not be dismissed as the OLRB hearing had not "dealt with the substance" of the employee's specific human rights complaint. In other words, the OLRB must deal with the human rights component of a complaint specifically in addition to possible violations of the *Labour Relations Act*[20] if the Tribunal is to dismiss an entire complaint.

With respect to deferral, when the Tribunal is faced with a matter appearing concurrently before the OLRB, the Tribunal is very likely to grant a deferral application in deference to the expertise of the OLRB. However, as with other forums, the same human rights issue must be addressed in both proceedings for the deferral request to succeed.

> See also:
>
> *Arias v. Centre for Spanish Speaking Peoples*, 2009 HRTO 1025 (CanLII).
>
> *Baylet v. Universal Workers Union*, 2009 HRTO 700 (CanLII).

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[19] *Baylet v. Universal Workers Union*, 2009 HRTO 700 (CanLII).

[20] *Labour Relations Act*, S.O. 1995, c. 1, Sch. A.

Brady v. Lewenza, 2010 HRTO 872 (CanLII).

Dunbar v. Haley Industries, 2009 HRTO 278 (CanLII).

Marc-Ali v. Graham, 2010 HRTO 1321 (CanLII).

Piechocinski v. Toronto Standard Condominium, 2010 HRTO 1207 (CanLII).

(c) Investigations under the *Employment Standards Act, 2000*[21] ("*ESA*")

In ***Lutgens v. Oxford University Press***[22], the Tribunal denied an application to dismiss a complaint alleging termination on the basis of sex discrimination (the employee was pregnant at the time of her dismissal.) The Tribunal ruled that while an investigation had taken place respecting the applicant's *ESA* complaint, no decision had yet been reached by the Ministry of Labour. Therefore, the Tribunal could not rule conclusively that another forum had "appropriately dealt with" the substance of the complainant's allegation. Instead, it granted a deferral.

In ***Vonella v. Blake Jarrett and Company***[23], an employer requested a deferral of a Tribunal complaint while the Ministry of Labour completed its *ESA* investigation. The Tribunal granted the adjournment request. In their ruling, the Tribunal noted that a deferral request rests on whether "the parties would be required to concurrently address substantially the same issues in two different forums."[24] If so, it will grant a deferral.

See also:

Calabria v. DTZ Barnicke, 2008 HRTO 411 (CanLII).

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[21] *ESA*, *supra* note 3.

[22] *Lutgens v. Oxford University Press*, 2009 HRTO 790 (CanLII).

[23] *Vonella*, *supra* note 16.

[24] *Ibid.*, at para.7.

Chan v. Drake International, 2009 HRTO 1067 (CanLII).

Howard v. Halton Condominium Corporation No. 59, 2009 HRTO 966 (CanLII).

Leblanc v. Toronto (City), 2009 HRTO 960 (CanLII).

(d) The Workplace Safety and Insurance Board ("WSIB") and the Workplace Safety and Insurance Appeals Tribunal ("WSIAT")

As alternate forums, consideration of matters concurrently before the WSIB and WSIAT are more complex. This is because the WSIB's enabling statute, the Workplace Safety and Insurance Act[25] ("*WSIA*") gives the WSIB exclusive jurisdiction to resolve matters under *WSIA*. It states:

> s.118(1) The Board has exclusive jurisdiction to examine, hear and decide all matters and questions arising under this Act, except where this Act provides otherwise.
>
> s.118(2) Without limiting the generality of subsection (1), the Board has exclusive jurisdiction to determine the following matters:
>
> s.118(3) An action or decision of the Board under this Act is final and is not open to question or review in a court.
>
> …
>
> s.123(1) The Appeals Tribunal has exclusive jurisdiction to hear and decide,
>
> (a) all appeals from final decisions of the Board with respect to entitlement to health care, return to work, labour market re-entry and entitlement to other benefits under the insurance plan;

Snow v. Honda Manufacturing[26] is a good example of the additional considerations applied by the Tribunal when faced with a concurrent complaint before the WSIB. This case was decided

[25] *Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16, Sch. A [*WSIA*].

[26] *Snow v. Honda Manufacturing*, 2007 HRTO 45 (CanLII) [*Snow*].

before amendments to the legislation. However, the principles are applied by the current Tribunal.

In that case, the applicant had developed work-related arm and hand pain. The following year, he injured his neck in a car accident. The employer accommodated him with time off and modified duties during this period and for more than three years afterwards. Towards the end of this three year period, the WSIB advised the employer that Snow had severe, permanent physical restrictions that required more permanent accommodation. Honda claimed it had no suitable work available that would meet Snow's restrictions. As a result, Snow was referred to a WSIB Labour Market Re-Entry ("LMR") Program to retrain him. A few months later, the WSIB informed Honda that it had terminated Snow's LMR program for non-cooperation. Honda responded by terminating Snow's employment.

Snow believed Honda did in fact have work that could meet his restrictions. Accordingly, Snow brought an application before the Tribunal alleging failure to accommodate, and demanding reinstatement.

The employer filed a preliminary request to dismiss Snow's complaint under then s.34 of the *Code*. Honda argued that the substance of the complaint had already been dealt with by the WSIB, and allowing the complaint to proceed before the Tribunal was akin to the Tribunal judicially reviewing the WSIB's ruling, a violations of *WSIA* s.123(1) which requires all WSIB appeals be made to WSIAT.

The Tribunal ruled that its jurisdiction was not ousted by the *WSIA*, noting that:

- the *Code* is a quasi-constitutional statute intended to supersede all other statutes when conflicts arise;
- the *WSIA* does not at all contemplate issues of harassment and discrimination in the workplace, thus the issues before the two forums were different; and

- the remedies sought were different. The WSIB only has exclusive jurisdiction to apply the *WSIA* and to determine whether proper accommodations were made within the confines of that statute. It does not consider discrimination in its findings.[27]

Since the *Code* was amended, the Tribunal has deferred a number of applications where the applicant had an outstanding WSIB issue. A prerequisite to a deferral is that there must be a proceeding. Neither an inactive WSIB claim nor a return-to-work mediation are proceedings and thus the HRTO will not defer applications in those circumstances.

The timing of a WSIAT appeal and the nature of that appeal were critical factors leading to the deferral in ***Cui v. MSM***[28]. In that case, the Tribunal found that "the suitability of the modified work offered by the employer, informed by the statutory obligation to accommodate to the point of undue hardship, is central to both proceedings" and the WSIAT hearing date was two months away. As such, the Tribunal found a deferral to be appropriate.

In ***Boyce v. Toronto Community Housing Corporation***, where an employer terminated an injured worker after he refused "suitable" work because he did not believe it was an appropriate accommodation, the same Vice Chair as in *Cui* did not defer.[29] The important distinction in the latter decision was that although the WSIB appeal process was ongoing, it was only at the initial internal WSIB appeal level.

In ***Buriticia v. Campus Living Centres***[30], no deferral was made because the Tribunal found no overlap in the time frame of the allegation before the Tribunal and the WSIB decision. Furthermore, the WSIB decision did not deal with the central issue in the application: the employer's duty to accommodate. Rather, the WSIB decision related to the granting of loss of earning benefits prior to the worker's attempted return to work.

See also:

Berisa v. Toronto (City), 2008 HRTO 46 (CanLII).

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[27] *Ibid.* at paras. 14-15, 19-23 (CanLII).

[28] *Cui v. MSM,* 2008 HRTO 449 (CanLII).

[29] *Boyce v. Toronto Community Housing Corporation,* 2009 HRTO 131 (CanLII).

[30] *Buriticia v. Campus Living Centres*, 2008 HTRO 334 (CanLII).

Dunn v. Sault Ste. Marie (City), 2008 HRTO 149 (CanLII).

Gayowski v. Windsor Essex Catholic District School Board, 2010 HRTO 511 (CanLII).

Lemieux v. Guelph General Hospital, 2010 HRTO 687 (CanLII).

Plummer v. Workplace Safety and Insurance Board, 2009 HRTO 65 (CanLII).

Smith v. Ontario Provincial Police, 2009 HRTO 483 (CanLII).

(e) Ontario Civilian Commission on Police Services ("OCCPS")

(i) Investigation under the *Police Services Act* and subsequent review by the OCCPS constitutes a "proceeding"

In ***Qiu v. Neilson (Regional Municipality of York Police Service Board)***[31], the Tribunal considered whether the OCCPS' investigative and dispute resolution model would qualify as a proceeding under s.45.1.

In that case, the applicant brought a complaint before the Tribunal alleging racial discrimination by police. The police had attended to Qiu's workplace to break-up a dispute between Qiu and his then-employer. The applicant alleged he was punched, pushed, beaten and handcuffed by police. While the police agreed the Qiu was handcuffed following a struggle, this was incidental to his arrest for causing a disturbance. Qiu lodged a complaint with the police service, and OCCPS investigated. OCCPS concluded the police had not violated Qiu's human rights. Unsatisfied with this finding, Qiu filed a complaint with the Tribunal.

The Tribunal was not concerned that an OCCPS investigation was not a "proceeding" under the *SPPA*. It found that the *SPPA* definition of "proceeding" was particular to that legislation only.

[31] *Qiu v. Neilson,* 2009 HRTO 2187 [*Qiu*] (CanLII).

Thus, non-*SPPA* Tribunals would not necessarily be automatically excluded from the application of s.45.1.[32] The deciding factor would be the nature of the OCCPS proceeding itself.

Thus, having not precluded OCCPS from qualifying on the basis of the *SPPA*, the Tribunal next considered whether OCCPS qualified as a proceeding within the meaning of s.45.1. In ruling that OCCPS did qualify, the Tribunal noted that the OCCPS process gave the applicant full disclosure of police materials and permitted the applicant to make detailed submissions through counsel. Further, the applicant fully participated in the process and provided "detailed and voluminous materials" [33] in support of his complaint. Thus, in that circumstance, OCCPS qualified as a proceeding within the meaning of s.45.1.

See also:

> *Franks v Financial Services Commission of Ontario*, 2009 HRTO 1119 (CanLII).
>
> *Leong v. Regional Municipality of Peel Police Services Board*, 2010 HRTO 725 (CanLII).
>
> *Telford v. Owen Sound Police Services Board*, 2010 HRTO 204 (CanLII).

(ii) Whether the Police Application "Appropriately Dealt With" the Substance of the Human Rights Application

In ***Qiu***, the Tribunal held that the allegations raised in the human rights complaint were "appropriately dealt with" by the police investigation and OCCPS review because:

- both were conducted using a fair process, and that the applicant was afforded an opportunity to present his allegations and supporting evidence;
- the applicant had the opportunity to have the police investigation reviewed by the OCCPS, and exercised that right;

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[32] *Pamula v. OPP*, 2010 HRTO 73 at para. 21 (CanLII).

[33] *Qiu*, *supra* note 31 at 31.

- during the course of the police investigation and for the OCCPS review, the applicant was represented by legal counsel;
- a panel of the OCCPS received and reviewed the full investigation file and considered the applicant's submissions, and made a determination as an independent body to uphold the findings of the police investigation;
- and there was "nothing to indicate that either the police investigation or the OCCPS review failed to recognize human rights principles in reaching the determinations that they did."[34]

(f) The Landlord Tenant Board ("LTB")

In ***Carlos v. 1174364 Ontario Ltd.***[35], the Tribunal ruled that "there was no dispute" that an LTB hearing was a proceeding within the meaning of s.45.1. Rather, the issue for the Tribunal with respect to LTB hearings is the scope of the LTB's inquiry and whether it properly deals with human rights issues in any given complaint.

In ***Carlos***, a landlord applied to the LTB to terminate a tenant's lease for non-payment. In her response to the LTB, the tenant claimed to be the victim of sexual harassment, interference and coercion by the landlord. When the LTB considered the landlord's application, it turned its mind only to the landlord-tenant issues in the complaint; that is, the non-payment of rent. The LTB did not consider human rights principles in reviewing the matter. The tenant later brought her complaint to the Tribunal, and the landlord sought to have the application dismissed under s.45.1.

The Tribunal ruled that the human rights issues raised in the application had not been "substantially dealt with" by the LTB and allowed the Tribunal complaint to proceed. The Tribunal noted: "The principles of judicial economy are not undermined by permitting tenants to

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[34] *Ibid.*, at paras. 41-42.

[35] *Carlos v. 1174364 Ontario Ltd.*, 2008 HRTO 403 at para. 35 (CanLII).

raise issues before the LTB for which that Board has particular expertise and also permitting them to raise other issues before this Tribunal for which we have particular expertise."[36]

In ***McKinnon v. Young***[37], the Tribunal considered whether to dismiss a complaint concurrently brought before the LTB. In its reasons, the Tribunal considered the subject matter of the other proceeding, the nature of the other proceeding, the type of remedies available in the other proceeding, and whether it would be fair overall to the parties to defer, having regard to the status of each proceeding and the steps that have been taken to pursue them.

In that case, the Tribunal found that the human rights issue raised by the applicant was "a smaller aspect in a larger landlord/tenant dispute" and thus it would be more "fair, just and expeditious" for the issues to be addressed by the LTB first[38]. The Tribunal application was successfully deferred.

(g) Special Education Tribunal ("SET")

Campbell[39], referenced earlier as the seminal case for the dismissal test before the human rights Tribunal, involved a parent seeking a remedy under the *Code* following a unsatisfactory ruling (in her view) by the SET with respect to special education opportunities given to her minor child. The Tribunal considered whether to dismiss the parent's application at the request of the respondent school board on the grounds that the matter had already been decided by the SET.

The Tribunal was satisfied that the SET was a proceeding under s.45.1 because it was established under a statutory regime. Further, the same facts, issues and incidents were addressed in both forums. The Tribunal dismissed the complaint.

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[36] *Ibid.,* at para. 35 (CanLII).

[37] *McKinnon v. Young*, 2010 HRTO 1183 (CanLII).

[38] *Ibid.*, at paras. 8-10.

[39] *Campbell*, *supra* note 7.

(h) Minutes of Settlement

Where an applicant has signed a full and final release in settlement of a previous proceeding, the respondent can request that the application be dismissed on this basis. Other proceedings where there were signed minutes of settlement could include: a civil action, a union grievance, or a prior human rights application on the same set of facts.

Releases are often pithy and tend to be structured like the following example:

> In consideration of the performance of the undertaking in paragraph 1, the Applicant hereby releases and forever discharges the Respondent, its subsidiaries, affiliates, and successors and each of their respective officers, directors, employees and agents [the Releasees] from any and all actions, causes of action, claims, demands and proceedings of whatever kind for damages, indemnity, costs, compensation or any other remedy which the Applicant or the Applicant's heirs, administrators or assigns has, may have or had against the Releasees to the date hereof of any nature whatsoever, including but without limiting, the Code, the Labour Relations Act, the Employment Standards Act or any other statute or at common law, arising out of her employment by the Respondent with respect to such employment to the date hereof.

Where a respondent believes the matter has already been appropriately dealt with on the basis of signed minutes of settlement, it should indicate this in s.6 of its Response. In ***Thompson v. Liquor Control Board of Ontario***[40], the Tribunal agreed with the respondents that minutes of settlement had resolved a number of union grievances that were filed by the applicant alleging the same human rights violations as raised in the Application. It struck these allegations from the application.

In that case, the Tribunal held that it was significant that the negotiated settlement had been entered into voluntarily by both parties. Otherwise, to allow an applicant to continue in these circumstances "could make the finality of settlement highly uncertain."[41]

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[40] *Thompson v. Liquor Control Board of Ontario*, 2010 HRTO 779 (CanLII).

[41] *Ibid.* at para. 9, citing *Dunn v. Sault Ste. Marie (City)*, 2008 HRTO 149 (CanLII).

The fact that an applicant signed a release does not "automatically bar" the person from bringing an application, even if the settlement released the employer from future claims.[42] Each case must be individually scrutinized and certain defences such as duress could negate a settlement. There are several cases where applicants have argued "economic duress," asserting that their financial circumstances required them to sign. However, the test for duress is a very high bar. In ***Martel v. North Shore Community Support Services***[43], the Tribunal reviewed the case law and held that the pressure asserted on the applicant must amount to a "coercion of the will."[44]

(i) Civil proceedings

The Tribunal has held that in enacting s.34(11), the legislature requires applicants to make a choice of forum when bringing complaints under the *Code*: "[o]nce a person claiming infringement has commenced a civil action claiming damages for alleged human rights violations…that person cannot then proceed with a complaint to this Tribunal."[45]

In ***Beaver v. Dr. Hans Epp Dentistry Professional Corp.***[46], the Tribunal held that s.34(11) is triggered when:

- an applicant raises the *Code* in a court action;
- the facts and issues are the same as those in the Application; and
- the court is asked to find an infringement of *Code* rights and award damages based on that alleged infringement.[47]

In ***Harrop v. Blount Canada Ltd.***[48], the Tribunal dismissed the application on the basis of s.34(11) of the *Code*. After the applicant's employment was terminated, she commenced a civil

[42] *Kailani v. Securitas Canada*, 2009 HRTO 1183 at para. 29 (CanLII).

[43] *Martel v. North Shore Community Support Services*, 2010 HRTO 957 (CanLII).

[44] *Ibid.*, at para. 16, citing *Taber v. Paris Boutique & Bridal Inc. (Paris Boutique)*, 2010 ONCA 157 (CanLII).

[45] *Ibid.*, at para. 13.

[46] *Beaver v. Dr. Hans Epp Dentistry Professional Corp.*, 2008 HRTO 282 at para. 10 (CanLII).

[47] *Ibid.*, at paras. 10-12.

action for wrongful dismissal, alleging that the termination was based on her disability. In her statement of claim, Harrop relied on and pled the *Code* to ground her civil court action. Then, four months later, she filed an application with the Tribunal alleging the same *Code* violations.

In dismissing the application, the Tribunal held:

- the factual and legal foundation for the *Code*-based allegations are the same in the application and the civil action;
- the civil action and the application cover the same subject matter, and the civil action had not been withdrawn, settled or determined; and
- the remedies available in the two forums need not be identical: what is determinative is that the applicant has asked the court to make a finding of an infringement under the *Code* and seeks significant damages that would flow from such infringement.[49]

Usually, requests for dismissals on the basis of a civil action are made on the basis of s.34(11). However, in ***Castellanos v. Guise Housing Co-operative***[50], the request was made under s.45.1. This is presumably because the applicant in that case was involved in civil proceedings with the respondent, but was the **defendant** in those proceedings, and was not making a *Code*-based claim, as s.34(11) requires.

In ***Castellanos***, the Tribunal denied the respondents' request to have the application dismissed, or in the alternative, deferred. The respondents were, concurrently, the plaintiffs in a civil action against the applicant. The respondents had commenced the action for libel on the basis of letters written and circulated by the applicant that described their actions as discriminatory, racist or as having violated the *Code*. The Tribunal denied the request for dismissal on the basis that under s.45.1, the other proceeding must have *already* "dealt with" the substance of the application. In this case, there was no indication that any determination on the substance of the human rights application had been made.

In refusing the request for deferral, the Tribunal held that:

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[48] *Harrop v. Blount Canada Ltd.*, 2009 HRTO 487 (CanLII).

[49] *Ibid.*, at paras. 10-13.

[50] *Castellanos*, *supra* note 11.

- although the civil action and the application "might involve some of the same events, they deal with different legal theories."[51] A finding a libel may not be relevant to finding a breach of the *Code*;

- the remedies being sought in each proceeding were "decidedly different"[52]: the respondents in the human rights complaint were seeking significant financial damages as plaintiffs in the civil suit against the defendant/human rights applicant. In addition, the human rights applicant sought financial and public interest remedies from the respondent in the human rights proceeding.[53]

Where the Tribunal refuses to dismiss an application because a related civil action does not clearly raise *Code* grounds, the Tribunal might defer the application pending the outcome of the civil action.[54]

See also:

> *Christianson v. The College of Physicians and Surgeons*, 2009 HRTO 438 (CanLII).
>
> *Milligan v. Toronto Jail*, 2009 HRTO 2200 (CanLII).
>
> *Hallett v. Grey Bruce Health Services*, 2009 HRTO 403 (CanLII).
>
> *Kim v. Toronto Police Services Board*, 2009 HRTO 1603 (CanLII).
>
> *Klein v. Toronto Zionist Council,* 2008 HRTO 189 (CanLII).

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[51] *Ibid.*, at para. 10.
[52] *Ibid.*, at para. 11.
[53] *Ibid.*, at paras. 10-11.
[54] *Ellis v. Home Outfitters*, 2010 HRTO 974 (CanLII).

(j) Criminal proceedings

Where there are criminal proceedings related to a human rights application, the Tribunal may grant a deferral of the application. In ***Hadley v. J.A.C.S. Cartage Ltd***.[55], there were ongoing criminal proceedings in which the applicant was charged with criminally harassing one of the personal respondents in the same time frame during which he alleges that she harassed him contrary to the *Code*. The Tribunal granted the deferral since the facts in the two proceedings would likely overlap, which “raises the possibility of inconsistent findings of fact”[56] if the application was not deferred and ran concurrently to the criminal proceeding.

On the other hand, in ***Martinez v. Peel Police Services Board***[57], the Tribunal refused to grant the deferral under Rule 14.1, and held that although a criminal process “may involve the same parties and events, there is no indication that the criminal process will address the human rights issues and or provide human rights remedies.”[58]

(k) Dismissal for a Failure to Establish a *Prima facie* Case

If an applicant does not make out a *prima facie* case of discrimination, the application may be dismissed.

A *prima facie* case is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a finding in the applicant's favour in the absence of an answer from the respondent.[59] The onus is on the applicant to establish a *prima facie* case of discrimination. Upon doing so, the burden shifts to the respondent to provide a credible and

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[55] *Hadley v. J.A.C.S. Cartage Ltd.*, 2010 HRTO 226 (CanLII).

[56] *Ibid.,* at para. 21.

[57] *Martinez v. Peel Police Services Board*, 2008 HRTO 434 (CanLII).

[58] *Ibid.* at paras. 6-7. See also, *Sutton v. Jarvis Ryan Associates*, 2009 HRTO 1072 (CanLII).

[59] *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at para. 28.

rational explanation demonstrating, on a balance of probabilities, that its actions were not discriminatory.[60]

Therefore, if the applicant alleges mistreatment by an employer or other proper respondent that is based on a Code ground, a *prima facie* case will likely be established. **For example:** "When her boss found out Mrs. Jones was pregnant, she told her that business was down and fired her on the spot." The burden would then shift to the respondent to prove on a balance of probabilities that either the events as described did not happen, or that (based on evidence) Mrs. Jones' pregnancy was not a factor in the termination of her employment.

Where the applicant cannot make out a *prima facie* case, their application may be dismissed without the burden being shifted to the respondent to provide a non-discriminatory reason for its actions.

The following are cases where the Tribunal dismissed the application because a *prima facie* case was not established:

- In *Wolfe v. Kitchener (City)*,[61] the applicant, an employee of the city, alleged that she was discriminated against in a job application process on the basis of sex in part because the job posting was put up when she was on vacation.

- In *King v. Enersource Hydro Mississauga*,[62] the applicant alleged that the respondent electricity provider discriminated against him (in part on the basis of race) when it: refused to repair the noise attenuation fence located on or near his property; came on his property with police officers in order to access the easement and perform repairs; and providing him with the name of a manager (rather than the CEO, as he had requested) when he sought to complain about Enersource's refusal to repair the fence. The Tribunal was not satisfied that the respondent knew whether the applicant was a racialized person or not.

It is likely that these cases would also be, or perhaps more appropriately be, the subject of a summary hearing under the Tribunal's new Rule 19A, described below.

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[60] *Ibid.* and see *Jagait v. IN TECH Risk Management*, 2009 HRTO 779 paras. 18-19.

[61] 2010 HRTO 1711.

[62] 2010 HRTO 699.

(l) Summary Hearings: Rule 19A

Even where the applicant can make out a *prima facie* case, a new Tribunal rule on summary hearings may be invoked to dismiss applications from going ahead where there is "no reasonable prospect" the application (or part of it) will succeed. Rule 19A.1 provides:

> The Tribunal may hold a summary hearing, on its own initiative or at the request of a party, on the question of whether an Application should be dismissed in whole or in part on the basis that there is **no reasonable prospect** that the Application or part of the Application will succeed. (emphasis added)

Where there is "no reasonable prospect" the application will succeed, either the Tribunal will hold a summary hearing or one of the parties may request the Tribunal to hold the hearing by serving a Form 26 (request for a summary hearing).

It is difficult to imagine situations where an applicant would request a summary hearing, but it is expected to become a common procedural step for respondents wishing to put an end to applications at an early stage. The Tribunal will also likely hold summary hearings on its own initiative to weed out weak cases and maximize the use of its resources.

Where a party makes the request, Rule 19A.3 provides that the Form 26 must contain "the full argument in support of the request for dismissal." A party responding the request must do so within 14 days with a Form 11, after which point the Tribunal will determine whether to hold a summary hearing.[63]

What the Tribunal requires the parties to do in advance of the hearing will depend on the case. Rule 19A.2 provides that the Tribunal "may give directions about steps the parties must take prior to the summary hearing, including disclosure or witness statements."

[63] Rules 19A.4, 19.A.5.

Given that this is a very new rule, there is no case law in Ontario to date. However, British Columbia has a similar provision in its Code. Rule 27(1)(c) enables the Tribunal (but not a party) to dismiss all or part of a complaint "with or without a hearing" if the Tribunal determines that "there is no reasonable prospect that the complaint will succeed…"

Based on the B.C. caselaw, there is no clear test for determining whether there the application has a reasonable chance of success. Each case will be dependent on the facts. In *Wickham and Wickham v. Mesa Contemporary Folk Art and others*,[64] the B.C. Tribunal held:

> [t]he role of the Tribunal, on an application, is not to determine whether the complainant has established a *prima facie* case of discrimination, nor to determine the *bona fides* of the response. Rather, it is an assessment, based on all of the material before the Tribunal, of whether there is a reasonable prospect the complaint will succeed: *Bell v. Dr. Sherk and others*, 2003 BCHRT 63.
>
> The assessment **is not whether there is a mere chance that the complaint will succeed, which would be the lowest threshold a complainant would have to meet. Nor is it that there is a certainty that the complaint will succeed, which would be at the highest threshold a complainant would have to meet.** Rather, the Tribunal is assessing whether there is a reasonable prospect the complaint will succeed based on all the information available to it.[65] [emphasis added]

As the court above noted, "a reasonable prospect" of success is something different from making a *prima facie* case. The fact that an applicant may be able to establish a *prima facie* case does not necessarily mean there is a "reasonable prospect" of success.

For example, if the applicant establishes a *prima facie* case, the burden shifts to the respondent(s) to provide a non-discriminatory reason for its actions. If the respondent has a strong defence, and can provide an explanation that it has, for example, accommodated the applicant's disability

[64] 2004 BCHRT 134.

[65] *Ibid.* at paras. 11 and 12. The Tribunal's approach was affirmed by the B.C. Court of Appeal in *Berezoutskaia v. British Columbia (Human Rights Tribunal),* 2006 BCCA 95 at paras. 9 and 27.

to the point of undue hardship, or provided a reasonable, non-discriminatory reason for its actions, the application may be dismissed after a summary hearing.[66]

(m) Dismissal – Federal Jurisdiction

Under Rule 13.1, the Tribunal may dismiss an application that is outside its jurisdiction. If, for example, an employer is federally regulated, the application is likely within the jurisdiction of the Canadian Human Rights Commission, rather than Human Rights Tribunal of Ontario.

Federal and provincial legislative powers are set out in sections 91 and 92 of the *Constitution Act, 1867*. However, determining which legislative jurisdiction the matter falls under can be complex. The Tribunal may require information from the respondent about the nature of its business in order to make that determination.[67] The Tribunal has held that the following are federally regulated businesses not within its jurisdiction:

- banking[68]
- trucking and transportation extending beyond Ontario[69]
- national telecommunications company providing services across the country[70]
- the provision of nuclear power.[71]

If a respondent wants to request that the application be dismissed on this basis, it should fill out section 6 of the Form 2 (Response to the Application), indicating that the matter is within exclusive federal jurisdiction.

---

[66] See, for example, *Steel v. Bounty Housing Co-Op*, 2010 BCHRT.

[67] *Morgan v. Ottawa (City)*, 2008 HRTO 145.

[68] *Gill v. Bank of Nova Scotia*, 2009 HRTO 1106; *Abramova v. Bank of Nova Scotia*, 2010 HRTO 660.

[69] *Soler v. Luckhart Transport*, 2009 HRTO 1486; *Rowland v. Canada Cartage Systems*, 2009 HRTO 1941; *Digby v. Trans-Provincial Freight Carriers*, 2010 HRTO 1354.

[70] *Dougan v. Rogers Communications*, 2009 HRTO 1169.

[71] *Osier v. Ontario Power Generation*, 2008 HRTO 374.

5) Conclusion

In the new human rights system, the Tribunal has the legislative authority to dismiss or defer applications. This paper has briefly outlined the various fact situations giving rise to a dismissal or deferral being granted.

Lawyers and paralegals who represent applicants should be aware of the various forums in which human rights violations can be pursued, and select the best forum for the remedy the applicant is seeking. Where remedies have been, or will be, pursued in other forums, applicants need to know that their application to the Tribunal could be deferred or dismissed.

Lawyers and paralegals representing respondents should use the Tribunal rules and *Code* sections to their strategic advantage, and request deferrals and dismissals in the appropriate circumstances

Select Human Rights Tribunal of Ontario Forms

Bay Ryley
Counsel, *Human Rights Legal Support Centre*

Amanda J. Hunter
Hicks Morley

Best Practices for Paralegals Appearing Before the Human Rights Tribunal of Ontario

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Human Rights Tribunal of Ontario

Application under Section 34 of the *Human Rights Code* (Form 1)

The Effect On You

9. How the Events You Described Affected You

Tell us how the events you described affected you (e.g. were there financial, social, emotional or mental health, or other effects)? Add more pages if you need to. Number each page.

The Remedy

10. The Remedy You are Asking for (See Applicant's Guide)

Put an "X" in the box beside each type of remedy you are asking that the Tribunal order. Explain why you want it in the space below.

☐ **Monetary Compensation** **Enter the Total Amount $_____**

Explain below how you calculated this amount:

☐ **Non-monetary Remedy – Explain below:**

☐ **Remedy for Future Compliance (Public Interest Remedy) – Explain below:**

Mediation

11. Choosing Mediation to Resolve your Application

Mediation is one of the ways the Tribunal tries to resolve disputes. It is a less formal process than a hearing. Mediation can only happen if both parties agree to it. A Tribunal Member will be assigned to mediate your Application. The Member will meet with you to talk about your Application. The Member will also meet with the respondent(s) and will try to work out a solution that both sides can accept. If mediation does not settle all the issues, a hearing will still take place and a different Member will be assigned to hear the case. Mediation is confidential.

Do you agree to try mediation? ○ **Yes**

Other Legal Proceedings

12. Civil Court Action (see Applicant's Guide)

Note: If you answer "Yes" to any of these questions, you must send a copy of the statement of claim that started the court action.

a) Has there been a court action based on the same facts as this Application?	○ **Yes (Answer 12b)** ○ **No (Go to 13)**

Ontario

Human Rights Tribunal of Ontario

Application under Section 34 of the *Human Rights Code* (Form 1)

b) Did you ask the court for a remedy based on the discrimination?	Yes (Answer 12c)	No (Answer 12g)
c) Is the court action still going on?	Yes (Answer 13)	No (Answer 12d)
d) Was the court action settled?	Yes (Answer 13)	No (Answer 12e)
e) Has the court action been decided?	Yes (Answer 13)	No (Answer 12f)
f) Was the court action withdrawn?	Yes (Answer 13)	No (Answer 12g)
g) If the court action does not ask for a remedy based on the discrimination, are you asking the Tribunal to defer (postpone) your Application until the court action is completed?	Yes	No

13. Complaint Filed with the Ontario Human Rights Commission (see Applicant's Guide)

Note: If you answer "Yes", you must attach a copy of the complaint.

Have you ever filed a complaint with the Commission based on the same facts as this Application?	Yes	No

14. Other Proceeding - in Progress (see Applicant's Guide)

Note: If you answer "Yes" to Question "14a", you must attach a copy of the document that started the other proceeding.

a) Are the facts of this Application part of another proceeding that is still in progress?	Yes (Answer 14b)	No (Go to 15)
b) Describe the other proceeding:		
☐ A union grievance	Name of union:	
☐ A claim before another board, tribunal or agency	Name of board, tribunal, or agency:	
☐ Other	Explain what the other proceeding is:	
c) Are you asking the Tribunal to defer (postpone) your Application until the other proceeding is completed?	Yes	No

15. Other Proceeding - Completed (see Applicant's Guide)

Note: If you answer "Yes" to Question "15a", you must attach a copy of the document that started the other proceeding and a copy of the decision from the other proceeding.

a) Were the facts of this Application part of some other proceeding that is now completed?	Yes (Answer 15b)	No (Go to 16)
b) Describe the other proceeding:		

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Human Rights Tribunal of Ontario

Application under Section 34 of the *Human Rights Code* (Form 1)

☐ A union grievance	Name of union:	
☐ A claim before another board, tribunal or agency	Name of board, tribunal, or agency:	
☐ Other	Explain what the other proceeding is:	

c) Explain why you believe the other proceeding did not appropriately deal with the substance of this Application.

Documents that Support this Application

16. Important Documents You Have

If you have documents that are important to your Application, list them here. List only the most important. Indicate whether the document is privileged. **See the Applicant's Guide.**
Note: You are not required to send copies of these documents at this time. However, if you decide to attach copies of the documents you list below to your Application they will be sent to the other parties to the Application along with your Application.

Document Name	Why It Is Important To My Application

17. Important Documents the Respondent(s) Have

If you believe the respondent(s) have documents that you do not have that are important to your Application, list them here. List only the most important.

Document Name	Why It Is Important To My Application	Name of Respondent Who Has It

Human Rights Tribunal of Ontario

Response to an Application under Section 34 of the *Human Rights Code* (Form 2)

Request for Early Dismissal of the Application

6. Request for Dismissal without Full Response

Complete this section only if you are requesting that the Tribunal dismiss the Application because one of the four situations below applies. Put an "X" in the box that applies. Please see the **Respondent's Guide**.

I request that the Tribunal dismiss this Application because:

- ☐ A claim based on the same facts has been filed in civil court, requesting a remedy based on the alleged human rights violation. (Attach a copy of the statement of claim and the court decision, if any. Include all your submissions in support of your request to dismiss the Application on this basis. The Tribunal may decide your request based only on your submissions.)
- ☐ A complaint was filed with the Ontario Human Rights Commission based on the same, or substantially the same, facts as this Application. (Attach a copy of the complaint and the decision, if any. Include all your submissions in support of your request to dismiss the Application on this basis. The Tribunal may decide your request based only on your submissions.)
- ☐ The applicant signed a full and final release with respect to the same matter. (Attach a copy of the release. Include all your submissions in support of your request to dismiss the Application on this basis. The Tribunal may decide your request based only on your submissions.)
- ☐ The issues in dispute in the Application are within exclusive federal jurisdiction. (Include all your submissions in support of your request to dismiss the Application on this basis. The Tribunal may decide your request based only on your submissions.)

Note: If you put an "X" in any of the boxes above, go to Question 20. Except in these four situations, or as otherwise directed by the Tribunal, requests to dismiss an Application will not be considered without a complete response.

7. Request for Dismissal under s. 45.1 of the *Code* with Full Response

Complete this section only if you are requesting that the Tribunal dismiss the Application because another proceeding has in whole or in part appropriately dealt with the substance of the Application. Put an "X" below if you are making this request. Please see the **Respondent's Guide**.

a)	☐ I request that the Tribunal dismiss the Application because another proceeding has in whole or in part appropriately dealt with the substance of the Application. (Attach a copy of the decision)
b)	Please name the other proceeding: _____
c)	Explain why you believe the other proceeding has in whole or in part appropriately dealt with the substance of the Application. _____

Note: You must complete the entire Response form and attach a copy of the document that started the proceeding and a copy of the decision.

Ontario

5

Human Rights Tribunal of Ontario

Response to an Application under Section 34 of the *Human Rights Code* (Form 2)

Request to Defer the Application

8. Request to Defer

Complete this section only if the facts of the Application are part of another proceeding that is still in progress.

a) Describe the other proceeding:

☐ A union grievance	Name of union:	
☐ A claim before another board, tribunal or agency	Name of board, tribunal, or agency:	
☐ Other	Explain what the other proceeding is:	
b) Are you asking the Tribunal to defer (postpone) the Application until the other proceeding is completed? (Attach a copy of the document that started the other proceeding)		◯ **Yes** ◯ **No**

Responding to the Allegations in the Application

9. Responding to the Allegations

Please summarize the facts and defences that support your Response to this Application. See the **Respondent's Guide**.

Please include as part of your Response:

- any submissions you make that the Application is outside the Tribunal's jurisdiction;
- what allegations in the Application you agree with;
- what allegations in the Application you disagree with;
- any additional facts that you intend to rely on; and
- any defences that you intend to rely on.

If you are filling this out on paper and need more space, please add more pages. Number each page.

10. Exemptions

Complete this section only if you are relying on one of the exemptions found in the *Code*. (See the **Respondent's Guide**)

a) What exemption in the *Code* do you believe applies to this Application?

b) Please explain why you believe the exemption applies:

11. Knowledge of the Events

Ontario

Human Rights Tribunal of Ontario

Request for Summary Hearing - Rule 19A (Form 26)

(Disponible en français)

www.hrto.ca

At any time after an application has been filed with the Tribunal, a party may make a Request for a Summary Hearing by completing this Request for Summary Hearing (Form 26).

A party who has received this Request for Summary Hearing form may file a Response to the Request using Form 11 not later than 14 days after the Request for Summary Hearing was delivered. The HRTO may direct that a Response to the Request for Summary Hearing is required.

For more information on summary hearings see the Tribunal's **Practice Direction: Summary Hearing Requests**.

Follow these steps to make your request:

1. Fill out this Form 26.
2. Provide all your submissions in support of the Request.
3. Deliver a copy of Form 26 along with a copy of the Tribunal's Practice Direction: Summary Hearing Requests to all parties.
4. Complete a Statement of Delivery (Form 23).
5. File the Form 26 and Form 23 with the Tribunal.

Information for all parties and any person or organization who receives a copy of this Request

You may respond to the Request for Summary Hearing by completing Form 11, delivering a copy to all parties and filing it with the Tribunal, along with a Statement of Delivery, not later than 14 days after the Request for Summary Hearing was delivered. The Tribunal may direct that a Response to the Request for Summary Hearing is required.

NOTE: After reviewing this Form and any response, the Tribunal will decide whether a summary hearing will be held. When the Tribunal decides not to hold a summary hearing, it need not give reasons for this decision.

7

Human Rights Tribunal of Ontario

Request for Summary Hearing - Rule 19A (Form 26)

Application Information	
Tribunal File Number:	
Name of Applicant:	
Name of each Respondent:	

1. Your contact information (person or organization making this Request)

First (or Given) Name	Last (or Family) Name	Organization (if applicable)

Street #	Street Name	Apt/Suite

City/Town	Province	Postal Code	Email

Daytime Phone	Cell Phone	Fax	TTY

If you are filing this as the Representative (e.g. lawyer) of one of the parties please indicate:

Name of party you act for and are filing this on behalf of: _____

LSUC No. (if applicable): _____

What is the best way to send information to you?

(if you check email, you are consenting to the delivery of documents by email)

○ Mail ○ Email ○ Fax

Check off whether you are (or are filing on behalf of) the:

○ Applicant

○ Respondent

○ Ontario Human Rights Commission

○ Other - describe: _____

2. Please indicate whether you are asking the Application to be dismissed in whole or in part. If in part, please specify.

3. On what basis do you claim that there is no reasonable prospect that the Application or part of the Application will succeed? Include any facts relied on and full submissions in support of the request.

4. Rule 19 A.3 requires that a party making a request for a summary hearing deliver to the other parties a copy of the Tribunal's Practice Direction: Summary Hearing Requests. Have you delivered this Practice Direction with this request?

○ Yes

8

Human Rights Tribunal of Ontario

Request for Summary Hearing - Rule 19A (Form 26)

5. If you are relying on any documents in this Request please list below and attach. You must include all the documents you are relying on.

6. Have you disclosed any documents to the other parties? If so, please advise what has been disclosed.

7. Please check off how you wish the Tribunal to deal with the matter:

- (•) Conference Call
- ( ) In Person Hearing

8. Explain why you wish the Tribunal to deal with the request in the manner indicated above.

9. Signature

By signing my name, I declare that, to the best of my knowledge, the information that is found in this form is complete and accurate.

Name

Signature

Date (dd/mm/yyyy)

☐ Please check this box if you are filing your Request electronically. This represents your signature. You must fill in the date, above.

Freedom of Information and Privacy
The Tribunal may release information about an Application in response to a request made under the *Freedom of Information and Protection of Privacy Act*. Information may also become public at a hearing, in a written decision, or in accordance with Tribunal policies. At the request of the Commission, the Tribunal must provide the Commission with copies of applications and responses filed with the Tribunal and may disclose other documents in its custody or control.

TAB 6

Remedies

Lori Mishibinijima
Staff Lawyer, *Human Rights Legal Support Centre*

Best Practices for Paralegals Appearing Before the Human Rights Tribunal of Ontario

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September 27, 2010

REMEDIES

Lori Mishibinijima
Staff Lawyer, *Human Rights Legal Support Centre*

Ontario Human Rights Code

The Tribunal's remedial powers are set out in section 45.2 of the *Code:*

Orders of Tribunal: applications under s. 34

45.2 (1) On an application under section 34, the Tribunal may make one or more of the following orders if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the application:

1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.
2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.
3. An order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act. 2006, c. 30, s. 5.

Orders under par. 3 of subs. (1)

(2) For greater certainty, an order under paragraph 3 of subsection (1),

(a) may direct a person to do anything with respect to future practices; and

(b) may be made even if no order under that paragraph was requested. 2006, c. 30, s. 5.

MONETARY REMEDIES

General Damages

ADGA Group Consults Inc. v. Lane, 2008 CanLII 39605 (ON S.C.D.C.) at paragraph 153:

> Among the factors that Tribunals should consider when awarding general damages are humiliation; hurt feelings; the loss of self respect, dignity and confidence by the complainant; the experience of victimization; the vulnerability of the complainant and the seriousness of the offensive treatment

Smith v. Menzies Chrysler, 2009 HRTO 1936 (CanLII) at paragraph 172:

> A human rights damages award for injury to dignity, feelings and self-respect includes recognition of the inherent value of the right to be free from discrimination. The Divisional Court in *ADGA Group Consultants Inc. v. Lane*, 2008 CanLII 39605 (ON S.C.D.C.), (2008), 91 O.R. (3d) 649, 2008 CanLII 39605 (ON S.C.D.C.), recently confirmed that an award to compensate for the "experience of victimization" is predicated upon a number of considerations, including: the impact of the infringement; the duration, frequency and intensity of the offensive conduct; the vulnerability of the complainant; the objections to the offensive conduct; and knowledge that the conduct was unwelcome: see also *Ketola, supra*, and *Baylis-Flannery v. DeWilde (Tri Community Physiotherapy)*, 2003 HRTO 28 (CanLII), 2003 HRTO 28 (CanLII).

Sanford v. Koop, 2005 HRTO 53 (CanLII), at paragraph 34 and 35:

> The Commission asks that the Tribunal award $25,000 in respect of general damages. In support of its position, the Commission submits Tribunal jurisprudence has established the principle that there is an intrinsic value to the rights enumerated in the *Code*, and the infringement of those rights warrants the assessment of general damages in addition to an award for mental anguish. (*Entrop v. Imperial Oil Ltd.* (No. 7) (1995), 23 C.H.R.R. D/213 (Ont. Bd. Inquiry) at para. 50, affirmed (1998), 30 C.H.R.R. D/433 (Ont. Ct. (Gen. Div.)), reversed in part on other grounds (2000), 37 C.H.R.R. D/433 (Ont. C.A.)). Further, it argues, there is no ceiling on general damage awards and in making such awards, the Tribunal should not set the quantum too low, since doing so would trivialize the social importance of the *Code* by effectively creating a "license fee" to discriminate. (*Shelter Corp. v. Ontario (Human Rights Commission)* (2001), 39 C.H.R.R.D/111 at paras.

43 and 44 (Div. Ct.), *Gohm* v. *Domtar Inc.* (No. 4) (1990), 12 C.H.R.R. D/161 at paras. 126 – 127 (Ont. Bd. Inq.), *Gibbons and Ladouceur v. Sports Medic Inc.* (2003), 48 C.H.R.R. D/98 at paras. 49 and 50, *Baylis-Flannery v. Walter De Wilde* (No. 2) (2003), 48 C.H.R.R. D/197 at para. 173 (Ont. Bd. Inq.))

The Commission provided a number of cases which set out the criteria to be used in assessing the appropriate quantum of general damages. These factors include:

- Humiliation experienced by the complainant
- Hurt feelings experienced by the complainant
- A complainant's loss of self-respect
- A complainant's loss of dignity
- A complainant's loss of self-esteem
- A complainant's loss of confidence
- The experience of victimization
- Vulnerability of the complainant
- The seriousness, frequency and duration of the offensive treatment

Special Damages

Pileggi v. Champion Products 2009 HRTO 2097 at paragraph 30:

> Where an applicant is dismissed, the amount of compensation to be awarded for loss of wages is not restricted to the time period of "reasonable notice" as established by the common law. The purpose of compensation is to place the applicant in the position he would have been in had the discrimination not occurred: *Impact Interiors Inc. v. Ontario (Human Rights Commission)* (1998),

Impact Interiors Inc. v. Ontario (Human Rights Commission) (1998), CanLII 17685 (ON C.A.) at paragraph 2:

> In *Piazza* v. *Airport Taxicab* reflex, (1989), 69 O.R. (2d) 281 at 284 [10 C.H.R.R. D/6347 at D/6348, para. 45017 (C.A.)] this Court held that under human rights legislation the purpose of compensation is to put complainants in the position they "would have been in had the discriminatory [conduct] not occurred". A measure of monetary damages is what the complainants would have earned had the discrimination not taken place.

LaFortune v. Washington Mills Electro Minerals, 2009 HRTO 1352 a paragraph 5 and 6:

> The right to lost wages is not indefinite. It is for a reasonably foreseeable amount of time that allows the applicant to be put back into the position he would have been in had the discrimination not occurred. In this case, the applicant obtained new employment one week after his lay-off and four months before the date of the discriminatory decision not to rehire. He remained in his new employment for the next four years.
>
> It is not reasonable to hold Washington Mills responsible for the applicant's lost wages from January 2009 onwards. These losses were incurred almost four years after the date of the decision not to rehire the applicant are too remote or indirect to be recoverable from Washington Mills.

Pre and Post Judgement Interest

Courts of Justice Act, R.S.O. 1990 c. C. 43,

Armstrong v. Anna's Hair & Spa 2010 HRTO 1751

"In all the circumstances, I find that an award of $1,000 is appropriate for the loss arising out of the infringement. The applicant did not request an order for prejudgment interest, and I do not find that such an order is appropriate given the circumstances of the case." Paragraph 82.

SPECIFIC REMEDIES

Reinstatement

Dhamrait v. JVI Canada, 2010 HRTO 1085 at paragraph 111:

> Based on the evidence before me, I find that on a balance of probabilities, the applicant would be employed by the corporate respondent but for the discrimination. While I have not reached this conclusion without some reservations, I find that reinstatement is the appropriate remedy in the circumstances.

Kreiger v. Toronto Police Services Board, 2010 HRTO 1361 at paragraph 183 and 186:

There are many indications that reinstatement will work in this case: The applicant has the support of the Association, and reports having the support of individual members of the Service. Moreover, the Service is a large and sophisticated employer.

Indeed, there are a number of details concerning the applicant's return to work that the parties have suggested they should first attempt to address themselves involving, among other things, medical clearance, re-training, seniority, work assignment and mentoring. Given the Tribunal is an outsider to this complex employment relationship, it certainly makes sense for the parties and the intervenor to try to negotiate the terms of the applicant's reinstatement rather than have the Tribunal impose conditions that may be inappropriate. In the event that the parties are unable to agree amongst themselves, the Tribunal will remain seized so that the terms of the applicant's reinstatement can be made the subject of an order.

Remedies
(PowerPoint)

Lori Mishibinijima
Staff Lawyer, *Human Rights Legal Support Centre*

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Remedies
September 27, 2010

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Ontario Human Rights Code 45.2 (1)

- 1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.
- 2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.
- 3. An order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act. 2006, c. 30, s. 5.

2

MONETARY REMEDIES

- General Damages
- Special Damages
- Interest

General Damages

- Factors affecting quantum (Sanford v. Koop 2005)
  - "Humiliati on experienced by the complainant
  - Hurt feelings experienced by the complainant
  - A complainant's loss of self-respect
  - A complainant's loss of dignity
  - A complainant's loss of self-esteem
  - A complainant's loss of confidence
  - The experience of victimization
  - Vulnerabili ty of the complainant
  - The seriousness, frequency and duration of the offensive treatment" at paragraph 35.

ADGA Group Consults Inc. v. Lane, 2008

- "Among the factors that Tribunals should consider when awarding general damages are humiliation; hurt feelings; the loss of self respect, dignity and confidence by the complainant; the experience of victimization; the vulnerability of the complainant and the seriousness of the offensive treatment" at paragraph 153.

5

Smith v. Menzies Chrysler, 2009

- "A human rights damages award for injury to dignity, feelings and self-respect includes recognition of the inherent value of the right to be free from discrimination. The Divisional Court in *ADGA Group Consultants Inc. v. Lane*, 2008 CanLII 39605 (ON S.C.D.C.), (2008), 91 O.R. (3d) 649, 2008 CanLII 39605 (ON S.C.D.C.), recently confirmed that an award to compensate for the "experience of victimization" is predicated upon a number of considerations, including: the impact of the infringement; the duration, frequency and intensity of the offensive conduct; the vulnerability of the complainant; the objections to the offensive conduct; and knowledge that the conduct was unwelcome." at paragraph 172.

6

Special Damages

- Lost wages
- Out of pocket expenses
  - Medical examinations
  - Gas
  - childcare
- Reimbursement of Pension
- Reimbursement of health and dental benefits

7

Lost Wages

- *Pileggi v. Champion Products* 2009 HRTO 2097
- *Impact Interiors Inc. v. Ontario (Human Rights Commission)* (1998), CanLII 17685 (ON C.A.)
- *LaFortune v. Washington Mills Electro Minerals*, 2009 HRTO 1352

8

Pileggi v. Champion Products, 2009

- "Where an applicant is dismissed, the amount of compensation to be awarded for loss of wages is not restricted to the time period of "reasonable notice" as established by the common law. The purpose of compensation is to place the applicant in the position he would have been in had the discrimination not occurred" at paragraph 30.

9

Impact Interiors Inc. v. Ontario (Human Rights Commission), 1998

- "In *Piazza* v. *Airport Taxicab* reflex, (1989), 69 O.R. (2d) 281 at 284 [10 C.H.R.R. D/6347 at D/6348, para. 45017 (C.A.)] this Court held that under human rights legislation the purpose of compensation is to put complainants in the position they "would have been in had the discriminatory [conduct] not occurred". A measure of monetary damages is what the complainants would have earned had the discrimination not taken place." at paragraph 2.

10

LaFortune v. Washington Mills Electro Minerals, 2009

- "The right to lost wages is not indefinite. It is for a reasonably foreseeable amount of time that allows the applicant to be put back into the position he would have been in had the discrimination not occurred. In this case, the applicant obtained new employment one week after his lay-off and four months before the date of the discriminatory decision not to rehire. He remained in his new employment for the next four years." at paragraph 5.
- "It is not reasonable to hold Washington Mills responsible for the applicant's lost wages from January 2009 onwards. These losses were incurred almost four years after the date of the decision not to rehire the applicant are too remote or indirect to be recoverable from Washington Mills." at paragraph 6.

11

Pre and Post Judgement Interest

- *Courts of Justice Act,* R.S.O. 1990 c. C. 43,
- Armstrong v. Anna's Hair & Spa 2010 HRTO 1751
  - "In all the circumstances, I find that an award of $1,000 is appropriate for the loss arising out of the infringement. The applicant did not request an order for prejudgment interest, and I do not find that such an order is appropriate given the circumstances of the case." at paragraph 82.

12

Calculation

- Prejudgment and post-judgment interest are calculated pursuant to the rates published on the AG's website, pursuant to O. Reg 339/07.
- Prejudgment interest is usually calculated from the date of the application, or as otherwise specifically ordered to the date of the order.
- Post-judgment is calculated 30 days from the date of the order. For Example:
- Principal Amount $2,500.00
- Prejudgment interest at the rate of 4.5% per annum from November 13, 2006 to June 4, 2009, being 933 days x $0.31/day $ 289.23
- Postjudgment interest at the rate of 2% per annum from July 4, 2009 to February 16, 2010, being 227 days x $0.15/day $ 34.05
- Total due as at February 16, 2010 $2,823.28
- Interest is accruing at the rate of $0.15 per day from February 16, 2010

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SPECIFIC REMEDIES

- Reinstatement
  - *Dhamrait v. JVI Canada,* 2010 HRTO 1085
  - *Kreiger v. Toronto Police Services Board,* 2010 HRTO 1361

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Dhamrait v. JVI Canada, 2010

- "Based on the evidence before me, I find that on a balance of probabilities, the applicant would be employed by the corporate respondent but for the discrimination. While I have not reached this conclusion without some reservations, I find that reinstatement is the appropriate remedy in the circumstances." at paragraph 111.

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Kreiger v. Toronto Police Services Board, 2010

- "There are many indications that reinstatement will work in this case: The applicant has the support of the Association, and reports having the support of individual members of the Service. Moreover, the Service is a large and sophisticated employer." at paragraph 183.
- "Indeed, there are a number of details concerning the applicant's return to work that the parties have suggested they should first attempt to address themselves involving, among other things, medical clearance, re-training, seniority, work assignment and mentoring. Given the Tribunal is an outsider to this complex employment relationship, it certainly makes sense for the parties and the intervenor to try to negotiate the terms of the applicant's reinstatement rather than have the Tribunal impose conditions that may be inappropriate. In the event that the parties are unable to agree amongst themselves, the Tribunal will remain seized so that the terms of the applicant's reinstatement can be made the subject of an order." at paragraph 186.

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Remedies

Paula M. Rusak
Mathews, Dinsdale & Clark LLP

Best Practices for Paralegals Appearing Before the Human Rights Tribunal of Ontario

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Continuing Professional Development

Best Practices for Paralegals Appearing Before the Human Rights Tribunal of Ontario

September 27, 2010

<u>Remedies</u>

Paula Rusak
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Investigations:

- Requiring investigation into practices to be done by Respondent
- Order for 3rd party external investigations on go forward basis
- Reporting back

Removal of Disciplinary Actions from the employees/school/records:

- Reinstatement

Public interest remedies:

Tribunals authority arises from s. 45.2 (1)(2)

Orders of Tribunal: applications under s. 34

45.2 (1) On an application under section 34, the Tribunal may make one or more of the following orders if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the application:

1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.

2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.

3. An order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act. 2006, c. 30, s. 5.

Orders under par. 3 of subs. (1)

(2) For greater certainty, an order under paragraph 3 of subsection (1),

(a) may direct a person to do anything with respect to future practices; and

(b)may be made even if no order under that paragraph was requested. 2006, c. 30, s. 5.

These are the non-monetary remedies

Development/Implementations of Human Rights and Anti-Harassment Policies

- Filing policies and having them monitored by the Commission
- Developing sick leave policy
- Other policies

Training of Employee/Management and Others on these policies:

- Training video
- Training of all employees/management
- Specific training requirements
- Development of Race Relations Committee

Removing Discriminatory Practices

- by imposing a form of employment equity hiring practices and reporting back
- by requiring rules to be altered which have discriminatory impact
- striking down discriminatory standard

Monitoring/Audit of Discriminatory Practices

- Ongoing monitoring to ensure compliance
- Hiring practices
- Quits
- Publishing requirement

Posting of Code/Decisions/Brochures

- Newsletter
- Website
- Insert in paystub

Apologies?

Remedies
(PowerPoint)

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MATHEWS DINSDALE | TORONTO | SARNIA | SAULT STE. MARIE

Remedies

September 27, 2010

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Removal of Disciplinary Actions from the employees'/school records:

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Public interest remedies:

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These are the non-monetary remedies

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