

Tribunal Watch Ontario

THE FACE OF JUSTICE DENIED

November 2020

Under cover of our current health crisis, the current Government has been quietly and steadily reducing the quality of justice that Ontarians can expect from our administrative justice system, including, for example, the Social Benefits Tribunal, the Landlord and Tenant Board and the Human Rights Tribunal of Ontario. By stripping tribunals of experienced and trained adjudicators, and underfunding operations, the Government has produced disruption and delays unimaginable in the past.

For disabled Ontarians, this can now mean waiting up to 18 months for a Tribunal determination of their entitlement to benefits; at the Landlord and Tenant Board, mismanagement of an application backlog is now forcing hundreds of tenants across the province into rushed telephone or video eviction hearings, often with insufficient notice and limited access to duty counsel; for individuals who have experienced discrimination, the final resolution of their claims can now take years. This is not how tribunal justice was delivered in Ontario before the current Government was elected in 2018.

This Statement is focussed particularly on the Human Rights Tribunal of Ontario and the steps taken by the Government to undermine that Tribunal's capacity to deliver expert justice in an accessible and timely way.

The human rights system that was in place when the current Government came into power was established in 2008. New legislation gave human rights claimants the right to file discrimination applications directly at a hearings tribunal. The new Human Rights Tribunal typically had 22 full-time, experienced adjudicators and a robust administrative staff. For ten years, the Tribunal was able to handle over 3,000 claims a year, up from about 100 Tribunal cases referred to the previous tribunal under the pre-2008 system. The Government itself was regularly a respondent to human rights claims, when Government programs or policies were challenged as discriminatory.

What has happened to the Human Rights Tribunal under the current Government?

First and foremost, the number of full-time human rights adjudicators has been reduced from 22 to just 11, even as the number of new discrimination cases has grown to over 4,400 in each of the last three years. Part-time tribunal members, who typically chair mediations, have been reduced in number from 35 to 13. Disturbingly, even as awareness of systemic discrimination has grown, Ontario's human rights enforcement system has become dysfunctional.

Thousands of discrimination applications are now stalled in the early stages of the process. The Tribunal stopped conducting hearings mid-way through 2019 in favour of a

mediation blitz, but it has not yet scheduled hearings for many of the cases stuck in its now enormous backlog. Alarming for the parties, it can now take two or three years to complete a three-day hearing, with the Tribunal scheduling each hearing day separately, many months apart. Particularly indicative of a system in disarray, is the fact that the Tribunal is often failing to promptly deliver new applications to the responding party, sometimes for months after the application was filed. And in cases where a hearing has been completed, decisions are often delayed for periods of over a year.

Part of this is a staffing problem. The Government has imposed a hiring freeze on administrative staff. This is having a debilitating impact on the capacity of the Tribunal to handle its caseload.

But more importantly, claimants are suffering critical delays as a result of what appears to be a Cabinet policy to rob Ontario tribunals of their experienced adjudicators and mediators. Expert human rights adjudicators and mediators, with excellent performance reviews, had their appointments prematurely discontinued when the Cabinet failed, without explanation, to renew their terms in the normal course. By the end of January 2021, there will likely only be two or three remaining of the 22 experienced full-time adjudicators at the Tribunal when the current Government took over. A similar story could be told about several other important Ontario tribunals.

Few of the discontinued adjudicators and mediators have been replaced and, of the handful of new appointees, some lack competitive qualifications for the position, qualifications which would include some combination of human rights expertise, legal training, experience as a mediator or adjudicator, and/or a litigation background before tribunals.

The Tribunal's Annual Report gives scant information on the impact of these cuts. There is, however, one telling comparison. In 2016/17, in 92% of cases, a mediation date was offered within five months of filing. In 2019/20, only 27% of cases received a mediation date within five months. Many individuals attempting to challenge discriminatory treatment are finding that the claims process has ground to a standstill at every single stage.

Perhaps most alarmingly, the qualifications of the current Tribunal leadership no longer meet the requirements of their positions as set out in job descriptions.

According to the information on the Government's own website, neither the new Associate Chair of the Tribunal, nor the person she reports to, the Executive Chair of Tribunals Ontario (both appointed this summer), appear to have any adjudication or mediation experience, any legal or academic expertise in human rights or administrative law, or any litigation or employment experience at an adjudicative tribunal. The Associate Chair is a non-practicing lawyer who instead owned and operated a jewelry store in Yorkville full-time for 10 years before her appointment. The Executive Chair has retired from a law practice advising financial institutions and pension funds, as well as managing a national law firm.

And like so many recent appointments to Ontario tribunals, the record shows that both the Associate Chair and the Executive Chair have solid connections to the provincial and/or federal Conservative party.

Tellingly, the current Government is now reportedly revising the job description for the Associate Chair position to no longer require the qualifications necessary to lead the adjudicative work of the tribunal. Until now, the job description required that the Associate Chair have the human rights law expertise necessary to provide “jurisprudential leadership”, as well as a “superior level” “understanding of the administrative justice system” and a “comprehensive practical knowledge of dispute resolution practices to mentor and coach others, to recommend options for change, and to design new processes...”.

By removing these core qualifications from the Associate Chair’s job description, and replacing expert adjudicators with inexperienced new appointees on short-term appointments, at least some of whom have solid Conservative party connections, the Government is not only intentionally undermining the capacity of the Human Rights Tribunal to make fair determinations in complex cases; critically, it is also undermining the integrity and independence of the Tribunal’s decision-making.

Today, Ontarians who appears before the Human Rights Tribunal cannot be confident that the adjudicator hearing the case is expert in the relevant law, has the ability to conduct a fair and efficient hearing, or even confidence that the adjudicator will decide the case free of influence from the Government that appointed them, something that is especially important when the Government is on the other side of the case.

In June of this year, when Premier Ford spoke to the media following a statement from the national First Ministers condemning racism and discrimination, he spoke strongly, saying: “Enough of the talking. Let’s start getting action”. But the only action his Government has taken with respect to the human rights enforcement process in Ontario is to undercut its resources, weaken its leadership and deprive it of expertise.

To put it bluntly, the Human Rights Tribunal of Ontario has been rendered unfit for the delivery of justice to the parties that appear before it.