Tribunal Watch Ontario

STATEMENT OF CONCERN: The Human Rights Tribunal of Ontario[1]
May 2022

Introduction

The Human Rights Tribunal of Ontario (HRTO) has not fared well over the last four years.

The Tribunal has lost its most experienced adjudicators and the current complement of adjudicators is not sufficient to keep up with a growing number of incoming cases, let alone the 90% increase in a case backlog that now numbers almost 9,000. Delays are endemic at all stages. In recent years, hundreds of applications have been dismissed on a preliminary basis or abandoned after being identified by the Tribunal for potential dismissal – applications that would have previously been sent to mediation or an oral hearing. A disproportionate number of these preliminary dismissals involved allegations of discrimination because of race or colour. The number of final substantive decisions has fallen every year, with only 16 released in the 2021/22 fiscal year, down from a pre-2018 annual average of 110. Very few of the newly appointed adjudicators have conducted a hearing, listened to evidence, and decided the merits of a discrimination application. Parties have been waiting between 3 to 7 years for a final discrimination decision.

Experienced human rights counsel report that they must now consider whether the HRTO remains a viable option for clients who have experienced discrimination or harassment.

Loss of adjudicative expertise

The work of the HRTO engages fundamental rights enjoyed by all residents of Canada. The caselaw from provincial human rights tribunals, and the federal tribunal, interacts with, informs, influences, and adapts to judicial jurisprudence under the Canadian *Charter of Rights and Freedoms.* This is a complex and constantly evolving area of law. Any assessment of the quality of justice at the HRTO must be approached in this context.

The HRTO was established in 2008 and operated with a full complement of adjudicators until 2018. The Progressive Conservative government declined to reappoint almost all of the adjudicators who had been appointed by the previous Liberal government. Other appointees left before their terms expired because of the lack of any job security, as well as concern about a shifting tribunal culture that emphasized backlog management over access to timely adjudication. By April 2020, there were only 10 full time adjudicators, half of the historical average of 20. A year later, the 2020/21 Annual Report records only 15 full time adjudicators.

Quite recently, a further round of appointments has brought the number up to 21, but this has not been sufficient to deal with the volume of new applications (now up to an annual average of

[1] The information in this paper incorporates data published by Tribunals Ontario Data Inventory - Open Data | Ontario's Open Data Directive, HRTO annual reports (TO: Governance Accountability Documents | Tribunals Ontario), decisions published on CanLII (Ontario - Human Rights Tribunal of Ontario | CanLII), information provided in response to a *Freedom of Information* request, the results of a March 29, 2022 webinar co-sponsored with the Public Law Centre at the University of Ottawa, as well as interviews with practitioners and a survey conducted by Tribunal Watch.

4,400, as compared to 3,400 prior to 2017/18), on top of the backlog created by four years with a significantly reduced complement and the impact of the pandemic.

With some exceptions, the new appointees did not bring recognized human rights expertise or significant adjudication or mediation experience to the HRTO, particularly in comparison with the panel of experienced adjudicators whose appointments were not renewed or who otherwise left. This is a marked departure from the previous recruitment history at the HRTO, and arguably inconsistent with the requirements of the *Human Rights Code* itself.[2]

Despite the overall decline in expertise and a work environment that seems to now favour backlog reduction over quality adjudication of discrimination cases, Tribunal Watch acknowledges that there are dedicated adjudicators and staff at the Tribunal, striving to do their job with integrity, despite the difficult environment.

Few full hearings and few decisions on discrimination

Since 2018, the Tribunal has held very few full evidentiary hearings and has issued a steadily declining number of decisions assessing the merits of a discrimination claim based on evidence and legal argument. Final decisions on the merits of an application (referred to as "merit" decisions) are important not only to the parties seeking a resolution, but also because they provide public guidance about the application of the *Code* to everyday situations.

Only 16 final merit decisions were released in the 2021/22 fiscal year.[3] This is approximately one-seventh of the pre-2018 historical average of 110 merits decisions per fiscal year as reported in Annual Reports. An examination of all merit decisions released since January 1, 2021, shows that most parties have been waiting between 3 and 7 years after filing to receive a final decision on an application.

Backlog up by 90%

The HRTO Annual Report no longer publishes information about its active caseload at the end of each fiscal year. However, pursuant to a *Freedom of Information* request, the Tribunal informed us that there were 8,979 active cases as of December 31, 2021, a 90% increase from the backlog of 4,696 cases at end of the 2016/17 fiscal year, the last year when this was information was published. Based on the Tribunal Watch survey and information shared by experienced counsel, delays appear to be endemic at every stage. It can take the Tribunal many months to even send an application to the respondent. There are a very large number of cases waiting to be scheduled for mediation and another long list of cases waiting over a year to be scheduled for a hearing.

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[2] Section 32 of the *Code* provides:

> The selection process for the appointment of members of the Tribunal shall be a competitive process and the criteria to be applied in assessing candidates shall include the following:
> 1. Experience, knowledge or training with respect to human rights law and issues.
> 2. Aptitude for impartial adjudication.
> 3. Aptitude for applying the alternative adjudicative practices and procedures that may be set out in the Tribunal rules.

[3] Decision data on the first three quarters of the fiscal year is available in the Tribunals Ontario Open Data Inventory on its website. The number of merit decisions in the final quarter was identified by a review of published decisions on CanLII.

Limited access to in-person hearings

The HRTO, as part of Tribunals Ontario[4], has adopted a "digital first" policy on hearing formats, meaning that, even post-pandemic, it will only consider scheduling an in-person hearing in two exceptional circumstances: if necessary, as an accommodation under the *Code,* or if a party can establish that a virtual process will result in an "unfair hearing". The HRTO "Updated Practice Direction on Hearing Formats" specifies that a party requesting an in-person hearing based on fairness, must demonstrate "significant prejudice".

According to the HRTO Open Data Inventory, over 80% of applicants are now self-represented when they file their application. The requirement to prove "significant prejudice" to qualify for an in-person hearing can raise inappropriate barriers to fair adjudication for unrepresented parties, including individuals with limited internet or computer access. This is particularly true because the HRTO, unlike other comparable tribunals, has failed to establish an accessible process for requesting an in-person hearing. [5]

Fewer settlements at mediation

The settlement rate at HRTO mediations has fallen to 44%, according to data provided to Tribunal Watch pursuant to a *Freedom of Information* request. The average settlement rate at mediation was 58.6% prior to 2018.

One explanation for the falling settlement rate, voiced by experienced practitioners, is that a number of currently appointed mediators appear to lack a firm grasp of human rights principles and/or are not skilled in mediation techniques. At mediation, both parties typically look to the mediator to help assess the strengths and weakness of the case and the range of options if the case were to go forward for adjudication. Mediators who have never conducted a full evidentiary hearing, and who lack deep expertise in human rights law, will be challenged in guiding the mediation process effectively.

Increase in HRTO-initiated dismissals and in abandonments

Since 2018, the Tribunal has issued a Notice of Intent to Dismiss (NOID), in significantly more cases than in the past, moving to dismiss hundreds of applications before they are delivered to the named respondent.[6] The Tribunal-issued NOID typically requires the applicant to provide additional written submissions demonstrating the link between the alleged negative treatment and the ground of discrimination alleged. The NOID warns that the application may not fall within HRTO jurisdiction and will be dismissed in the absence of further submissions. In many of these cases, the applicant filed their application months before receiving the NOID, and heard nothing from the Tribunal in the interim. The numbers show that many applicants simply give up

[4] There are 13 adjudicative tribunals 'clustered' in Tribunals Ontario, including the HRTO.

[5]See the practice of the Social Security Tribunal of Canada: "*Form of hearing: Now your choice",* January 2019, under *"What's New",* (https://sst-tss.gc.ca/en/whats-new). Unlike the SST, the HRTO does not give parties a choice and does not have even a form to request an in-person hearing or a supportive step-by-step guide.

[6] See: Frank Nasca, *Jurisdiction and Access to Justice: An Analysis of Human Rights Tribunal of Ontario-issued Notices of Intent to Dismiss,* OBA Annual Update on Human Rights Law, May 25, 2022. This paper documents an increase from a pre-2018 five-year annual average of 260 NOIDs to 989 NOIDs in 2021. Figure 3, p. 18.

after receiving a NOID, leading to dismissal of their application as abandoned. Approximately twice as many applications were abandoned in 2021/22 as compared to 2017/18.

Currently over 80% of applicants are not represented by counsel when they file their applications. The statutory scheme was in fact designed to facilitate the participation of self-represented parties. It is not surprising that the ramped-up use of NOIDs has contributed to many self-represented applicants abandoning their applications.

In a small-sample analysis of 43 files where NOIDs were issued, a recent paper presented at the Ontario Bar Association *Annual Human Rights Update* on May 25, 2022, found that only 10 applications were clearly non-jurisdictional[7] and of the remaining 33 applications, only 4 did not meet the standard of presenting an arguable or "prima facie" case. Alarmingly, the analysis also found that applications raising race-related grounds, including race, colour and citizenship, were overrepresented in the group of 33 applications subject to NOIDs, relative to their representation in the overall HRTO caseload.[8]

Increase in preliminary dismissals without an oral hearing

Section 43(2)1 of the *Code* provides that the Tribunal may not finally dispose of an application that is within its jurisdiction without giving the parties an opportunity to make oral submissions Over the last four years, however, the Tribunal has redefined and restricted its understanding of its jurisdiction to dispose of hundreds of applications without an oral hearing. In the past, many of these dismissed applications would have instead been sent to an oral summary hearing, providing the often-unrepresented applicant with an opportunity to explain the basis for their claim in an informal telephone hearing. In 2021/22, the Tribunal held less than half the number of summary hearings that were held in 2017/18,

The Tribunal has instead been dismissing increasing numbers of applications as non-jurisdictional on the basis that the reviewing adjudicator believes that the applicant will not be able to prove the allegations or establish a link between the alleged negative treatment and a *Code*-protected ground. The fact that it may not be clear from the written application form how the applicant will prove their allegations or establish a link to a *Code*-protected ground does not deprive the Tribunal of jurisdiction to hear the case.

Apart from inconsistency with the statutory requirement to provide an oral hearing before a preliminary dismissal, the Tribunal's current approach does not take other important factors into account, including:

- Most applicants are self-represented and have drafted their application without legal advice. They may have difficulty expressing themselves in writing and may not know the information needed to demonstrate potential merit. Importantly, this is how the system was designed in the legislation – to allow self-represented parties to tell their story in their own words in the application and response forms.

[7] For example, cases within the jurisdiction of the Federal government or another province; out of time; dealt with in another proceeding or in a civil action.

[8] Frank Nasca, see footnote 6. In assessing whether a *prima facie* case existed, the analysis looked for at whether the application disclosed a *Code*-protected ground, an adverse impact in a social area and a link between the two.

- In many cases, the evidence in support of the allegations is the evidence of the applicant. For example, if the allegation is that a supervisor said or did something discriminatory in a private conversation, the only available evidence about that conversation comes from the two people involved. This requires an assessment of the credibility of the testimony. The Tribunal's insistence that such cases require additional evidence to support the allegations seems to lead to the perverse conclusion that the Tribunal believes it lacks jurisdiction if the only evidence in support of the allegations is the evidence of the applicant.

- As HRTO decisions have noted in the past: "In considering what evidence is reasonably available to the applicant, the Tribunal must be attentive to the fact that in some cases of alleged discrimination, information about the reasons for the actions taken by a respondent are within the sole knowledge of the respondent. Evidence about the reasons for actions taken by a respondent may sometimes come through the disclosure process and through cross-examination of the people involved."[9]

- In most of the hundreds of recent dismissal decisions, the determination that the applicant will be unable to prove at a hearing that their *Code* rights have been infringed is being made by adjudicators appointed to the Tribunal with little or no prior expertise in human rights law and who have never conducted a full discrimination hearing.

Dismissal decisions without adequate reasons

In a very large proportion of recent decisions dismissing an application as non-jurisdictional, only inadequate reasons are provided. These decisions consist almost entirely of "boiler plate" language. There is typically no analysis of what the allegations were, or the reasons that the adjudicator believes that the applicant will be unable to prove their allegations or why the allegations do not relate to the *Code*. In cases where the applicant has provided more information in response to a Notice of Intent to Dismiss, many decisions indicate that submissions were received but that they were "not responsive", with little or no information in the decision about the additional information provided and the basis on which it was found to be inadequate. It seems doubtful that these decisions, providing no analysis or explanation, meet the standard set by the courts for adequate reasons.[10]

Unreasonable expectations leading to dismissals

In March 2020, at the start of the pandemic, the Government of Ontario issued an Emergency Order under the *Emergency Management and Civil Protection Act*. The order suspended limitation periods and procedural time periods relevant to tribunal proceedings.

In response, the HRTO issued advance directions in a large number of cases requiring the applicant to file further submissions within 30 days of the lifting of the Emergency Order, on whatever future date that happened. The Order was lifted in September 2020, but the HRTO failed to notify the affected applicants of this fact. A search on CanLII indicates that over 150 Applications have been dismissed because the applicant failed to file submissions within 30 days.

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[9] *Dabic v. Windsor Police Service*, 2010 HRTO 1994

[10] See: *(Canada (Minister of Citizenship and Immigration) v. Vavilov* 2019 SCC 65.

It is not reasonable to expect any party, particularly a self-represented party, to be aware of the promulgation of government regulations. The HRTO should have advised parties that the Emergency Order had been lifted and that the 30-day period had commenced.

Crisis of Confidence

What emerged in presentations and audience participation at the March 29th webinar, as well as through practitioner interviews and in responses to the Tribunal Watch survey, is that there is a loss of confidence in the HRTO. Significantly, several lawyers questioned whether it was still possible to recommend the HRTO as a viable option for clients experiencing human rights violations. Counsel for respondents point to the significant burden on individual respondents, as well as corporate respondents, when discrimination allegations are not processed efficiently by the HRTO and hang over their clients for several years.

Every response to the Tribunal Watch survey expressed dissatisfaction with delays. Every response reported that the overall experience of litigators at the Tribunal had deteriorated since 2018, in terms of the quality, accessibility and timeliness of justice. None of those completing the survey reported that they had any confidence that the deterioration would be reversed in the post-pandemic period.

What needs to be done

Tribunal Watch calls on the government, Tribunals Ontario, and the HRTO, to take the following steps to address the ongoing crisis and the lack of confidence in the HRTO's ability to fulfill its statutory mandate under the *Code* "to facilitate the fair, just and expeditious resolution of the merits"[11] of applications before it:

By the Government of Ontario:

1. Commit to an accessible human rights case resolution system with the opportunity for a timely oral hearing as provided for in the *Human Rights Code*.
2. Establish an Adjudicative Tribunal Justice Council with oversight of the recruitment and renewal process for Tribunal members.
3. Establish a truly competitive recruitment process that ensures that new appointees have expert knowledge of human rights law and mediation or adjudication experience. The statutory requirements should be a minimum standard for qualification.
4. Ensure that there are enough adjudicators to deal with the increasing case load and provide additional resources to allow the Tribunal to deal with the unacceptable backlog.
5. Ensure sufficient administrative resources.

[11] Section 40 of the *Code* provides that: The Tribunal shall dispose of applications made under this Part by adopting the procedures and practices provided for in its rules or otherwise available to the Tribunal which, in its opinion, offer the best opportunity for a fair, just and expeditious resolution of the merits of the applications.

By Tribunals Ontario and the HRTO:

1. Start consultations immediately about a strategy to manage the backlog of cases in a manner that is transparent and fair and that does not undermine the rights of those in the backlog or new cases.
2. Undertake an internal review to examine why the number of evidentiary hearings and merits decisions has fallen by 85%. Address this issue transparently in the next Annual Report.
3. Conduct an internal review to determine if cases based on grounds of race, colour, ethnic origin, place of origin, citizenship and ancestry have been disproportionally affected by HRTO-initiated dismissals.
4. Ensure that applications alleging discrimination are not dismissed without giving an opportunity for an oral hearing where this is required by the statute.
5. Establish an accessible process to support the option of an in-person hearings when requested by a party.
6. Ensure that all decisions include adequate reasons and not just conclusions.
7. Re-establish a standing Stakeholder Advisory Committee that is representative of the practising human rights bar, including legal clinics and the Human Rights Legal Support Centre.
8. Reinstitute the pre-2018 practice of producing Annual Reports with transparent data, including the number of hearings, mediations, settlement rates, representation rates, in keeping with Tribunal Ontario's stated core values of accessibility, accountability, integrity and fairness.

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