

# THE HUMAN RIGHTS TRIBUNAL OF ONTARIO: WHAT NEEDS TO HAPPEN

January 2023

The Human Rights Tribunal of Ontario (HRTO) has a backlog of over 9,000 cases. This number continues to rise and there is currently no clear plan for how to manage and resolve these cases, many of which were filed years ago. The extraordinary delays are denying access to justice to thousands of Ontarians, and undermining the protection of human rights in Ontario. In this Statement, Tribunal Watch Ontario calls on the government and the HRTO to address this crisis on an urgent basis and offers some solutions.

## The backlog

As Tribunal Watch Ontario has documented in the past<sup>1</sup>, the backlog of cases at the HRTO began to increase significantly after the Ford government first came to power and declined to reappoint or retain most of the existing adjudicators and then failed to make new appointments. There has been a corresponding significant turnover of administrative staff. When the Government began to make new adjudicator appointments, for the most part, the people appointed, including to leadership positions, had little or no expertise in human rights law and/or little or no dispute resolution experience. While other tribunals have been able to adapt to pandemic realities, the HRTO was hampered by a lack of experienced leadership, adjudicators, and administrative staff.

Thousands of cases have been languishing for years with little or no communication from the tribunal about their status or when they may be dealt with. This results in stress and unfairness for all concerned. For both applicants and respondents, delays that are measured in years make it harder to access evidence to prove that discrimination did or did not occur. Witnesses become unavailable, documents are harder to locate, and memories become less reliable. The majority of cases filed with the Tribunal allege discrimination in employment. With the increased passage of time, employers go out of business, key personnel leave the employment, and records become unavailable. If the applicant is still in the employ, the fact that there is an ongoing unresolved human rights complaint stuck in the Tribunal's backlog can create very significant labour relations problems and/or increased psychological trauma.

For the past few years, the Tribunal has closed approximately 3,000 cases a year but has not managed to close more cases than it receives since 2017, even though the number of new cases filed has declined.<sup>2</sup> With a backlog now of over 9,000 cases, even if the Tribunal could somehow stop accepting any new applications, it would take several years to clear the backlog with current resources.

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<sup>1</sup> [Tribunal Watch Ontario Statement about the HRTO May 2022](#) [Tribunal Watch Ontario Statement of Concern about Tribunals Ontario May 2020](#)

<sup>2</sup> For the year ending March 31, 2022, there were 3,751 new applications, compared to an average of 4,271 over the previous five years.

## **What is the HRTO doing about this?**

The Tribunal now has almost a full complement of adjudicators.<sup>3</sup> However, most of them were appointed without the background necessary to effectively adjudicate or mediate human rights cases. Only a handful of the current adjudicators have the experience conducting full hearings on the merits of applications and applying complex discrimination law. Only 16 such decisions were issued in the year ending March 2022, the last time this data was provided, and most of those were written by people who are no longer at the Tribunal.

It appears that the primary backlog reduction strategy that the Tribunal has adopted is to develop new ways to dispose of cases following only a cursory review of the Application. The Human Rights Code requires that the Tribunal not dispose of cases that are within the Tribunal's jurisdiction without an opportunity for an oral hearing. The Tribunal has significantly narrowed the interpretation of its own jurisdiction, allowing it to dismiss hundreds of cases without giving the parties an opportunity for an oral hearing. Many more cases have been abandoned because of the Tribunal's delay.

The Tribunal continues to offer mediation as the first approach to cases that are not otherwise dismissed. No data is publicly available about the number of cases that go to mediation and how many are settled. A mediation process that does not include access to adjudication if the case does not settle is fundamentally unfair and may force parties to accept unreasonable settlements, or no settlement at all. The Tribunal has announced that it will offer a second mediation in some cases that did not settle in the first session. While this has merit, it does not address the unfairness resulting from the unavailability of adjudication.

## **What needs to be done**

### **1. Admit there is a problem**

The 2021/22 Tribunals Ontario Annual Report documents many of the HRTO's failings, including an inability to meet any of its performance standards. However, the only acknowledgement that there is a serious problem is found in a note which indicates that the Tribunal has been engaged in "COVID recovery efforts" and that "timelines are expected to improve significantly once the HRTO has completed its full recovery from the pandemic." There is no explanation of what the recovery efforts may be or how they will significantly improve timelines or deal with the backlog.

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<sup>3</sup> It can be difficult to determine how many people appointed to the HRTO are actually doing work for the tribunal because of a practice of cross-appointing adjudicators to multiple tribunals within Tribunals Ontario.

## **2. Additional resources**

The government of British Columbia recently recognized that increased pressure on its human rights system required a significant increase in resources to prevent a burgeoning backlog from getting worse. Ontario must do the same.

## **3. Appoint people with knowledge of human rights law and adjudicative and mediation experience**

All future appointments to the HRTO, including leadership positions, must comply with section 33(3) of the Code:

33(3) 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.

## **4. Create a specialized team to deal with the backlog**

Additional resources can be used to create a specialized expert team to resolve the 9000 cases in the backlog, an approach utilized in 2008 when the new HRTO inherited a backlog of cases from the Human Rights Commission under the previous system. In this way, new cases do not become part of the backlog. New rules can be developed to expedite proceedings of backlogged cases. The specialized team needs to be adequately resourced with a transparent and fair plan for the timely elimination of the backlog. It is essential that the members of the team have demonstrated human rights and dispute resolution experience.

## **5. Reconstitute a stakeholder advisory council**

In the past, the HRTO, like most other Ontario tribunals, had a standing advisory council, consisting of leading practitioners and representatives from the Human Rights Commission and the Human Rights Legal Support Centre. The new leadership at Tribunals Ontario disbanded all stakeholder advisory councils. Although the Tribunal has consulted electronically to a limited extent about specific changes, like new procedural forms, this cannot replace the information, insight, and expert advice that would be available from a reconstituted expert standing council.

## **6. Ensure compliance with the statutory duty to provide parties with the opportunity to make oral submissions before dismissal**

The Tribunal must review its current practice of dismissing hundreds of applications without giving the parties an opportunity for an oral hearing.

## **7. Transparent communication**

To regain lost trust, the HRTO must be transparent and comprehensive in explaining what it is doing to address the backlog. As in past years, the HRTO should again report annually on key outcomes including the number of mediations held and the percentage of mediations that settle. This includes providing data on its website in a timely fashion.

The Tribunal should also proactively seek feedback from its users on their experience and opinions which should guide any future developments. A user survey such as the one offered to Social Security Tribunal users could be very helpful for this purpose.

The HRTO must introduce regular communication with the parties who have cases pending. Many parties go months and months without receiving any correspondence from the HRTO advising them as to the status and progress, if any, of their case. This is one of many factors that has led more and more human rights lawyers and advocates to no longer recommend that individuals seek justice at the HRTO.