Process at the Human Rights Tribunal of Ontario

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Where we are

- The “new” Tribunal is almost one year old:
  - Who we are
  - What we’ve done
  - The Process: Then & Now
  - What we’ve seen
  - Developing Trends
  - What’s next
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 brought before the Tribunal, and to determine 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
    - 22 part-time
What we’ve done

New Applications under Section 34

- As of March 31, 2009:
  - 1829 new applications received
  - 350 mediations held
  - 16 hearings held
  - 424 decisions issued
  - 391 cases closed
What we’ve done

Transitional Applications (Sections 53(3) and 53(5))
- Separate stream with designated resources

- As of March 31, 2009:
  - Received 945 transitional applications under 53(3)
  - 345 mediations and 80 hearings held
  - 141 cases settled at mediation
  - 252 cases finally resolved

- Additional 183 applications since January under Section 53(5)

- 127 mediations and 110 hearings scheduled through June 2009
What we’ve done

Commission referred complaints

- As of March 31, 2009, 142 active cases:
  - Scheduled for Mediation: 31
  - In Settlement Discussions: 18
  - Scheduled for Hearing: 39
  - Adjourned: 12
  - Pending Final Decision: 9
The Process - Then

- Complaints were filed with the Ontario Human Rights Commission
- Unless the matter was dismissed under s. 34, the Commission “shall investigate a complaint and endeavour to effect a settlement”
- Under s. 33 of the Code, the Commission had various investigatory powers
- Where the Commission decided it was appropriate, it would refer a complaint to the Tribunal for a hearing
- The Commission referred about 150 cases each year to the Tribunal
The Process - Then

- At a hearing at the Tribunal, the Commission was a party together with the Complainant(s) and Respondent(s)
- The Tribunal mediated and conducted hearings *de novo* – the Commission’s investigation and recommendation was not binding
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.
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 of 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
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.
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
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.
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
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.
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
- Early days, jurisprudence is developing
Developing Trends

Examples:

- In Campbell, the Tribunal found that a decision of the Special Education Tribunal appropriately dealt with the substance of the application.

- In Dunn, the Tribunal decided that a settlement of a matter before another tribunal may be sufficient to conclude that section 45.1 applies.
Requests to Expedite and Requests for Interim Remedy

- Exceptional circumstances, to deal with urgent issues
- Except where the Tribunal orders otherwise, Respondent has 7 days to respond to request
- Tribunal may expedite all or part of the process
- Tribunal may decide request in writing, in person or by teleconference
Trends: What we’ve learned

Reconsideration

- Not an appeal
- Only available in limited circumstances:
  - There are new facts or evidence that could potentially be determinative of the case and that could not reasonably have been obtained earlier
  - The party seeking reconsideration was entitled to but, through no fault of its own, did not receive notice of the proceeding or a hearing
  - The decision or order which is the subject of the reconsideration request is in conflict with established jurisprudence or Tribunal procedure and the proposed reconsideration involves a matter of general or public importance
  - Other factors exist that, in the opinion of the Tribunal, outweigh the public interest in the finality of Tribunal decisions.

- Two step process:
  - Threshold of whether Tribunal should reconsider
  - If yes, may reconsider all or part of the decision

- Respondent need not respond unless directed to by the Tribunal
What’s next

- More cases moving into hearing phase
- Monitoring pre-hearing and hearing processes
- Working through Commission referred cases and s. 53(3) and 53(5)
  - Individuals with complaints still at the Commission have until June 30, 2009 to “transfer” their complaints to the Tribunal by making an application under section 53(5)

Consultation:

- Stakeholder Advisory Committee
- Considering consultation on privacy issues
- Gathering information for 18 month fine tuning of forms and Rules
Learn more

www.hrto.ca

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