Labour & Employment Law

A Stitch in Time Saves Nine:
Early Dismissal Motions
in Human Rights Proceedings

CANADIAN BAR ASSOCIATION CONFERENCE
NOVEMBER 25 – 26, 2011

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The purpose of this document is to provide information as to developments in the law. It does not contain a full analysis of the law nor does it constitute an opinion of Norton Rose OR LLP on the points of law discussed.
CONTENTS

Introduction ........................................................................................................................................... 1

PART ONE .............................................................................................................................................. 1
Summary Dismissal at the Human Rights Tribunal of Ontario .............................................................. 1
Requests for Early Dismissal Under Rules 13 and 19 ......................................................................... 2
The Bases for Summary Dismissal ......................................................................................................... 3
   Constitutional jurisdiction .................................................................................................................. 3
   Geographical jurisdiction .................................................................................................................. 5
   The application falls outside of the Code ......................................................................................... 5
   Timeliness ......................................................................................................................................... 7
Section 34(11) - concurrent or prior civil proceedings ......................................................................... 8
   Section 45.1 - the substance of the application has been dealt with by a previous proceeding .................................................................................................................. 11
What is a “proceeding”? ...................................................................................................................... 12
   When has the substance of an application been “appropriately dealt with”? .............................. 14
Issue estoppel/abuse of process ........................................................................................................... 15
   Issue Estoppel ............................................................................................................................... 15
   Abuse of Process ........................................................................................................................... 17
Summary hearings ............................................................................................................................... 20
Deferral of applications ....................................................................................................................... 24
Motions for non-suit ............................................................................................................................. 25
Judicial review ..................................................................................................................................... 26
Conclusion regarding summary dismissal requests before the Human Rights Tribunal of Ontario ......................................................................................................................... 27

PART TWO .............................................................................................................................................. 28
Summary Dismissal under the Canadian Human Rights Act – Federal Considerations 28
   Overview of federal human rights process .................................................................................... 28
   The CHRC’s powers ....................................................................................................................... 29
   Preferable procedure ....................................................................................................................... 29
   CHRC lacks jurisdiction ................................................................................................................ 31
      Constitutional jurisdiction .......................................................................................................... 31
   No nexus between the alleged incidents and a prohibited ground of discrimination ................... 31
      Definition of “employment” ....................................................................................................... 33
      Definition of “service customarily available to the public” ...................................................... 34
   Trivial, frivolous, vexatious or made in bad faith ......................................................................... 35
   Timeliness ....................................................................................................................................... 36
   The CHRT’s summary dismissal powers ....................................................................................... 37
   Issue estoppel ............................................................................................................................... 39
   Abuse of process ........................................................................................................................... 40
   Effect of filing a judicial review application ................................................................................. 41
   Motions for non-suit ....................................................................................................................... 42
   Conclusion ....................................................................................................................................... 45
**Introduction**

Whether representing a complainant or a respondent in a human rights matter, it is important to be aware of the many bases upon which human rights complaints may be either dismissed entirely or partially through summary proceedings. In light of the inability of human rights tribunals to award costs to the successful party, it is especially important for counsel to take a long, hard look at the means by which the complaint may be dealt with most efficiently and expeditiously. Even if they do not result in a dismissal of the complaint, motions for preliminary decisions may be very helpful in “clearing the procedural underbrush” that may delay and unnecessarily complicate human rights proceedings.\(^1\) Clarifying the parameters of the complaint well before preparation for the hearing or the investigation may result in a significant reduction in time, resources and headaches!

Tribunals and other human rights bodies have express provisions in their legislation granting them the power to deal with allegations and complaints on a summary basis. It is important, however, to be aware of the most recent case law interpreting those provisions as this can make a significant difference in the way one approaches the motion.

The scope of this paper is limited to motions for preliminary dismissal of human rights complaints in two jurisdictions: the Human Rights Tribunal of Ontario and the Canadian Human Rights Commission/Tribunal.

**PART ONE**

**Summary Dismissal at the Human Rights Tribunal of Ontario**

Since July 2008, Ontario has had a “direct access” human rights tribunal.\(^2\) This means that individuals alleging human rights violations must now file applications directly with the Human Rights Tribunal of Ontario (“HRTO”), rather than with the Ontario Human Rights Commission (“OHRC”) as was previously done. Thus the OHRC is no longer the gatekeeper to the HRTO. In place of the OHRC’s gatekeeper role are new provisions in the *Code* and the HRTO *Rules* to

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enable the Tribunal to deal with applications on a summary basis. These new provisions are discussed in detail below.

There are essentially four ways in which an application may be challenged on a preliminary, or early basis: (1) the HRTO may initiate its own inquiry into its jurisdiction under Rule 13 of the Rules; (2) a respondent may bring a Request under Rule 19 for an order during proceedings requesting that the Application be summarily dismissed on various grounds; (3) a respondent or the HRTO may initiate a summary hearing under the new Rule 19A on the question of whether there is a reasonable prospect of success; and (4) a respondent may make a motion for non-suit at the hearing after the applicant has presented her/his case. Each of these options and the grounds for requesting summary dismissal will be examined below. We also consider the status of HRTO proceedings when judicial review of a preliminary ruling is sought. For ease of reading, all references to statutory provisions are to the Code, and all references to rules are to the Rules of the HRTO.

**Requests for Early Dismissal Under Rules 13 and 19**

Pursuant to Rule 13.1, the HRTO may summarily dismiss an application that is outside of its jurisdiction on its own motion. Prior to dismissing an application under this rule, the HRTO must send a Notice of Intent to Dismiss to the applicant, thus giving the applicant an opportunity to file written submissions in support of his or her application. An application will only be dismissed under Rule 13.1 if it is “plain and obvious” that the application falls outside of the HRTO’s jurisdiction. In practice, this means that an applicant must establish that it is at least possible that the subject matter of the application comes within the HRTO’s jurisdiction. This is a low threshold for an applicant to meet at the preliminary stage.

If the HRTO refuses to dismiss an application under Rule 13, this does not mean the end of any jurisdictional concerns for the applicant. It simply means that the HRTO cannot decide the jurisdictional issue without hearing evidence from the parties.

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6 Rule 13.5 of the *Rules*, see note 4.
If a respondent wishes to raise a preliminary objection to the Tribunal’s jurisdiction, or request that the application be dismissed on a preliminary basis for any reason, this must be done by means of a Rule 19 Request for an Order During Proceedings.

Generally, a respondent must file a full response to an application prior to raising any preliminary objections or making a Request for an Order. However, where a respondent alleges in a Rule 19 Request, that: (a) the issues in dispute come under exclusive federal jurisdiction; (b) a full and final release has been signed by the parties; (c) a civil court proceeding has been commenced requesting a remedy based on the alleged human rights infringement; or (d) a complaint has been filed with the Commission, the respondent need only provide the relevant documents (i.e. complaint, statement of claim, release) and is not required to respond to the allegations. The respondent must however provide full argument in support of its position that the application should be dismissed.

We will examine the bases for arguing that an application is outside of the Tribunal’s jurisdiction below.

**The Bases for Summary Dismissal**

A respondent to a human rights application can object to the HRTO’s jurisdiction to deal with the application, for many reasons. Predominately, these reasons fall within the following categories, each of which are explained in detail below:

1. **Constitutional jurisdiction**;
2. **Geographical jurisdiction**;
3. **The allegations do not fall within the purview of the Code**;
4. **The application is untimely**;
5. **There are concurrent or prior civil proceedings dealing with the same issues**;
6. **The substance of the application has been dealt with by a previous proceeding**; and
7. **Issue estoppel and abuse of process**.

**Constitutional jurisdiction**

The HRTO has the power to consider the constitutional division of power under sections 91 and 92 of the *Constitution Act, 1867*. It will also consider constitutional jurisprudence that has

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7 *Masood*, see note 5, at paras. 8 and 9.
8 *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3
determined whether a particular industry or practice is governed federally or provincially.\(^9\) For example, the HRTO has dismissed an application where the employer provided inter-provincial transport services on a regularly scheduled basis and was therefore a federal undertaking.\(^{10}\) Similarly, where the respondent to an application provided investment and securities services, not banking services, the HRTO found it had jurisdiction under the “property and civil rights” head of power in section 92(13) of the *Constitution Act, 1867*.

A determination of whether provincial or federal human rights legislation applies to an activity is based on whether the industries, undertakings or activities with which these liberties are connected, are themselves within the legislative power of Parliament or a provincial legislature.\(^{11}\) The general rule is that labour relations, including human rights in the employment context, will fall within provincial jurisdiction unless the nature of the business or undertaking’s operations and normal activities can be characterized as federal in nature.\(^{12}\) The *Code* will not apply to “services, goods and facilities” which are part of the “core” of a federal work or undertaking to the extent that the application of the *Code* is incompatible with the doctrines of interjurisdictional immunity or federal paramountcy.\(^{13}\) An illustration of this principle is seen in *Canada Mortgage and Housing Corp. v. Iness*.\(^{14}\) In that case, a housing cooperative received a federal grant from Canada Mortgage and Housing Corporation which came with attendant terms and conditions regarding the rent that could be charged for tenants receiving social assistance. The terms were incorporated into the rent provisions in the housing cooperative’s Operating Agreement. The rent provisions of the Operating Agreement were challenged by a social assistance recipient. The Ontario Court of Appeal held that the doctrine of interjurisdictional immunity prevented the Ontario Human Rights Tribunal from taking jurisdiction over the complaint.

The Court found that the grant to the Co-op constituted an exercise of the federal spending power, and the rent provisions formed part of the vital or essential part of the core exercise of the federal spending power. The application of the *Code* would impair the operation of the federal

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\(^{10}\) *Morgan v. Ottawa (City)*, 2008 HRTO 145.


\(^{12}\) This is known as the “functional test”: *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031 at 1045.


\(^{14}\) *Canada Mortgage and Housing Corp. v. Iness*, 2004 CanLII 15104 (ON CA).
spending power since it would permit the HRTO to dictate to the federal government how the spending power could be exercised. This, the Court found, was not permitted under the doctrine of interjurisdictional immunity. Therefore, the provincial human rights legislation did not apply.

Geographical jurisdiction
A respondent may object to an application on the basis that the alleged events occurred outside of Ontario. A good example of this type of jurisdictional issue is found in Hughes. Wherein the HRTO summarily dismissed the application. The applicant was residing in Quebec, her regular place of employment was in Quebec, and her employer’s regular place of business was in Quebec. The HRTO considered whether or not the application had a sufficient connection to Ontario to come within the Code and determined that the “pith and substance” of the acts complained of did not relate to matters within Ontario. It did not matter that the respondent’s head office was in Ontario or that clients of the respondent were located in Ontario. Thus the application was summarily dismissed.

The application falls outside of the Code
The Code is very specific and, as such, does not extend to every situation where a person feels that he or she has been aggrieved. Although an applicant may feel that he or she has been subjected to unfair treatment, unless that treatment would constitute a discriminatory practice under the Code, the HRTO does not have jurisdiction to address it.

The Code is limited to protecting people in Ontario from discrimination and harassment in the areas of employment; housing; goods, services and facilities; contracts; membership in trade and vocational associations; and reprisals based on filing a human rights complaint. Therefore, in order to be within the jurisdiction of the HRTO, the alleged discrimination must be in relation to one of these areas.

One of the issues that often comes up is whether the alleged discrimination occurred with respect to “services”. Although the HRTO has held that “services” under the Code must be given a broad, liberal and purposive interpretation, the Tribunal has held that the following situations did not involve a “service” under the Code:

- the content and result of an adjudicative decision-maker’s decision;

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15 Hughes, see note 5.
16 See for example C.K. v. Ontario (Minister of Children and Youth Services), 2010 HRTO 2500 (CK v. Ontario).
17 See for example Baird v. Workplace Safety and Insurance Appeals Tribunal, 2009 HRTO 99; C.K. v. Ontario, see note 16.
• the content of a newspaper editorial;\textsuperscript{18}

• the inscription on a monument erected on church property;\textsuperscript{19}

Conversely, the HRTO held in \textit{Oliver v. Hamilton (City)}\textsuperscript{20} that the issuance of a Mayoral proclamation was a “service” pursuant to the \textit{Code}. The HRTO stated at paragraph 34:

Issuing a proclamation is a service because it is generally perceived in the community as being a benefit to the groups that seek it, and therefore it should be seen as a legitimate privilege to which citizens have access without fear of discrimination.\textsuperscript{21}

A more fulsome analysis of the tests to be applied in determining whether an activity constitutes a “service” is provided in the part of this paper that deals with the federal Commission and Tribunal.

Questions may also be raised as to whether the applicant is in an employment relationship with the Respondent. However, the courts and tribunals have been unwilling to use technical definitions of “employment” to rule out employment relationships for the purposes of provincial and federal anti-discrimination laws.\textsuperscript{22} Employment relationships have been found in several cases where there is no employment relationship from the standpoint of the common law or for other purposes. For example, employment relationships have been found between cadets and the Armed Forces,\textsuperscript{23} between police and both the Board of Police Commissioners and the Chief of Police,\textsuperscript{24} between an equity partner in a law firm and the law firm,\textsuperscript{25} and between a volunteer counsellor and a women’s shelter.\textsuperscript{26}

\textsuperscript{18} Whiteley v. Osprey Media Publishing Inc., 2010 HRTO 2152.

\textsuperscript{19} Dallaire v. Les Chevaliers de Colomb - Conseil 6452, 2011 HRTO 639.

\textsuperscript{20} Oliver v. Hamilton (City), [1995] O.H.R.B.I.D. No. 56 (“Oliver”).

\textsuperscript{21} Oliver, see note 20.

\textsuperscript{22} See for example: HMTQ et al v. Emergency Health Services Commission et al, 2007 BCSC 460 at para. 152, wherein the British Columbia Supreme Court stated: “Where there is a relationship between a respondent and complainant that contains some elements of the traditional common law employment relationship or a contract of services, and even where the relationship is unusual or more akin to a contract for services (independent contractor relationship) or to a volunteer-like relationship, courts and tribunals have stretched the meaning of “employment” to ensure that the purposes of human rights legislation are not thwarted in the sense that the targets of discrimination are not left without any remedy.”


\textsuperscript{25} McCormick v. Fasken Martineau Damoulin (No. 2), 2010 BCHRT 347.

\textsuperscript{26} Nixon v. Vancouver Rape Relief Society, 2002 BCHRT 1, rev’d on other grounds Vancouver Rape Relief Society v. Nixon, 2003 BCSC 1936 (“Nixon”).
**Timeliness**

Under subsection 34(1) of the *Code*, an applicant must file his or her application within one year of the incident that is alleged to form the basis for the *Code* violation, or within one year of the last incident if there is a “series of incidents”. If the applicant has not met this timeline, the Tribunal will only have jurisdiction to consider the out-of-time incidents if the applicant can show under subsection 34(2) of the *Code* that the delay was incurred in good faith and that no substantial prejudice will result to any party because of the delay.

The HRTO has stated that there are two basic requirements for a group of incidents to constitute a “series” within the meaning of the section. First, there cannot be significant gaps between the incidents. It has been held, on more than one occasion, that a gap of more than one year between incidents in a series would, in most cases, interrupt the series. Second, there must be some connection or nexus between the incidents that form a series. In numerous decisions interpreting 34(1)(b), the Tribunal has considered the nature of the events and whether they may reasonably be viewed as a pattern of conduct, or are comprised of incidents relating to discrete and separate issues without some connection or nexus. When alleging that incidents that would normally be out of time be actually part of a series, the applicant must provide sufficient particulars for the Tribunal to come to that conclusion. An applicant cannot create a nexus between separate incidents simply by making the bold statement that the incidents are part of a pattern of discrimination.

If a series of incidents is not found by the HRTO, then all incidents that are alleged to have taken place one year prior to the filing of the application are considered out of time. However, the HRTO may still exercise its discretion to hear the allegations relating to out of time incidents provided it is satisfied that there was a good faith reason for the delay and no substantial prejudice will result to any affected party. The HRTO has held that a good faith delay is a very high onus to meet and has only been met when the applicant has established that he or she was

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27 *Code*, see note 3, section 34(1)(a).


29 See for example *Chintaman v. Toronto District School Board*, 2009 HRTO 1225; *Sutherland v. District School Board Ontario North East*, 2010 HRTO 2270; and *Savage*, see note 28.


unaware of his/her rights or unable to file an application. An application cannot establish a good faith delay based on broad assertions of medical or emotional factors without providing particulars to substantiate why these factors prevented the applicant from asserting his or her rights within the statutory time period. When considering substantial prejudice, the HRTO considers factors such as fading memories, destruction of documents and difficulty locating witnesses.

Section 34(11) - concurrent or prior civil proceedings
One of the most significant amendments to the Code in 2008 was the introduction of section 46.1. This section allows plaintiffs in civil proceedings to seek remedies for Code-based infringements. Section 34(11) was introduced to accompany section 46.1. Section 34(11) provides that a person cannot bring an application before the HRTO if:

(a) a civil proceeding has been commenced 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.

A respondent to an application before the HRTO may seek summary dismissal of the application if either of the two criteria in section 34(11) has been met. Section 34(11) is designed to avoid duplicative proceedings and has been rigorously applied by the Tribunal. One of the cases most often cited on this point is the decision of Vice Chair Wright in Beaver v. Dr. Hans Epp Dentistry Professional Corp. In that case, the applicant commenced a wrongful dismissal action alleging that the termination of her employment was discriminatory. The applicant sought damages for the alleged Code violations. Subsequently, the applicant filed an application before the HRTO alleging discrimination and failure to accommodate. Vice Chair Wright confirmed that the purpose of section 34(11) is to eliminate duplicate court and HRTO proceedings alleging breaches of the Code. A person is therefore faced with a choice of filing either a civil proceeding or a human rights application. Once a civil

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33 An applicant must also establish that they had no reason to make inquiries about his or her rights under the Code. It is not sufficient to establish that they were simply unaware of the specific avenues under the Code. See for example Cartier v. Northeast Mental Health Centre–North Bay Campus, 2009 HRTO 1670.

34 For example, due to a disability as in Lutz v. Toronto (City), 2010 HRTO 769.


36 Beaver v. Dr. Hans Epp Dentistry Professional Corp, 2008 HRTO 282 (“Beaver”).
proceeding is commenced alleging violations of the *Code*, even if section 46.1 is not specifically pled in that action, section 34(11) is engaged and an application to the HRTO is barred. Vice Chair Wright suggested in *obiter* that an applicant may be able to amend a statement of claim to remove *Code*-based claims and then re-gain access to the HRTO.

In *Kupiec v. Starburst Coin Machines Inc.*[^Kupiec]_, the Tribunal indicated that the amendments to the statement of claim would have to be made **prior** to filing an application or the application will be barred by section 34(11). The applicant in that case had filed a complaint with the OHRC and then two months later commenced a civil action claiming damages for breach of the *Code*. Subsequent to the civil action, the applicant transferred the complaint to an application before the HRTO. The respondent parties requested that the HRTO dismiss the application in its entirety, pursuant to section 34(11). In considering the respondent’s request, Vice Chair Slotnick explained the choice that section 34(11) imparts on parties:

> Under the revisions to the *Code*, the courts were given clear jurisdiction to determine claims of human rights violations when those claims are part of a broader action […] However, the person **claiming infringement of human rights must make a choice on whether to put that allegation before the courts or before the Tribunal […] Once a person claiming infringement has commenced a civil action claiming damages for the alleged human rights violation, **that person has made a choice** and section 34(11) […] is clear in stating that the person cannot then proceed with a complaint to this Tribunal **unless he or she has first withdrawn the civil action.** The legislation does not contemplate withdrawal of a portion of a civil action only after a responding party objects.^[Kupiec]_ (emphasis added)

Thus, if a civil action has been commenced in which discrimination has been alleged, respondents should move to have the application dismissed. Based on *Kupiec*, it will not be open to the applicant to amend the statement of claim and continue with the human rights application.[^Medrano]

The HRTO’s decisions in *Baker v. Sears Canada Inc.*[^Baker]_ and *Borden v. Toronto Grace Health Centre*[^Borden]_ illustrate the difference between a civil action that relies upon the new civil jurisdiction


created by section 46.1, and a civil action that relies upon the same facts as an application before
the HRTO, but does not allege human rights violations. In Baker the applicant did not mention
the Code nor allege discrimination in her civil action. However, the facts underpinning both the
civil action (for wrongful dismissal) and the human rights application were the same. The HRTO
refused to apply section 34(11), stating that the factual similarity between the claims was not
sufficient to engage section 34(11). The threshold question was whether the applicant raised the
Code in the court action. In Borden, the statement of claim in issue did not cite the Code.
However it did allege failure to accommodate. The HRTO held that, in substance, the applicant
had raised the same facts and issues in her statement of claim as in her HRTO application. Thus,
section 34(11) was triggered and the application was barred.
In Medrano, the HRTO sated that if a remedy is sought for a violation of the Code, it does not
matter whether section 46.1 (the remedy provision in the Code) is cited. It is worth noting that the HRTO has been willing to summarily dismiss an application where the
civil action in question only contained some of the Code-based grounds that the application
contained. Vice Chair Joachim commented in Reis v. CIBC Mortgages:

 […] if a person raises in a civil proceeding an allegation of an
infringement of a right under the Code arising out of a specific
factual context, s.34(11) bars that person from also filing an
application before the Tribunal to claim a Code infringement
arising out the same factual context. The fact that the applicant has
only raised the disability-related Code infringement in her Civil
Action, and not the alleged race/colour discrimination does not
affect my analysis.

Thus it appears that section 34(11) analysis relies heavily on whether or not the civil action
alleges a Code violation and/or contains general allegations of discrimination, or, simply relies on
the same facts as an application before the HRTO, but seeks no remedy under the Code.

41 Borden v. Toronto Grace Health Centre, 2010 HRTO 1109. The approach in Beaver, see note 36, is supported by Free v. Magnetawan
(Municipality), 2010 HRTO 719. The approach in Kupiec, see note 37, is supported by Khan v. CCSI COMPUCON Systems, 2009 HRTO 2220.
42 Baker, see note 40.
43 See also Ivey v. Millard Refrigerated Services, 2009 HRTO 1065 where the fact that the wrongful dismissal action contained a suggestion that
the plaintiff’s race was in some way related to her dismissal, was not sufficient to engage section 34(11) of the Code. A similar result was reached
in Baghdasserians v. 674469 Ontario, 2008 HRTO 404 (“Baghdasserians”).
44 Borden, see note 41.
45 Medrano, see note 39.
46 Reis v. CIBC Mortgages, 2009 HRTO 1350, at para 7.
Section 45.1 - the substance of the application has been dealt with by a previous proceeding

Section 45.1 provides that the Tribunal may dismiss an application, in whole or part, if it is of the opinion that another proceeding has appropriately dealt with the substance of the application.47

Very recently, the Supreme Court of Canada released a decision in *British Columbia (Workers’ Compensation Board) v. Figliola*48 in which the Court studied an almost identical provision in the British Columbia *Human Rights Code* (“*B.C. Code*”). The complainant workers in that case suffered from chronic pain and sought compensation from the British Columbia Worker’s Compensation Board (“BCWCB”). They received a fixed amount, as stipulated by the Board’s Chronic Pain Policy. The complainants argued that a fixed award for chronic pain was discriminatory. The BCWCB Review Officer accepted jurisdiction over the matter and held that the Chronic Pain Policy was not discriminatory. Instead of applying for judicial review of this decision, the complainants filed new complaints with the B.C. Human Rights Tribunal, repeating the same arguments that had been made before the BCWCB Review Officer.

The BCWCB brought a motion asking the Tribunal to dismiss the new complaints on the basis of section 27(1)(a) of the *B.C. Code* since the complaints had been “appropriately dealt with” by the Review Officer. The Tribunal rejected the motion and found that the issue raised was an appropriate question for the Tribunal to consider and that the parties to the complaints should have the full benefit of a Tribunal hearing.

The Supreme Court of Canada stated that section 27(1)(a) does not represent a statutory invitation either to judicially review another tribunal’s decision, or to reconsider a legitimately decided issue in order to explore whether it might yield a different outcome. It constitutes a mechanism whereby the Tribunal may avoid a multiplicity of proceedings, and protect the integrity of the administration of justice, all in the name of fairness. The common law doctrines of issue estoppel, collateral attack and abuse of process are not to be rigidly followed in determining whether the matter should be dealt with by the Human Rights Tribunal. Rather, the Tribunal should be guided more by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them.

47 *Code*, see note 3.

48 *British Columbia (Workers’ Compensation Board) v. Figliola*, 2011 SCC 52 (“*Figliola*”).
The Court provided the following test for determining whether complaints should be dismissed on the basis of provisions like section 45.1 of the Ontario Code:

Relying on these underlying principles leads to the Tribunal asking itself whether there was concurrent jurisdiction to decide human rights issues; whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself. All of these questions go to determining whether the substance of a complaint has been “appropriately dealt with”. At the end of the day, it is really a question of whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute.49

In the Figliola case, the Court found that the complainants were simply trying to relitigate the matters that had already been determined by the BCWCB Review Officer. The Tribunal’s rigid adherence to the common law doctrines of issue estoppel, res judicata and abuse of process made it complicit in the complainants’ efforts. The Tribunal’s reasons represented a litany of factors having to do with whether it was comfortable with the process and merits of the Review Officer’s decision. This it should not have done, stated the Supreme Court of Canada.

On the basis of Figliola, it is necessary to view all of the Tribunal’s jurisprudence regarding section 45.1 of the Code (presented in the following sections) in light of the Court’s clear direction to be guided first and foremost by the principles of fairness and the avoidance of duplicative decision-making.50

The HRTO has confirmed that there are two distinct aspects to this provision. First, it must determine whether there was another “proceeding”; second, it must determine whether or not that proceeding “appropriately dealt with the substance of the application.”51

**What is a “proceeding”?**
The HRTO has commented that for the purposes of section 45.1 a “proceeding” includes an adjudicative process established under a statutory regime52 where due process is afforded to all

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49 Figliola, see note 48, at para. 37.
50 The Tribunal’s enumeration of factors to be considered in section 45.1 requests in Jarvis v. Sheet Metal Workers’ International Association, 2009 HRTO 121 is very much in line with the SCC’s reasoning in Figliola.
52 Campbell, see note 51.
parties involved. It is not necessary that the proceeding involved a hearing or an opportunity to make oral submissions.

Examples of adjudicative processes that have been found to be “proceedings” for the purposes of section 45.1 have been held to include:

- a hearing of the Special Education Tribunal of Ontario
- deliberations of the Law Society of Upper Canada’s Professional Development and Competence Committee
- grievance arbitrations
- a decision of the Health Professions Appeal and Review Board (despite the fact that the Board did not have power to award damages)
- a hearing before a University’s Anti-Discrimination Tribunal under the University’s Anti-Discrimination Policy
- Workplace Safety and Insurance Board hearings

In *Maurer v. Metroland Media Group*, the Tribunal held that a purely private, internal process without formal guarantees of procedural fairness, impartiality or independence does not constitute “another proceeding”; the application of section 45.1 of the *Code* in such circumstances would deprive the applicant of the right to pursue a remedy under the *Code*.

It is important to note the context in which the *Maurer* decision was made. The *Maurer* case dealt with a private employer’s internal Harassment Policy, under which complaints of discrimination or harassment were investigated by the Human Resources Manager with a provision for an appeal to “the Company.” It is perhaps understandable why this would not constitute “another proceeding” for the purposes of section 45.1 of the *Code*.

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55 *Campbell*, see note 51.
57 For example, *Denbar v. Haley Industries Limited*, 2010 HRTO 272 (“*Denbar*”).
60 *Berisa v. Toronto (City)*, 2008 HRTO 246.
In Dunn v. Sault Ste. Marie62 the HRTO found that the settlement of a proceeding brought under another statutory regime could be a “proceeding” for the purposes of section 45.1.63 Vice Chair Wright commented that section 45.1 must be interpreted to include the settlement of a proceeding.

When has the substance of an application been “appropriately dealt with”?

Once it has been determined that the previous adjudicative process was a “proceeding” for the purposes of section 45.1, it must be determined if that proceeding appropriately dealt with the substance of the application. This does not mean that the HRTO must find it would have reached the same conclusion as the decision in the prior proceeding.64 Rather, the HRTO will consider whether the application before it arises from the same set of facts that provided the basis for the other proceeding, whether the substance of the issues raised in each forum was substantially the same and whether the matter raised was “appropriately dealt with” in the other proceeding.65 A good example of this type of analysis is found in Dunbar66. The HRTO dismissed the application where a grievance arbitrator had dealt with the subject matter of the application. The HRTO’s comments are worth noting:

[…] while the arbitrator does not make specific reference to the Code, he conducted the type of analysis contemplated by the Code and fully considered the applicant’s evidence […] Although the arbitrator did not specifically decide each of the allegations made in the [human rights] application […] in reviewing the respondent’s actions as a whole following the applicant’s injury, I am satisfied that the arbitrator dealt with the “substance of the application” within the meaning of section 45.1. The question before the arbitrator was […] not the exact question raised by the application. However, as I have explained, the question at issue need not be a perfect match, as long as the substance – the essential nature of the complaint – was considered and addressed67

(emphasis added)

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63 The HRTO has on several occasions found that a settlement was a “proceeding” under section 45.1. See for example Lewis v. Leisureworld Caregiving Centre, 2010 HRTO 710.
64 Campbell, see note 51, at para. 68.
65 Dunn, see note 51.
66 Dunbar, see note 57.
67 Dunbar, see note 57.
A similar analysis can be found in *Campbell*. There, the HRTO held that the Employment Standards Officer (“ESO”) had appropriately dealt with the substance of the application. Key to the HRTO’s finding was that the main issue in both the application before it and the *Employment Standards Act* (“ESA”) complaint was differential treatment due to pregnancy. The HRTO was satisfied that the ESO had considered these allegations and applied human rights concepts in reaching her decision. Further, the *ESA* itself contained anti-discrimination provisions. Thus, the HRTO was satisfied that the substance of the application had been appropriately dealt with.

In the recent case of *College of Nurses v. Trozzi*, the Ontario Superior Court of Justice reviewed a decision of the HRTO in which the HRTO refused to dismiss an application on the basis of section 45.1. The Health Professions Appeal and Review Board (“HPARB”) decided that the imposition of conditions on a nurse’s Certificate of Registration as a Registered Practical Nurse was not discriminatory. The HRTO acknowledged that the substance of all of the applicant’s complaints were dealt with by the HPARB, but that the HPARB did not apply the principles of undue hardship and adverse impact and did not reflect those principles in its reasons. The Court found that the HRTO failed to recognize that the HPARB had a public protection mandate, which meant that it was required to determine the degree of accommodation that was appropriate in that context. The Court held that the HRTO had no expertise in protecting public health and should not assume jurisdiction in order to substitute its statutory mandate for the mandate of another tribunal having responsibility and expertise in that area. The Court found that the HRTO had effectively permitted the complainant to launch a collateral attack on the HPARB decision, which it was not permitted to do.

As the above examples demonstrate, section 45.1 is a very broad ground for obtaining summary dismissal of an application.

**Issue estoppel/abuse of process**

**Issue Estoppel**
The doctrine of issue estoppel provides that if an issue has been previously decided in a proper forum, the parties to that decision cannot re-litigate the issue in a different forum. In light of the recent decision in *Figliola*, counsel is advised to avoid an overly mechanistic or slavish adherence to the doctrines. However, given that the Supreme Court did indicate that provisions

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68 *Campbell*, see note 51.

69 *College of Nurses v. Trozzi*, 2011 ONSC 4614 ("Trozzi").
such as section 45.1 embrace the underlying principles in the doctrines of issue estoppel, *res judicata* and abuse of process, it is still useful to review the doctrines and their application in the human rights context. When arguing a Request pursuant to section 45.1, counsel would do well to refer to the principles underlying the doctrines but to acknowledge that section 45.1 is not encumbered by the strict criteria of the common law doctrine of issue estoppel.70

A recent decision of the HRTO, *Snow v. Honda of Canada Manufacturing*,71 provides a thorough examination of the doctrine of issue estoppel as it applies to administrative tribunals.72

Given that *Snow* has been consistently followed,73 this decision is analyzed in detail below. In *Snow*, the respondent Honda asserted that the HRTO was barred from considering the complaint by virtue of the doctrines of issue estoppel and/or abuse of process. Honda argued that prior to the complaint being filed with the OHRC, the Ontario Workplace Safety and Insurance Board ("WSIB") had determined that Honda could not accommodate the complainant. Honda alleged that the human rights complaint was an attempt to re-litigate this decision of the WSIB.

According to Vice Chair Joachim, the rationale for the doctrine of issue estoppel is the need for finality in decision-making. A party should not be twice "vexed" by the same issue. However, as this is a common law doctrine, there has been some hesitation by human rights tribunals to apply it. Vice Chair Joachim explained that the concern is that summary dismissal of a complaint deprives the parties of the opportunity to have their case heard on the merits by a tribunal that specializes in adjudication of human rights disputes. Therefore, the Vice Chair felt that it was appropriate to use caution and restraint when applying issue estoppel.

Vice Chair Joachim went on to examine the three required elements for the application of issue estoppel. These are:

1. The same questions are being decided in both proceedings. The determination of the issue in the first proceeding must have been necessary to the result of that proceeding; that is, issue estoppel only covers fundamental issues determined in the first proceeding.

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70 *Campbell*, see note 51.
72 Note that this decision was released prior to the *Code* amendments discussed above, and therefore section 45.1 of the *Code* was not yet in force.
The judicial decision that is said to create the estoppel must be a final decision. If there is a process of appeal or reconsideration of that decision that the party does not utilize, the decision can be considered final.

The parties, or their privies, must be the same for both proceedings. Where the parties are not the same, this part of the test can still be met if one party was the privy of another in the previous proceeding. In order to be a privy, there must be a sufficient degree of common interest between the party and the privy to make it fair to bind the party to the determination made in the previous proceeding.

In *Snow*, the doctrine of issue estoppel was held not to apply as none of the elements noted above were met. The WSIB did not render a decision as to whether the worker could be accommodated, it simply referred him to the Labour Market Re-Entry Program. Moreover, the parties to the proceedings were not the same and the issue was not the same - the WSIB considered accommodation from the point of view of the *Workplace Safety and Insurance Act*, not the *Code* and the WSIB did not consider whether the applicant’s termination was tainted by discrimination and whether there had been any workplace harassment. Therefore Vice Chair Joachim found that issue estoppel did not apply and went on to consider the doctrine of abuse of process.

Abuse of Process

Pursuant to section 23(1) of the *Statutory Powers Procedures Act*\(^{74}\) a tribunal has jurisdiction to dismiss or stay complaints if to proceed would amount to an abuse of the tribunal’s process.\(^{75}\) Typically, the abuse of process doctrine is applied where the strict requirements of issue estoppel or *res judicata* have not been met. However, in *Snow*, Vice Chair Joachim noted that there are other circumstances that might ground a claim for abuse of process and the grounds are not closed. Citing the Supreme Court of Canada’s decision in *Toronto (City) v. C.U.P.E. Local 79*, the Vice Chair stated:

> […] the doctrine of abuse of process is appropriately used to preclude relitigation in circumstances where the strict requirements of issue estoppel […] have not been met, but where allowing the litigation to proceed would nonetheless violate principles such as


\(^{75}\) Interestingly, Rule 1.7(v.1) provides that the HRTO may make such orders or give such directions as are necessary to prevent abuse of its processes. This rule is rarely referred to when the HRTO is considering allegations of abuse of process.
judicial economy, consistency, finality, and the integrity of the administration of justice.76

The Vice Chair then listed some of the circumstances that had in the past resulted in an application being dismissed for abuse of process. For example:

1. A delay between the date of occurrence and Tribunal proceedings which causes such prejudice and unfairness that it would be an abuse to continue with proceedings;77
2. The fact that the complainant has settled with the respondent and signed a release;78
3. When Complainant’s behaviour caused such prejudice and unfairness that it would be an abuse to continue;79 and
4. When the allegations of discrimination have been heard and determined appropriately in another forum.80

On this last point, Vice Chair Joachim listed some of the factors that a tribunal will take into account when considering whether to dismiss an application for abuse of process where it is alleged that the issues have already been determined in another forum. These factors include:

1. The wording and purpose of the other statute (that governed the previous proceeding);
2. The availability of an appeal in the other proceeding;
3. The safeguards available to the parties in the other proceeding;
4. The expertise of the decision maker in the other proceeding;
5. The circumstances giving rise to the prior proceeding;
6. The issues decided in the other proceeding;
7. Whether or not human rights principles were applied in the other proceedings;
8. Whether or not fresh evidence is available which was not available in the earlier proceeding;
9. Whether the earlier proceeding was tainted by fraud, dishonesty or unfairness of any kind; and
10. Any potential injustice.

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77 Citing for example, Ontario (Human Rights Comm.) v. Dofasco Inc. (No. 4), 2004 HRTO 5, aff’d. 61 CHRR 273 (ON SCDC).
Applying the above factors, Vice Chair Joachim held that it would not be an abuse of process to continue with the complaint, despite the WSIB proceedings. She held that in an appropriate case, a WSIB decision that a worker cannot be accommodated may prevent the employee from relitigating the same issue before the HRTO. However in the case at bar, given that no formal decision had been made by the WSIB, and that the WSIB had not considered whether the applicant’s termination was tainted by discrimination and whether there had been any harassment, it would not be an abuse of process to continue with the complaint.

A common ground for a claim of abuse of process is that a settlement has been reached between the parties, covering the subject matter of the human rights application. The HRTO has indicated a willingness to summarily dismiss such applications where it is satisfied that the applicant entered into the settlement willingly and knowingly, and there was no duress or untoward conduct by the respondent in obtaining the settlement. In fact, the HRTO has dismissed applications on this basis even if the settlement did not involve a full and final release. For example, in *Messiah v. Snap-on Tools of Canada*, the HRTO held that the absence of reference to a “release” was not determinative. Rather, the question was whether it would be unfair to permit the application to continue having regard to the terms of the memorandum of settlement and the surrounding circumstances. Given that the memorandum of settlement provided that the parties wished to resolve “all outstanding issues” with respect to the applicant’s “employment and resignation form employment,” this was sufficiently broad to make it unfair to proceed with the application. Similarly, in *Dunn*, the HRTO commented that the absence of a release did not determine the issue of whether the application should be dismissed. Requiring a specific release of Code claims where these claims were specifically raised in the other proceeding would defeat the purposes of section 45.1 and focus on form over substance.

In *N.P. v. Ottawa-Carleton District School Board*, the respondent raised a number of preliminary objections to the application, including that aspects of it were an abuse of process. Citing *Snow*, Vice Chair Flaherty ruled in favour of the respondents and dismissed a portion of the application as being an abuse of process. The parties to the application had been involved in a defamation action wherein the trial judge had made a finding of fact that the applicant had not

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81 See for example *Zu v. Hamilton (City)*, 2010 HRTO 2461.
83 *Dunn*, see note 62, at para. 45.
been injured in an incident that took place at her school. At the HRTO, the applicant again raised this injury in the context of a claim of discrimination. Vice Chair Flaherty held that the applicant was seeking to relitigate the trial judge’s finding of fact regarding the injury and dismissed this part of the application, despite the fact that the trial judge had not considered any allegations of discrimination.

One final example of the HRTO dismissing an application on the ground that it would be an abuse of process is *Henderson*, 85 Again, the HRTO followed the principles set out in *Snow*. 86 The applicant in this case had previously filed a complaint under the *Employment Standards Act*. The applicant had deliberately withheld two key concerns from this complaint, in the belief that the HRTO could award more significant damages on these issues. The HRTO took the view that this was a deliberate attempt to split the applicant’s case and provide two opportunities to litigate claims of discrimination against the respondents. It would have been an abuse of process for the HRTO to consider these new allegations and they were summarily dismissed.

**Summary hearings**

Rule 19A.1 provides that:

> 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 part on the basis that there is no reasonable prospect that the Application or part of the Application will succeed. 87

(emphasis added)

A summary hearing can take place in person or by teleconference. The HRTO will send the parties a Notice of Summary Hearing, indicating which format the hearing will take. The HRTO’s *Rules* with respect to disclosure of documents and witnesses do not apply to summary hearings. Rather, the HRTO can give directions about the steps the parties must take prior to or at the summary hearing, including with respect to documents and witnesses.

Typically, summary hearings are held at a relatively early stage in the HRTO’s process and do not involve calling witnesses. Summary hearings involve receiving the applicant’s submissions

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85 *Henderson*, see note 54.

86 *Snow*, see note 71.

87 *Rules*, see note 4.
on his or her legal theory and what evidence he or she anticipates calling at the merits hearing in support of the allegations.\(^{88}\)

The seminal (and first) decision of the HRTO on summary hearings is *Dabic v. Windsor Police Services*.\(^{89}\) Chairperson Wright for the HRTO was careful to point out that the HRTO’s jurisprudence on this rule would develop over time, and his decision was not intended to set out a definitive test or standard about the meaning of the phrase “reasonable prospect of success.” Nonetheless, by way of “initial observations,” Chairperson Wright noted two distinct lines of inquiry for a summary hearing. The first involves asking whether or not the application has a reasonable prospect of success, assuming all of the allegations to be true. This is a legal inquiry – can the facts alleged by the applicant amount to a breaches of the *Code*? The second line of inquiry considers whether or not the applicant can prove, on a balance of probability, that his or her *Code* rights have been violated. The applicant must be able to establish a link between the impugned events, and a protection offered by the *Code*.

Given that the summary hearing takes place at a very preliminary stage in an application, the HRTO must be conscious of the fact that evidence which is disclosed through the disclosure process may assist the applicant in establishing the link between the evidence and the *Code*. The HRTO must therefore consider whether there is a reasonable prospect that such evidence could lead to a finding of discrimination.

In *Leopold v. YMCA of Greater Toronto*\(^{90}\) it was held that it was not enough for an applicant to simply state that the evidence will show discrimination. The applicant must be able to articulate how the evidence will show discrimination. As the Tribunal explained further in *Forde v. Elementary Teachers’ Federation of Ontario*:

> The Tribunal does not have the power to deal with general allegations of unfairness. For an Application to continue in the Tribunal’s process, there must be a basis beyond mere speculation and accusations to believe that an applicant could show discrimination on the basis of one of the grounds alleged in the *Code* or the intention by a respondent to commit a reprisal for asserting one’s *Code* rights.\(^{91}\)

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\(^{88}\) *Pellerin v. Conseil scolaire du district catholique Centre-Sud*, 2011 HRTO 1777, at para. 18 (“*Pellerin*”).

\(^{89}\) *Dabic v. Windsor Police Services*, 2010 HRTO 1994 (“*Dabic*”).

\(^{90}\) *Leopold v. YMCA of Greater Toronto*, 2010 HRTO 1504.

In *Pellerin v. Conseil scolaire du district catholique Centre-sud*, the application was summarily dismissed as having no reasonable prospect of success. However, rather than applying the Rule 19A test at the outset of the process, Chairperson Wright dismissed the application after hearing some, but not all, of the evidence. Chairperson Wright made it clear that Rule 19A summary hearings can be used at any time during a hearing, and not just at the preliminary stage before any evidence is heard. However, Chairperson Wright was careful to point out that it is for the HRTO to determine if it will consider a request for summary dismissal part-way through a hearing.

The Chairperson commented at paragraph 20 that the “reasonable prospect of success” test was more appropriate in the context of a Rule 19A hearing than the traditional test of a *prima facie* case:

> [...] when a general evaluation of the evidence that has been called and is proposed to be called makes it clear that the Application has no reasonable prospect of success the Application should be dismissed. This is a principled test that is consistent with the Code, and that incorporates the concept of *prima facie* case. I think that it is usually more understandable, accessible and flexible to consider the issues and evidence against a general test of reasonable prospect of success.

According to the Tribunal, if during the hearing it becomes apparent that there remains only a theoretical prospect that evidence could meet an applicant’s burden of proof will come forward, the application must be dismissed.

In that case, Mr. Pellerin, a school principal, made a number of allegations against his supervisor Ms. Francella, a superintendent for the school board. These allegations included discrimination on the basis of disability and reprisals for a previous human rights complaint. It was the applicant’s evidence that Ms. Francella criticized him, placed expectations on him not placed on other principals, and undermined his credibility with staff. Further, Ms. Francella had tried to make him resign because he had major depressive disorder and had previously complained to the OHRC.

The respondents took the position that Ms. Francella’s actions were legitimate supervision of Mr. Pellerin’s job performance and had no connection with his disability or prior *Code* complaint. It was agreed by the parties that Ms. Francella’s evidence would be heard first. After hearing this evidence and the applicant’s theory and intended evidence, Chairperson Wright was satisfied that

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92 *Pellerin*, see note 38.
there was no reasonable prospect that the applicant could prove discrimination or reprisal. Chairperson Wright commented that when an applicant has had a chance to fully outline the evidence they intend to call and to explain the basis upon which his or her application could succeed, and it is clear that there is no reasonable prospect of establishing a Code violation, the application should be dismissed.

Another example of the HRTO of a summary dismissal is Abdul v. York University.93 There, the applicant alleged discrimination on various grounds against York University and University of Waterloo. The applicant alleged that her failure to be offered a position for which she interviewed at York, and to obtain an interview for an advertised position at Waterloo, was tainted by discrimination. The HRTO directed that a joint summary hearing be held with respect to both applications. The HRTO’s “case assessment direction” noted that the application did not appear to provide a factual or evidentiary basis for the applicant’s belief that she was discriminated against.

At the summary hearing, the applicant was required to explain exactly how she could prove that she experienced discrimination. She was unable to do so; rather, she could only provide speculation as to the reasons for the universities’ conduct. The HRTO found nothing in the applicant’s materials that could support her allegations. As such the application against both universities was dismissed.

The HRTO has been willing to grant summary dismissal under Rule 19A where it is clear from previous jurisprudence that the application has no reasonable prospect of success. For example, several applications have been summarily dismissed when the applicant alleged discrimination by his or her union for failing to proceed with a grievance.94 In these cases the HRTO has relied on its previous decision in Traversy v. Mississauga Firefighter’s Association95 for the principle that a union cannot be said to have violated the Code simply due to its failure to pursue a grievance.

Further guidance on the interpretation of this new provision can be taken from the British Columbia Human Rights Tribunal. The B.C. Tribunal has rendered a number of decisions on the basis of a similar provision in the B.C. Code. For example, in Sparrow v. D. W. Johnson Holdings,96 the Tribunal stated that the threshold is low for a complainant to establish that the

93 Abdul v. York University, 2011 HRTO 1851.
95 Traversy v. Mississauga Firefighter’s Association, 2009 HRTO 996.
case should not be summarily dismissed. The complainant must only show the evidence takes the case out of the realm of conjecture.97

The B.C. Tribunal stated, however, in Sparrow that factual differences between the parties’ account of the events giving rise to issues of credibility do not, in themselves, preclude summary dismissal. The Tribunal stated:

Credibility, like other issues raised in a complaint or application, are assessed by the Tribunal on a global basis to determine, on a consideration of all the material before it, whether the complaint has no reasonable prospect of success: Evans v. University of British Columbia, 2008 BCSC 1026 (CanLII), 2008 BCSC 1026, paras. 34-37; Homer v. Concord Security Corporation, 2003 BCHRT 86, para 23.

However, when credibility issues arise directly from the central issue raised in the complaint, the Tribunal will decline to issue summary judgment, and will instead proceed to a full hearing.98

As suggested by Chairperson Wright in Dabic,99 the HRTO’s jurisprudence regarding summary dismissals will develop as more parties seek access to this potentially cost- and time-saving feature of the Rules.

Deferral of applications
Section 45 allows the HRTO to defer an application in accordance with the Rules. Rule 14 provides that the HRTO can defer consideration of an application “on such terms as it may determine, on its own initiative, or at the request of an Applicant under Rule 7, or at the request of any party.”

Given the broad scope of Rule 14, one must look to the HRTO’s jurisprudence to determine the grounds upon which a deferral may be granted. In Baghdasserials v. 674469 Ontario100 the HRTO enumerated some of the factors that it would take into account when deciding whether or not to defer an application. These include:

- the subject matter of the other proceeding;
- the nature of the other proceeding;
- the type of remedies available in the other proceeding; and

97 Sparrow, see note 96, at para. 16.
98 Sparrow, see note 96, at para. 18.
99 Dabic, see note 89.
100 Baghdasserials, see note 43, at para. 19
whether, having regard to the status of each proceeding and steps taken to pursue them, it would be fair overall to the parties to defer the application.

In *Monck v. Ford Motor Company of Canada*\textsuperscript{101} the HRTO refused to defer the application. The applicant had been terminated from employment and consequently lost his health benefits coverage. His wife was terminally ill and required medical treatment, and the grievance arbitration relating to his termination was proceeding slowly. The HRTO held that deferral would be unfair to the applicant. Notably, in *obiter*, the HRTO pointed out that it would generally defer an application where there was an ongoing grievance arbitration based on the same facts and issues.

**Motions for non-suit**

A motion for non-suit is generally brought by a respondent at the close of the applicant’s evidence. By bringing a non-suit motion, the respondent is alleging that the facts as established by the applicant, taken at their strongest, do not demonstrate an infringement of the *Code*. That is, a *prima facie* case has not been established.

The HRTO has considered whether the strict common law rule should be applied in the human rights context. Unfortunately, the HRTO has not developed a consistent approach. Its decision in *Modi v. Paradise Fine Foods Ltd.*\textsuperscript{102} highlights the lack of a unified approach. In *Modi*, counsel for the respondent indicated that he would be making a motion for non-suit at the end of the OHRC’s case. Counsel for the respondent sought a reassurance from the HRTO that he could make such a motion without prejudice to his right to call evidence. The HRTO granted this reassurance, and later issued reasons for this decision. In these reasons, the HRTO noted that there was no consensus in human rights jurisprudence as to whether the rule requiring the foregoing of the right to call evidence was applicable to human rights proceedings. The HRTO noted that there were two principle concerns with allowing a respondent to make a non-suit motion without foregoing the normal right to call evidence. Firstly, it is potentially prejudicial to the applicant for the HRTO to entertain the respondent’s motion without the benefit of the respondent’s evidence. The applicant may obtain useful admissions from the respondent’s witnesses and this evidence may assist the applicant’s case. The second concern is that the

\textsuperscript{101} *Monck v. Ford Motor Company of Canada*, 2009 HRTO 861.

fairness of the proceeding is risked if an adjudicator comments on the evidence of one side before the other side has presented its evidence.

In Modi, the HRTO dismissed these concerns, stating that a decision that the applicant has, through its evidence, passed the “relatively low threshold” of establishing a *prima facie* case, did not carry with it any strong pronouncement on the merits of the case or, more particularly, how the adjudicator would view or evaluate the testimony supporting the complainant once the testimony for the respondents has been heard. The HRTO also noted that a strict application of the common law rule would dissuade respondents from bringing motions for non-suit, which was detrimental to the administration of the human rights regime because unmeritorious cases may continue to a full hearing.

Thus, the respondent was not put to an election and was able to bring a motion for non-suit without prejudice to its right to call evidence should that motion fail (which it did).

On the basis of Modi, and the cases considered therein, it appears that the strict common law rule will not always be applied by the HRTO. Rather, a balancing will take place between the possible prejudice to the applicant from the HRTO hearing and determining a motion to dismiss before the respondent has called evidence, and the unfairness of continuing with a hearing if the respondent can establish that there is insufficient evidence to support the applicant’s case.\(^{103}\)

**Judicial review**

What happens to HRTO proceedings when a preliminary decision is judicially reviewed? Is it automatically stayed, or does the party seeking the review have to obtain a stay?

Section 25 *Statutory Powers and Procedures Act* provides that:

**Appeal operates as stay, exception**

25.(1) An appeal from a decision of a tribunal to a court or other appellate body operates as a stay in the matter unless,

(a) another Act or a regulation that applies to the proceeding expressly provides to the contrary; or

(b) the tribunal or the court or other appellate body orders otherwise.

(2) An application for judicial review under the *Judicial Review Procedure Act*, or the bringing of proceedings specified in subsection 2 (1) of that Act is not an appeal within the meaning of subsection (1).

\(^{103}\) See also *Potocnik v. Thunder Bay (City)*, [1996] O.H.R.B.I.D. No. 16 (Ont Bd Inq) (“*Potocnik*”).
Thus, the judicial review of an HRTO decision does not automatically stay the HRTO proceeding.\textsuperscript{104} The question is therefore in what circumstances will the HRTO stay its own proceedings?

In \textit{Snow}\textsuperscript{105} the respondents sought a stay of the HRTO proceedings to pursue a judicial review of the OHRC’s decision to refer the complaint to the HRTO. The HRTO held that an adjournment of its proceedings pending judicial review of the OHRC’s decision was an “extraordinary remedy,” such that the party requesting it must clearly demonstrate that the balance of convenience overwhelmingly favours the granting of a stay.

In \textit{Phipps v. Toronto Police Services Board}\textsuperscript{106} the OHRT stated that:

\begin{quote}
In general, an application for judicial review does not operate as a stay of a Tribunal decision. […] Nonetheless, for a stay to be granted, the respondents must establish: (1) that there is a serious issue to be tried; (2) that they will suffer irreparable harm if the stay is not granted; and (3) that the balance of convenience favours the granting of the stay.
\end{quote}

(emphasis added)

In general, courts are reluctant to hear applications for judicial review of interim or preliminary discretionary decisions of a tribunal like the HRTO.\textsuperscript{107} There is a well established practice of allowing the process before a tribunal to run to completion before entertaining an application for judicial review. Generally, the court will only interfere on a preliminary issue if the tribunal has lost, or never had, jurisdiction.\textsuperscript{108} However, in \textit{Trozzi}, the Court decided that since the HRTO’s decision to deny the section 45.1 Request to dismiss the application would result in a long, complicated and costly hearing, it made sense to entertain the judicial review application in order to avoid embarking on that process.

\textit{Conclusion regarding summary dismissal requests before the Human Rights Tribunal of Ontario}

In light of the fact that the HRTO is now a direct access tribunal, it has at its disposal a number of means for dealing with applications on a summary basis. Counsel for respondents would do well to consider these means of avoiding the time-consuming

\textsuperscript{104} This has been confirmed in many decisions of the HRTO; see for example \textit{Newman v. Sault Major Hockey Association}, 2009 HRTO 1981; \textit{Washington v. Toronto Police Services Board}, 2009 HRTO 640, application for judicial review quashed 2010 ONSC 419.

\textsuperscript{105} \textit{Snow}, see note 71.


\textsuperscript{107} \textit{Trozzi}, see note 69, at para. 20.

process of litigating matters that do not warrant full scale hearings. Even if the request does not result in the dismissal of the entire application, it may well result in streamlining or limiting the scope of the application to the essential issues. For example, a request to strike untimely allegations may result in a substantial reduction in the time and expense of responding to an application. Counsel for applicants must be prepared to meet the challenges of requests for summary dismissals.

PART TWO

Summary Dismissal under the Canadian Human Rights Act – Federal Considerations

Overview of federal human rights process
Respondents to complaints in the federal arena have opportunities to make early objections to the validity of the complaint at key points in both the Canadian Human Rights Commission (“CHRC”) and Canadian Human Rights Tribunal (“CHRT”) processes. The first such opportunity arises immediately after a complaint is initiated, as the Canadian Human Rights Act requires the CHRC to determine whether the complaint is one it must “deal with” in accordance with sections 40 and 41 of the Act. The CHRC shall not deal with the complaint, pursuant to section 40, if it lacks a sufficient nexus to Canada, for example, or if it relates to the terms of a pension plan. This part of the paper will focus on the grounds for “not dealing” with a complaint set out in section 41(1) of the CHRA.
Section 41(1) provides that the CHRC may determine that it will not deal with a complaint on the grounds that the complainant ought to pursue the complaint through other means such as a grievance procedure or pursuant to another act, the complaint is beyond the jurisdiction of the CHRC, the complaint is trivial, frivolous, vexatious or made in bad faith, or the complaint is based on acts or omissions the last of which occurred more than one year before receipt of the complaint. If the CHRC decides to deal with the complaint, there is a second opportunity for early dismissal at the end of the CHRC’s investigation process, when the CHRC must determine whether or not the matter merits further inquiry by the CHRT. Section 44 of the CHRA creates this further

109 Canadian Human Rights Act, RSC, 1985, c. H-6 (“CHRA” or “Act”)
110 CHRA, see note 109, sections 40(5) and 41. The Commission may extend the time for filing where it considers it appropriate to do so.
opportunity, once the matter has been thoroughly investigated, for the CHRC to determine that the matter ought to be dealt with through an alternate and preferable procedure, or that a hearing before the CHRT is not warranted, or that the complaint should be dismissed because it is not within the CHRT’s jurisdiction, it is frivolous and vexatious or it is out of time.

If the CHRC refers the complaint to the CHRT for a hearing, a respondent may raise certain preliminary objections, and seek a summary dismissal before the CHRT. The various grounds for early dismissal before the CHRC and CHRT are explored in further detail below.

The CHRC’s powers
The CHRC may decide not to deal with a complaint or, having investigated it, the CHRC may decide that an inquiry by the CHRT is not warranted. The grounds upon which the CHRC may rely are the same at both stages in the CHRCs process: when it considers whether to investigate and, having investigated, when it determines whether an inquiry by the CHRT is warranted.

Preferable procedure
When the CHRC decides not to deal with a complaint because a preferable procedure for redress exists, it will defer its decision until the other adjudicative process has been exhausted and the outcome is known.111

While other administrative decision-makers, such as labour arbitrators, have jurisdiction to consider human rights issues and apply the CHRA, the CHRC retains concurrent jurisdiction. Even after Weber v. Ontario Hydro,112 where the Supreme Court of Canada held that all matters arising under a collective agreement are within the exclusive jurisdiction of a labour arbitrator, courts have been clear that the CHRC retains jurisdiction over discriminatory practices in unionized workplaces.113

Different considerations arise in respect of other administrative decision-makers, such as adjudicators appointed to hear complaints of unjust dismissal under section 242(1) of the Canada Labour Code.114 In MacFarlane v. Day & Ross Inc.115 the Federal Court ruled that a Labour

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111 CHRA, see note 109, sections 41(1)(a) and (b), and 44(2)(a) and (b).
Code adjudicator must decline to hear a human rights complaint if another substantially similar complaint has been filed under the CHRA or, in the event that no complaint has been initiated under the CHRA, if the Labour Code unjust dismissal complaint raises human rights issues which could reasonably constitute a basis for a substantially similar complaint under the CHRA. However, if the CHRC, in the exercise of its statutory discretion under either section 41(1)(b) or section 44(2)(b) of the CHRA, refers a complaint to a Labour Code adjudicator, then the adjudicator would have the authority to hear and decide the human rights allegations to the extent that they relate to the unjust dismissal which the adjudicator is appointed to adjudicate.

Therefore, according to MacFarlane, the question of whether a section 242(1) Labour Code adjudicator can properly assert jurisdiction over an unjust dismissal complaint alleging human rights violations depends on the manner in which the complaint comes before the adjudicator. Unless the matter is referred to the adjudicator by the CHRC pursuant to sections 41(1)(b) or 44(2)(b), the adjudicator must decline to hear such a complaint. The practical implication of this decision is that if parties wish to have the matter dealt with by a Code adjudicator rather than the CHRC and CHRT, they should first request that the Commission exercise its discretion under section 41(1)(b) to defer to the Code adjudicator.

The decision in MacFarlane is consistent with the Federal Court’s decision in Canada (Attorney General) v. Boutilier, where the Court held that the statutory scheme permits the CHRC to determine which procedure should be used to resolve a complainant's human rights issues in the event of overlapping jurisdiction between the CHRC and the Public Service Staff Relations Board. “Indeed,” the Court opined, “the ability of the CHRC to make such a determination is consistent with its pivotal role in the management and processing of complaints of discriminatory practices.” In Chow v. Canada (Attorney General), the Federal Court of Appeal found that, if [the grievances] were, in pith and substance, human rights complaints in respect of which redress was available under the CHRA, then subsection 91(1) of the [Public Service Staff Relations Act] precluded the Adjudicator from hearing them, in absence of a

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115 MacFarlane v. Day & Ross Inc., 2010 FC 556.
116 See Rinke v. Canadian Food Inspection Agency, 2004 PSSRB 143, at para. 136 (The Board lacks jurisdiction to rule on human rights complaints unless the matter is referred to the Board under section 41(1)(a) of the CHRA); see also Aganeh v. Rogers Communications Inc., 2010 CarswellNat 3714.
118 Boutilier, see note 117, at para. 32.
In *Moussa v. Canada (Immigration & Refugee Board)*\(^{121}\) the Federal Court noted that the CHRC has no obligation to consider the availability of differing remedies under the alternate procedure when determining whether to dismiss or defer the complaint. At the section 41 screening stage, there is no obligation to consider the matter of a remedy; its task is solely to determine whether the facts warrant referring the complaint to the CHRT.\(^{122}\)

**CHRC lacks jurisdiction**

**Constitutional jurisdiction**

In order to deal with any complaint, the CHRC must be satisfied that the matter falls within the CHRC’s jurisdiction.\(^{123}\) First, the complaint must fall within federal, rather than provincial, jurisdiction or the CHRC shall not deal with it. Complaints involving, for example, federally regulated employers such as banks, shipping companies, and airlines, are obviously within the CHRC’s jurisdiction to oversee. While many areas of federal competence are well-established and easily recognized, technological and societal advances sometimes require novel considerations of the legislative division between federal and provincial powers. For example, in *Citron and Toronto Mayor’s Committee v. Zundel*,\(^{124}\) the CHRT held that repeated communication of hate messages on the Internet is captured by a purposive interpretation of the CHRA, and falls within the federal Parliament’s competence over telecommunications. In a similarly novel inquiry, the Manitoba Court of Queen’s Bench is currently reserving on the issue of whether the regulation of the safety of the blood system falls within federal or provincial jurisdiction, in a complaint brought by a rejected blood donor against Canadian Blood Services.\(^{125}\)

**No nexus between the alleged incidents and a prohibited ground of discrimination**

Apart from the fundamental question of whether the complaint is federally or provincially regulated, jurisdictional barriers to the CHRC’s handling of a complaint arise where the

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\(^{120}\) *Chow*, see note 119, at para. 3.

\(^{121}\) *Moussa v. Canada (Immigration & Refugee Board)* 2006 FC 918. ("Moussa")

\(^{122}\) *Moussa*, see note 121, at para. 44.

\(^{123}\) CHRA, see note 109, section 41(1)(c).


complaint does not disclose a violation of the Act. When the CHRC dismisses a complaint prior to an investigation, the substance of the allegations must be accepted as true. Where it is plain and obvious, accepting the allegations, that the complaint cannot succeed, an investigation is not required and the CHRC may refuse to deal with the complaint, as seen in *Valookaran v. Royal Bank of Canada*. At this screening stage, there is no need for evidence because the allegations are taken to be true. Evidence and documentation only become necessary if the complaint proceeds to an investigation.

A complainant must not make bald and vague assertions without facts to support them. Failure to properly ground the complaint within the provisions of the CHRA may result in the complaint being dismissed for lack of jurisdiction. For example, in *Valookaran* and *Hartjes v. Canada (Attorney General)*, the complainants failed to provide any clear link between a ground of discrimination in the Act and the incidents alleged to be discriminatory. The CHRC declined to deal with the complaints based on lack of jurisdiction pursuant to section 41(1)(c) because it was not based on a prohibited ground of discrimination. The complainant has the burden of putting sufficient information or evidence forward to persuade the CHRC that there is a link between the acts complained of and a prohibited ground. Where no such evidence is advanced, the claim is beyond the statutory authority of the CHRC. In discussing section 41(1)(c) of the CHRA, the court observed that this section provides the CHRC with considerable discretion:

Specifically, s. 41(1)(c) provides that "the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that ... the complaint is beyond the jurisdiction of the Commission". The use of the words "it appears to the Commission" infers the exercise of discretion.

If the CHRC decides to deal with a complaint at the outset, it may nonetheless determine at the conclusion of the investigation that no inquiry is warranted based on jurisdictional grounds if the investigation failed to establish a sufficient connection to a prohibited ground of discrimination.

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126 *Valookaran v. Royal Bank of Canada*, 2011 FC 276, at para. 15 ("Valookaran")

127 *Valookaran*, see note 126, at para. 22.

128 *Hartjes v. Canada (Attorney General)*, 2008 FC 830 ("Hartjes")


130 See, for example, *Comstock v. P.S.A.C.*, 2007 FC 335.
Just as there must be a sufficient connection to a prohibited ground of discrimination to found jurisdiction, the complaint must relate to a discriminatory practice, within the scope of the CHRA. Section 5 of the Act prohibits discrimination “in the provision of goods, services, facilities or accommodation customarily available to the general public.” Section 7 of the CHRA prohibits discrimination in “employment”. A complaint is beyond the CHRC’s jurisdiction if it does not relate to one of these practices.

Definition of “employment”
To fulfill the remedial purpose of human rights legislation, courts and tribunals have attributed a considerably broader meaning to the words “employ” and “employment” than the technical definition of master and servant used in other areas of employment law. Human rights cases provincially and federally have consistently defined “employ” as meaning “to utilize”. Under this liberal definition, the Federal Court of Appeal has applied the prohibition against discrimination in employment to protect a contractor’s employee from discriminatory conduct by the client company. In Fontaine v. Canadian Pacific Ltd., the complainant was employed by a catering company that assigned him to work as a camp cook for a Canadian Pacific (“CP”) maintenance crew. When the crew discovered the complainant was HIV positive, the men refused to eat his food and effectively drove him from the worksite. Although CP was not his true employer under employment law principles, the complainant was nonetheless able to make out his case against CP under section 7 of the CHRA because CP had “utilized” his services at its camp. With a similarly liberal interpretation of “employ”, the Federal Court of Appeal in Rosin v. Canadian Forces extended the CHRA’s protections to a cadet whom the Armed Forces expelled from a parachuting course upon discovering he had only one eye. The Court had “no problem” finding that an employment relationship existed based on the facts that the cadet earned an honorarium for participating in the course, the Canadian Forces had control over him and benefited from his attendance at the course.


132 Fontaine, see note 131.

133 Rosin, see note 131.
Provincially, several cases have held that volunteer activities may fall within the definition of “employment” under human rights legislation.\(^{134}\)

Despite this broadly encompassing interpretation of section 7, a complaint will not be within the CHRC’s jurisdiction if no employment relationship exists and a complaint may be dismissed on this basis.

**Definition of “service customarily available to the public”**

Several cases have explored the meaning of a “service customarily available to the public.” Whether or not the alleged discrimination relates to a “service” within the meaning of the *CHRA* is an important question for respondents to consider and raise early in the CHRC’s proceedings. It is also a legal question that may be raised before the CHRT, (although, as discussed below, this question will not always lend itself to a preliminary motion depending on the evidence required for the CHRT to make such a determination).

There is no definition of the term “services customarily offered to the general public” in the *CHRA*. However, the Supreme Court has stated that in determining whether a particular activity is a “service customarily available to the general public” the following two questions must be answered:

1. is the activity a service; and
2. is the service “customarily available to the public” in that it creates a public relationship between the service provider and the service user?\(^{135}\)

The Federal Court has held that the term “services” in section 5 of the *CHRA* contemplates something of benefit being “held out” and “offered” to the public.\(^{136}\) The Court noted that “services” provide an improvement, benefit or assistance to people. In addition to determining whether the alleged “service” holds out something of benefit or assistance to the general public, one must also inquire whether that benefit or assistance was the essential nature of the activity.\(^{137}\)


\(^{137}\) *Dreaver v. Pankiw*, 2009 CHRT 8 (CanLII), at paras. 42 & 43, Respondent’s BOA at Tab 3, (“*Dreaver*”).
Where the federal government is the respondent, cases holding that not everything the government does is a “service” are instructive. The enactment of regulations by a government agency, certain of the CRA’s tax assessment actions, and the government’s enforcement actions are not “services.” On the other hand, the Court has observed that nearly everything the government does is for the public and is therefore “customarily available to the general public” within the meaning of section 5 of the Act.

With respect to the requirement that the service be “generally available to the public,” the CHRT in Dreaver v. Pankiew stated that a service by any public body will generally meet the test of being customarily available to the public. Even a “targeted” service may fall under the meaning of a “service available to the general public.” In Crockford v. British Columbia (Attorney General) the B.C. Court recognized that every service has its own public, which can rightly be defined through eligibility criteria. Such criteria are necessary to ensure that the services reach their intended beneficiaries, thereby avoiding the unnecessary depletion of scarce resources. The Federal Court has echoed the view that “each service has its own public and that once that public is defined, it is prohibited to establish distinctions within that public.”

**Trivial, frivolous, vexatious or made in bad faith**

The CHRC may choose not to deal with or refer a matter that is “trivial, frivolous, vexatious or made in bad faith” pursuant to section 41(1)(d) of the CHRA. This ground for dismissal encompasses a broad range of objections to a complaint. A complaint may be considered “trivial, vexatious and made in bad faith” when it is “plain and obvious” on the evidence that it cannot succeed, or because it has been fully addressed in other proceedings, or has been finally resolved through a settlement agreement.

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138 See for example, Watkin, see note 136.
139 Canadian Transportation Agency v. Sasvari, 2005 FC 1022.
140 P.S.A.C. v. Canada (Revenue Agency), 2011 FC 207.
141 Watkin, see note 136.
142 Rosin, see note 131, at para. 13.
143 Dreaver, see note 137, at para. 53.
144 Crockford v. British Columbia (Attorney General), 2005 BCSC 663. (“Crockford.”)
145 Crockford, see note 144, at paras. 69-70.
147 Hérold v. Canada (Revenue Agency), 2011 FC 544.
It is “plain and obvious” a complaint cannot succeed when the evidence fails to disclose any connection to a prohibited ground of discrimination, or otherwise lacks an essential element required by the CHRA.\(^{148}\)

The CHRC may properly dismiss a complaint under section 41(1)(d) if it has been dealt with and disposed of by the decision of another administrative body or grievance process. The concept of a “frivolous or vexatious” proceeding is thus closely bound up with the principle of abuse of process. Before dismissing a complaint on this basis, the CHRC must review the evidence itself and make its own decision as to the proper disposition of the case. The CHRC must turn its mind to the findings of fact and credibility that were made by the decision-maker in order to determine whether the proceedings fully addressed the human rights complaint. In short, the CHRC cannot simply “rubber-stamp” the decision of another board or decision-making body.\(^{149}\)

Similarly, where an applicant has signed a settlement or compromise agreement releasing its employer from any grievances or complaints and then subsequently files a complaint with the CHRC, it is open to the CHRC, upon reviewing the relevant facts and evidence surrounding the making of the agreement, to find that the applicant’s complaint is vexatious or made in bad faith.\(^{150}\)

**Timeliness**

Pursuant to section 41(1)(e) of the CHRA, the CHRC has the authority to dismiss a complaint where the complaint is based on acts and omissions the last of which occurred more than one year before the filing of the complaint.

In seeking an extension of the time to bring the complaint, the onus is on the complainant to demonstrate by “providing persuasive and compelling reasons for the CHRC to exercise its discretion” that the complaint should proceed.\(^{151}\) Once the complaint is filed with the CHRC, the respondent may seek to have it dismissed or the CHRC may do so on its accord.

The CHRC must assess the complainant’s reasons for the delay in light of a variety of factors including:

\(^{148}\) See for example Hérold, see note 147; Deschênes c. Canada (Procureur général), 2009 FC 1126 and Slattery v. Canada (Human Rights Commission) (1994), 81 F.T.R. 1.


\(^{151}\) Canada (Revenue Agency) v. McConnell 2009 FC 851, at para 12.
• the breadth of the CHRC’s discretion under section 41(1)(e);
• the length of the delay;
• the resulting prejudice to the respondent; and
• the active pursuit by the complainant of other forms of redress before filing a complaint.  

The CHRC may additionally look at whether the delay was incurred as a result of bad faith or whether there would be any unfairness or the respondent would suffer prejudice as a result of the delay. In determining whether the respondent would be prejudiced by the delay, evidence is required about the availability of records and witnesses and the respondent’s ability to answer the complaint.

Where a complaint is based upon some allegations which are timely and others which are not, and the allegations do not form a single continuous series of events, the CHRC may exercise its discretion to pare down the complaint by severing only those distinct allegations which are out of time.

The CHRT’s summary dismissal powers
Once the CHRC requests the CHRT to conduct an inquiry, the grounds upon which summary dismissal is available become considerably more narrow. The enumerated grounds for dismissing a complaint set out in section 41(1) of the CHRA do not apply to the CHRT and the CHRT lacks jurisdiction to rely on these statutory grounds to dismiss a complaint. Moreover, the CHRT does not have the jurisdiction to review the CHRC’s decision that an inquiry is warranted. If a respondent believes the CHRC erred in referring a complaint to the CHRT because, for example, it believes the complaint is frivolous, vexatious, or made in bad faith, the respondent must seek redress in the Federal Court by way of a judicial review of the CHRC’s decision. Before the CHRT, such arguments may generally only be raised as defences. It the complaint is truly frivolous, vexatious, or made in bad faith, the CHRT may dismiss the complaint as being unsubstantiated once it has heard all the evidence.

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152 Donoghue v. Canada (Minister of National Defence) 2011 FCA 50, at 5 (“Donoghue”).
153 Donoghue, see note152, at para 51.
155 Oster v. International Longshoremen's and Warehousemen's Union, 2001 FCT 1115 (“Oster”). Eyerley, see note 113, Quigley, see note 113; Parisien, see note 113; Desormeaux, see note 113.
156 Tweten v. RTL Robinson Enterprise Ltd., 2004 CHRT 8, at para. 28 (“Tweten”). See also Leonardis, see note 113, at para. 23.
As a creature of statute, any power the CHRT has to dismiss a complaint without holding a full hearing must be found in the CHRA. The CHRT is guided by the legislative directive to “conduct an inquiry” and give parties a “full and ample opportunity” to present evidence and make representations, provided in section 50(1) of the CHRA. Section 53(1) provides that “[a]t the conclusion of an inquiry, the member or panel conducting the inquiry shall dismiss the complaint if the member or panel finds that the complaint is not substantiated.”

The CHRT’s authority to consider preliminary motions for dismissal arises from sections 50(2) and 50(3)(e), which provide that the CHRT may decide “all questions of law or fact necessary to determining the matter” and “any procedural or evidentiary question arising during the hearing”. In Cremasco, the Federal Court held that the choice of the word “inquiry” instead of “hearing” in the legislation indicates that the referral of a matter to the CHRT does not necessarily have to result in a hearing in every case.\(^{157}\) The Court held in that case that “it would seem to be perfectly proper for the CHRT, at the outset of an inquiry, to entertain preliminary motions so as to clear the procedural underbrush.”\(^{158}\) Nonetheless, the CHRT has held that given its statutory mandate to give the parties a “full and ample” opportunity to be heard, the power to entertain preliminary motions for dismissal must be used cautiously and only in the most exceptional circumstances.\(^{159}\)

Such exceptional circumstances may arise where the determination of a pure question of law, or a question of law that rests upon undisputed facts, would dispose of the case without the need for any further evidence.\(^{160}\) Summary dismissal motions may also be heard to determine whether procedural delays have resulted in a violation of section 7 of the Charter (in accordance with Blencoe,\(^{161}\) whether the doctrine of res judicata applies,\(^{162}\) or if conducting an inquiry would amount to an abuse of process.\(^{163}\) Caution and restraint must be used in the application of the

\(^{157}\) Cremasco, see note 2, at para. 17.

\(^{158}\) Cremasco, see note 2, at para. 14.

\(^{159}\) Harkin v. Canada (Attorney General), 2009 CHRT 6.


\(^{161}\) Blencoe v. British Columbia (Human Rights Commission), 2000 SCC 44.

\(^{162}\) O’Connor, see note 80.

\(^{163}\) O’Connor, see note 80.
doctrine of *res judicata* in the context of human rights complaints, since the dismissal of a complaint results in a denial of the opportunity to be heard.\(^\text{164}\)

However, as in the provincial context, one must carefully consider the implications of the Supreme Court’s decision in *Figliola*. The CHRT’s decision in *O’Connor v. CN Railway* dismissing a human rights complaint against CN on the basis of issue estoppel and abuse of process, is consistent with the Supreme Court’s reasoning in *Figliola*. In *O’Connor*, the CHRT found that although the arbitrator had not used the same language as the CHRT might use in making its determination, the arbitrator nonetheless conducted a human rights analysis. The Tribunal found that it would be an abuse of process to re-litigate the matter.

**Issue estoppel**

In *Cremasco*,\(^\text{165}\) the CHRT stated that when it rules on a *res judicata* motion, this ruling is not a review of the CHRC’s decision to refer the complaint to the CHRT. The issue is whether it would be an abuse of the **CHRT’s process** to rehear a matter that has been determined in another forum, not whether it was an abuse of the **CHRC’s process** to have referred a complaint.

The key to the Court's decision in *Cremasco* is that the Tribunal, as master of its own process, has an obligation to ensure that its processes are not abused. If the circumstances of the case are such that it would be an abuse of process or contrary to the interests of justice for the case to be heard by the Tribunal, then the Tribunal may refuse to hear the case even if the Commission has referred it to the Tribunal.\(^\text{166}\)

Where the same or related issues have been resolved in prior proceedings, the CHRT applies the common law doctrine of issue estoppel, in determining whether it ought to proceed with its own hearing. The following three elements must exist for the doctrine to apply:\(^\text{167}\)

\begin{itemize}
  \item[a)] the **same issue(s)** have been decided in both proceedings (the determination of the issue in the first litigation must have been necessary to the result),\(^\text{168}\)
  \item[b)] the prior judicial decision was final
  \item[c)] **same parties or their privies** (for parties to be privy there must be a sufficient degree of common interest between the party and the privy to make it fair to bind the party to the
\end{itemize}

\(^{164}\) *Cremasco*, see note 2, at para. 83.

\(^{165}\) *Cremasco*, see note 2.

\(^{166}\) *O’Connor*, see note 80, at para 19.

\(^{167}\) *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 SCR 460, at para 33 (“*Danyluk*.”).

\(^{168}\) *Minott v. O’Shanter Development Co.* (1999), 42 OR (3d) 321 (CA), at para 23.
determinations made in the previous proceedings; decisions about “mutuality” are made on a case-by-case basis.

(emphasis added)

Even if each of these requirements for issue estoppel is satisfied, the CHRT must consider whether to exercise its discretion to apply it. Certain unique considerations arise in the application of the doctrine of issue estoppel in the context of human rights proceedings. First, where the CHRC is a party in the proceedings before the CHRT, the requirement for “mutuality of the parties” will not be met, if the CHRC was not a party in the prior proceeding. Mutuality of the parties may similarly not be met where the prior proceeding was a labour arbitration in which the complainant was represented by a union, whereas the complainant advances his or her case as an individual in the human rights process. The CHRT will conduct a review of the prior proceeding to determine whether the complainant’s human rights issues were squarely before the other decision-maker.

**Abuse of process**
Where the three elements of issue estoppel are not met under a strict application of the doctrine, the CHRT may nonetheless dismiss a matter that has been resolved in another forum based on the more general principle that it would be an abuse of its process to continue with the hearing. The CHRT has adopted the Supreme Court of Canada’s enunciation of the doctrine of issue estoppel, as set out by Justice Arbour in *Toronto (City) v. C.U.P.E., Local 79*, where the Justice stated that “the doctrine of abuse of process engages “the inherent power of the court to prevent the misuse of its procedure, in a way that would bring the administration of justice into disrepute.” She observed that “Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would

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169 *Danyluk*, see note 167, at para 60.


171 *O’Connor*, see note 80, at para. 61; *Sherman v. Revenue Canada*, 2005 CHRT 38, at para. 54.

172 See for example, *Tweten*, see note 156, at para. 25; *Parisien*, see note 113, *Desormeaux*, see note 113.

173 *Smith*, see note 170.

174 For example, see *Culic v. Canada Post Corporation* 2006 CHRT 6; *Smith*, see note 170; *Tweten*, see note 156, at para. 26; *Desormeaux*, see note 113.
nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.”

While the CHRT cannot sit in review of the CHRC’s decision to extend the time limit for filing a complaint, it may rely upon the doctrine of abuse of process to conclude that a matter ought to be dismissed because procedural delays have created prejudice of sufficient magnitude to impact on the fairness of the hearing. Similarly, abuse of process may be raised where the matters at issue have already been finally resolved in a settlement agreement. In every case, the party seeking summary dismissal has the burden of demonstrating that the question lends itself to a motion and does not require a full hearing of the evidence to be decided.

**Effect of filing a judicial review application**

A party seeking judicial review of the CHRC’s decision to refer a matter to the CHRT for an inquiry will invariably want that inquiry to be suspended pending the outcome of the Federal Court’s decision on the application. The CHRT generally will not stay its proceedings simply because an application before the Federal Court raises issues as to whether an inquiry is warranted. The CHRT is not bound by the Supreme Court of Canada’s test for granting a stay of proceedings, set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*. Rather, the CHRT’s jurisdiction to grant adjournments arises from the administrative law principle that, in the absence of specific rules or regulations, tribunals are masters of and control their own proceedings. This discretion must be exercised consistently with the Tribunal’s mandate and the rules of natural justice. In *Baltruweit v. Canadian Security Intelligence Service*, the CHRT concluded:

> There is nothing in the Canadian Human Rights Act that confers the statutory power on the Canadian Human Rights Tribunal to stay its proceedings pending an application for judicial review. Nor, in my opinion, does the statutory regime of the Act suggest that such

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175 *Toronto v. C.U.P.E.*, see note 76, at para 37.
176 *Oster*, see note 155.
179 *First Nations Child*, see note 160.
a power can be inferred.\textsuperscript{182}

The \textit{RJR-Macdonald} approach has been rejected by the CHRT in a number of cases where the imperatives of natural justice required the CHRT’s proceedings to continue, notwithstanding the existence of an outstanding judicial review application.\textsuperscript{183} A party seeking a stay of the CHRT’s process pending the outcome of the judicial review application may instead apply to the Federal Court for an order staying the CHRT’s proceedings until the judicial review application has been determined.

\textit{Motions for non-suit}

As in the provincial context, a motion for non-suit may be made at the conclusion of the complainant’s case and is based on the argument that a \textit{prima facie} case of discrimination has not been made out. There is a certain degree of inconsistency at the federal level, as well as the provincial level as to whether the respondent will be required to forego the right to call evidence if the motion is unsuccessful.

In \textit{Chopra v. British Columbia (Department of National Health & Welfare)},\textsuperscript{184} the CHRT considered whether a respondent should be required to elect to not call evidence before making its motion for non-suit. Previous cases went either way: in some, the respondent had to make the election\textsuperscript{185} while in others, the respondent did not.\textsuperscript{186} In still others, the case simply proceeded directly to hearing the motion for non-suit or dismissal because the election issue was not raised.\textsuperscript{187}

In \textit{Chopra}, the CHRT followed the approach taken by the HRTO in \textit{Nimako}\textsuperscript{188} and concluded that the common law rule of election applied. The Tribunal wanted to avoid the “tails I win, heads you lose” approach if the respondent were not required to elect. It referred to a passage in \textit{Nimako} that explained that it is only upon the completion of the whole case that a tribunal is in a position to weigh the evidence and come to a decision, and it may happen that evidence adduced

\begin{itemize}
\item \textsuperscript{182} Baltruweit, see note 181, at paras 10-12.
\item \textsuperscript{183} Warman v. Lemire, 2007 CHRT 37, Montreuil v. Canadian Forces, 2008 CHRT 44, Marshall, Linda v. Cerescorp Company, 2011 CHRT 5, Brooks v. Canada (Fisheries and Oceans), 2007 CHRT 4; Warman v. Western Canada for Us, 2006 CHRT 23
\item \textsuperscript{184} Chopra v. British Columbia (Department of National Health & Welfare), [1999] CHRD No 5, 40 CHRR D/387 (“Chopra”).
\item \textsuperscript{186} Foucault v. Canadian National Railways (July 30, 1981) (CHRT TD 8-81).
\item \textsuperscript{187} Cassan v. Hudson Bay Mining and Smelting Co. Ltd. (March 21, 1985) (CHRT, TD 1/85).
\item \textsuperscript{188} Nimako v. Canadian National Hotels (1985), 6 CHRR D/2894 (Ont Bd of Inquiry).
\end{itemize}
from witnesses called on behalf of a respondent tips the scales against him or her. There is also
discussion of the difficulties human rights complainants may face in accessing all the information
relevant to establishing discrimination, and this is especially so in the workplace.
However, the application of the rule may be waived by the complainant or the rule may not apply
where there are exceptional circumstances. The Tribunal held that the challenge is to strike a
balance between the possible prejudice to the complainant from the Tribunal hearing and
deciding a motion to dismiss at an early stage in the proceedings versus the unfairness of
continuing with a hearing if the respondent can make the case that there is not enough evidence
to continue.\footnote{Chopra, see note 184, at para 24, citing Potocnik, see note 103, and Tomen v. Ontario Teacher's Federation (No.3), (1989) 11 C.H.R.R. D/23.} There were no special circumstances in this case; neither the questions of time nor
of expense justified a derogation from the basic principle and therefore the Tribunal held that the
respondent could proceed with its motion to dismiss the complaint only if it elected to not call
any evidence.
In terms of the \textit{prima facie} case which must be proven, the Tribunal held that it is not to assess or
weigh the evidence. “If there is some evidence that a reasonable finder of fact could believe and
accept to establish the complaint alleged, then a \textit{prima facie} case has been made out and the
motion should be dismissed.”\footnote{Chopra, see note 184, at para 14, citing Nova Scotia Board of Inquiry decision in Gerin et al v. I.M.P. Group Limited et al (1994), 24 C.H.R.R. D/449 at D/452.} Thus, any concerns regarding the respondent “testing the
waters” or “taking the temperature” and determining how well it has addressed the complaint
against it thus far are avoided because the Tribunal is not required to assess the complainant’s
evidence.\footnote{Chopra, see note 184, at para 15.}
In \textit{Filgueira v. Garfield Container Transport Inc.},\footnote{Filgueira v. Garfield Container Transport Inc., 2005 CRHT 30, aff’d 2006 FC 785 (“Filgueira”).} the CHRT did not put the respondent to an
election when it brought its motion for non-suit. It also rejected the notion that not requiring a
party to elect allows them to “take the temperature” since there is no weighing of the evidence
and nothing to comment on if the application fails. The issues of costs and whether the motion is
brought in good faith may be considered when determining if there are special circumstances that
would warrant not requiring the election.
In reviewing the decision in \textit{Filgueira}, the Federal Court held that the Tribunal has jurisdiction to
dismiss a complaint by way of an application for non-suit. The Court stated that the requirement
as to the election is a matter of procedure and not a matter of law or of natural justice. The Court held that “tribunals should be allowed reasonable latitude when it comes to procedure provided that it does not amount to error of law or a breach of natural justice.” The Court held that the Tribunal had “weighed the relevant factors,” made a procedural decision, and that this was not a determination that should be overturned on a judicial review even if the reviewing court would have ruled otherwise. Also, the Court confirmed that there is in fact no “taking of the temperature” since there is no weighing or assessment of the evidence at this stage. Moreover, in terms of the *prima facie* case, the Court held that a motion for non-suit can be granted even where there is some evidence but it is “weak”, “not appreciable” or “so minimal as to have no effect in law.”

In *Fahmy v. Greater Toronto Airports Authority*, the Tribunal referred to *Chopra* and *Filgueira* and noted that the issue of whether to require the respondent to make an election “should be decided in the circumstances of each case.” The Tribunal was more persuaded by arguments in favour of not requiring an election: there is no pre-trial oral discovery process, no motion for summary judgment, cost awards are not available to a victorious respondent, and a respondent dealing with a frivolous or vexatious complaint has little recourse to a summary determination short of a full hearing once the Commission has referred the complaint to the Tribunal. The Tribunal went on to say that “courts have set a high bar for non-suit motions to succeed.” When determining if a *prima facie* case has been met, there is no weighing or assessing of evidence, including credibility. The allegations are accepted as though proven. Finally, in *Khalifa v. Indian Oil & Gas Canada*, the respondent was put to an election. The Tribunal stated that the Court’s reasons in *Filgueira* does not establish that respondents should *never* be put to an election but that the election issue should be decided depending on the circumstances of the case. The Tribunal concluded that there were no special circumstances here to justify not putting the respondent to the election.

Thus, it is clear that there is no pattern to follow on non-suit motions. Whether the respondent will be put to an election will depend on the facts of each case, the member hearing the case and the strength of counsel’s arguments. While in some cases, it may make sense to make a motion

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193 *Filgueira*, see note 192, at para 22.
194 *Filgueira*, see note 192, at para 31.
196 *Khalifa v. Indian Oil & Gas Canada*, 2009 CHRT 27.
for non-suit, and a motion for non-suit is likely a rarer occurrence before the CHRT than the HRTO, most complaints with weak *prima facie* cases will have been dismissed by the Commission or settled, leaving only the more challenging cases to be heard. In those cases, respondents may be less willing to take the risk of being put to an election in a motion for non-suit.

**Conclusion**

It is always worthwhile at the outset of a case, to review whether there are grounds to bring a motion or a request for summary dismissal. Even if the complaint is not dismissed in its entirety, the scope of the complaint may be significantly narrowed. This will ensure not only that the parties’ resources are wisely spent, but also that the scarce resources of the tribunals established to deal with human rights complaints are not wasted on spurious allegations or complaints that are outside the tribunal’s jurisdiction.