

**Procedural Issues:
How to Get What You Want/Need**

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***Ontario's Human Rights System:
Keeping on Top of Key Developments***

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Introduction

As the Human Rights Tribunal's processes are becoming more developed and widely-understood, the opportunities for using these processes strategically are increasing. For both Applicants and Respondents there are particular junctures in the Part IV Application process where a strategic advantage may be gained or lost. The disclosure regime under the *Rules of Procedure*, for example, can be used by Applicants and Respondents to gain leverage with regard to a potential settlement of an Application, and it can be used at the same time to narrow the issues for hearing and ready the evidence.

Understanding the procedure of the Tribunal can be an advantage for both Applicant and Respondent counsel. However, both Applicants and Respondents should be aware that pushing the limits on the *Rules of Procedure* to gain a strategic advantage can backfire. The Tribunal, pursuant to the *Code*, has broad powers to issue orders deviating from almost all of its own procedural requirements. Parties can request that the Tribunal issue orders requiring particular types of witness statements, disclosure of documents in a particular format, disclosure on timelines other than those prescribed in the rules, etc. In many cases it may be better to adhere to the spirit of full disclosure, rather than the letter of the *Rules of Procedure*, in order to avoid unfavourable interim orders or other complications further along in the Application process.

The sections below canvass seven different procedural aspects of the Part IV Application process. In these sections we offer a non-exhaustive review of some of the practical implications of selected procedural strategies.

Non-Response

If the Respondent does not file a Response within the 35 day prescribed time limit, there are strategic issues for the Applicant to consider. An Applicant may request an Order under Rule 5, seeking to constrain the Respondent's participation in the process on the basis of late-filing.

The Applicant can serve and file a Request for an Order using Form 10. The strategic decision for an Applicant is when to make this Request for a Rule 5 Order. This issue arises because

the Respondent files their Response with the Tribunal and does not serve it on the Applicant. The Respondent may have met the deadline without the Applicant being aware of that fact. The Tribunal could potentially issue a Rule 5 Order on its own initiative upon a Respondent being late, however most Applicants would not want to wait for this to happen. A telephone call to the Tribunal can sometimes reveal whether the Respondent has met the deadline but not in all cases, and sometimes not for 4-5 days after the deadline has passed.

Rule 5 provides a number of potential remedies for non-compliance with the *Rules* and also establishes that the HRTO can act on its own initiative in compelling compliance with the *Rules* or in penalizing a non-compliant party in some way. Specifically, the HRTO has several options: (a) the Respondent can be deemed to admit the allegations; (b) the Application can continue to proceed without further notice to the Respondent; (c) the HRTO can deem the Respondent to have waived all rights with respect to further notice or participation in the proceeding; and/or (d) the HRTO can decide the matter based only on the material before it.¹

If the Applicant is late in meeting filing deadlines, this lateness will most likely arise in the context of documentary or witness disclosures. Rule 5 also applies in these circumstances and provides potential remedies for a Respondent. Where an Applicant is late with disclosures of witnesses and documents, a Respondent can file a Request for an Order in Form 10 asking that the HRTO decide the matter based solely on the evidence before it.

Case law suggests that it is unlikely that the Respondent would be deemed to admit the allegations or that the HRTO would proceed without further notice to the Respondent where the Respondent appears to have been delayed by inadvertence, and where the Respondent is an active participant in the process. As long as the Respondent can muster a plausible explanation for the delay, a more likely interim remedy for late-filing would be that the HRTO would order the Respondent to make its submissions within a compressed timeline, subject to the Applicant's right to raise the issue of prejudice arising from the delay: *Cymbalisty v. Wal-Mart Canada*, 2008 HRTO 338. If the Respondent does not file a Response within the compressed timeline, the HRTO may proceed without further notice to the Respondent: *Smolak v. 1636764 Ontario*, 2008 HRTO 379. The HRTO has in certain cases, however, been willing to deem Respondents to have admitted all allegations, especially where the HRTO has confirmation that the Respondent is aware of the Application and has simply not complied, and where there has already been an

¹ Rule 5 of the HRTO *Rules of Procedure*.

interim “no response” decision: *Hill-LeClair v. Booth*, 2009 HRT0 536; *Kearns v. 1327827 Ontario Ltd.*, 2009 HRT0 457.

Disclosure of Records

The *Rules of Procedure* for s. 34 Applications require that documents be disclosed in two stages, first, arguably relevant documents, and second, those to be relied upon at the hearing. Strategically, a represented Applicant would be advised to spend less resources organizing and collating the arguably relevant documents than on the to-be-relied upon documents. The arguably relevant documents are served only on the other party. Spending time and money carefully collating and tabbing documents at this stage may assist the Respondent and not bring a great advantage to the Applicant. As long as all arguably relevant documents are disclosed in one form or another, the procedural obligation is met. Serving these documents electronically is a perfectly viable, environmentally friendly, and cost-effective option (assuming the Respondent has consented to service by email on their Form 2).

It is far more important to organize, index, and collate the to-be-relied upon documents. These are the documents that will be used at a hearing and they must be filed at the Tribunal and served on the Respondents. There is no provision for this in the *Rules*, but it may be advisable to provide the to-be-relied upon documents in a joint-brief with the Respondent. This will likely aid the Tribunal Member in terms of locating relevant documents quickly and easily, and will make things more manageable for counsel and witnesses.

There is a caveat, however, on the haphazard disclosure of arguably relevant documents. In *Cormie v. Laurentian University*, 2008 HRT0 44 (CanLII), the Human Rights Commission disclosed 2000 loose-leaf pages, divided by handwritten tabs that allegedly bore no relation to the content of the documents. The Respondent was able to get an Order from the Tribunal requiring the Commission to re-disclose its arguably relevant documents, in chronological order, with an index providing the name and date of each document. As with the disclosure of witness statements, discussed below, the *Rules of Procedure* only form a baseline for the procedure before the Tribunal. Parties can request orders deviating from this procedure, and the Tribunal may on the initiatives of the parties, or on its own initiative, issue orders deviating from this procedure.

Disclosure of Witness Statements

The requirement to disclose witness statements in s. 34 Applications arises in rule 17.2 of the Tribunal's *Rules of Procedure* which states:

The witness list must include a brief statement summarizing each witness' expected evidence.

The Tribunal has recently begun requiring more detailed witness statements from some parties. It appears from the handful of interim decisions released so far on this point that the Tribunal will require detailed witness statements in circumstances where the witness statements previously provided are unclear, contain irrelevant information, or where sweeping allegations are made without specific supporting information. Witness statements can be required by an Order of the Tribunal to set out *exactly* what a proposed witness will say, rather than merely briefly summarizing what the witness will say. Detailed witness statements have been required in several decisions.

In *Boyd v. Toronto (City)*, 2010 HRTO 607 (CanLII), per David Wright, Interim Chair, the Tribunal ordered the parties to provide *signed* witness statements, setting out exactly how the evidence of each witness would relate to the specific allegations. For witnesses that were not prepared to sign their statements, the parties were required to provide a list of questions that would be asked of the witness.

In *Gibbs v. Kawartha Pine Ridge District School Board*, 2010 HRTO 521 (CanLII) per Ailsa Jane Wiggins, Vice-Chair, the Tribunal required the Applicant to re-file witness statements setting out *exactly* what each witness would say in their testimony.

It does not appear at this time that the Tribunal is requiring every litigant to provide exact witness statements. The default requirement remains the one specified in Rule 17, being simply to provide a brief summary of the witness' expected evidence. However, the Tribunal appears willing to exercise its inquisitorial powers to require more detail in selected cases.

Parties

The Tribunal has produced a Practice Direction on naming parties which is available at: <http://www.hrto.ca/hrto/sites/default/files/Resources/IB-NamingRespondents.pdf>.

The Practice Direction contains helpful information on the mechanics of naming parties, such as the role of the Contact Person for an organizational respondent, how to name government parties, the utility of doing corporate searches for the legal names of organizational respondents, etc.

The legal issues surrounding naming respondents, however, are only addressed in the Tribunal's case law.

Personal Respondents

The Tribunal has developed clear jurisprudence for determining whether Applications should proceed against personal respondents in circumstances where an organizational respondent has also been named. Applicants should be mindful that any strategic advantage momentarily gained by naming a personal respondent can be quickly undone by a Request for an Order. Respondents should be aware of the availability of a process for removing personal respondents. The leading case is *Persaud v. Toronto District School Board*, 2008 HRTO 31 per Vice-Chair Mark Hart:

...the following non-exhaustive list of factors may be helpful in assessing whether a personal respondent should be removed:

- 1) Is there is a corporate respondent in the proceeding that also is alleged to be liable for the same conduct?
- 2) Is there any issue raised as to the corporate respondent's deemed or vicarious liability for the conduct of the personal respondent who sought to be removed?
- 3) Is there is any issue as to the ability of the corporate respondent to respond to or remedy the alleged Code infringement?
- 4) Does any compelling reason exist to continue the proceeding as against the personal respondent, such as where it is the individual conduct of the personal respondent that is a central issue or where the nature of the alleged conduct of the personal respondent may make it appropriate to award a remedy specifically against that individual if an infringement is found?

- 5) Would any prejudice be caused to any party as a result of removing the personal respondent?

In considering whether any compelling reason exists to continue the proceeding against a personal respondent, one way of approaching this question is to ask whether it is necessary to involve this person as a party in order to have a fair, just and expeditious resolution of the merits of the complaint.

In *Sigrist and Carson v. London District Catholic School Board*, 2008 HRTO 14 per Mark Hart, the Tribunal provides the following guidance respecting the removal of personal Respondents:

Where there is no issue as to the ability of a corporate respondent to respond to or remedy an alleged Code infringement and no issue raised as to a corporate respondent's deemed or vicarious liability for the actions of an individual who is sought to be added as a personal respondent, then in my view the individual ought not be added as a personal respondent in the absence of some compelling juridical reason. A compelling juridical reason may exist, for example, where it is the individual conduct of a proposed personal respondent that is a central issue as opposed to actions which are more in the nature of following organizational practices or policies or where the nature of the alleged conduct of a proposed personal respondent may make it appropriate to award a remedy specifically against that individual if an infringement is found.

Persaud and *Sigrist* make it clear that proceedings will not automatically be permitted against personal respondents in cases where there is also an organizational respondent. A moderately high bar is set by requirement for a "compelling reason" to proceed against a personal respondent where there is a case for the vicarious liability of the organizational respondent arising from the same impugned conduct.

Adding Parties

The Tribunal has also developed jurisprudence for the adding of respondents to previously-filed Applications. A two-part test is set out in *Sigrist and Carson v. London District Catholic School Board et al.* The test is similar in some ways to the test for the viability of a civil cause of action:

[6] The legal principles to be applied in addressing a request to add a person as a party respondent were recently reviewed by the Tribunal in *Greenhorn v. 621509 Ontario Inc. (c.o.b. Belleville Dodge Chrysler Jeep)* [2006] HRTO 22. In that case, the Tribunal confirmed that there is a two-part test to be applied when dealing with such requests.

[7] The first part of the test is whether there are facts alleged that, if proven, could support a finding that the proposed respondent violated the complainant's rights: *Greenhorn, supra*, at para. 23. The second part of the test is whether the addition of the proposed respondent would cause substantial prejudice to that party's ability to make full answer and defence to the allegations that cannot be alleviated by procedural orders of the Tribunal.

[8] In applying this test, it is important to bear in mind that this is a legal proceeding in which the Tribunal is expressly directed to determine whether a right of the complainant under the *Code* has been infringed and, if so, to award an appropriate remedy. This is different from an audit, such as those conducted by the Provincial Auditor, or a policy consultation, such as those conducted by the Commission, which address a broad range of concerns and issues and which may result in broad recommendations for change or reform. While the important work of such broad-based initiatives may afford helpful evidence for the Tribunal to consider, at the end of the day the focus of this legal proceeding is on whether a respondent has infringed the rights of either or both complainants under the *Code*.

Bifurcated Proceedings (Liability/Remedy)

Bifurcated proceedings can sometimes be a useful tool in managing complex, highly-charged, or remedially uncontentious proceedings. In *Ramoutar v. Toronto Community Housing Corporation*, 2008 HRT0 391 (CanLII) per Vice-Chair Mark Hart, the Tribunal bifurcated the hearing into separate liability and remedy portions.

In a complicated proceeding where the factual allegations require a lot of parsing and proof is a difficult issue, it may make sense to leave the issue of remedy to a separate proceeding. This may be good for the parties and for the Tribunal simply from the perspective of having a bit of breathing room between an intense liability hearing and an equally intense remedy hearing. From the parties' perspective a bifurcated hearing may also make sense where there is not a great deal of animosity and where there is a real potential to make a joint submission on the issue of remedy. Particularly where a successful Applicant is seeking reinstatement into housing or employment, an agreement between the parties as to the appropriate remedy may be advisable. Any type of ongoing relationship between the parties may be well served by bifurcating the hearing to provide a window of opportunity to craft a remedy that everyone can live with.

As in *Ramoutar*, parties may often consent to bifurcating a hearing, especially where the Member hearing the liability portion of the hearing remains seized of the remedy portion.

Requests to Expedite

The new HRT0 regime specifically provides for a mechanism whereby Applicants can request that their Applications be expedited due to extenuating circumstances.

Rule 21 and the decisions that have been recently released indicate that the test is somewhat akin to the test for an interlocutory injunction at common law. If there is some damage that may be caused by delay which cannot be rectified somehow in an Order that the HRTO may eventually make, such a situation may militate in favour of an expedited process. The test is essentially whether or not the HRTO's usual process would be adequate to preserve the subject matter of the Application or prevent irreparable harm. The key decision on this issue is *Weerawardane v. 2152458 Ontario Ltd.*, 2008 HRTO 53.

In *Ebrahimi v. Durham District School Board*, 2009 HRTO 1062 (CanLII), per Michael Gottheil, Chair, the Tribunal added the following gloss on the test from *Weerawardane*:

[11] Where a requested (and arguably appropriate) remedy will be moot, or unavailable, without expediting an Application, the Tribunal may exercise its power under Rule 21. This reflects the broad remedial purpose of the Code. In *TA v. 60 Montclair*, 2009 HRTO 369 (CanLII), 2009 HRTO 369 (CanLII), the Tribunal discussed this focus in the context of its power to grant interim relief. In my view, the same approach is applicable in considering whether to grant a request to expedite. The question is whether it is necessary to ensure the Tribunal is able to provide an appropriate and effective remedy, if the Application is successful.

The framework for assessing the necessity of an Order to Expedite is an analysis of what remedies will be practically available at the time a final decision is rendered on the merits of the Application. The burden clearly falls on the Applicant to prove that an appropriate remedy would not be practically available by the time the matter is likely to proceed to final adjudication.

As former-Chair Gottheil suggests in the passage cited above, it is unlikely that an Applicant will be successful in seeking an Order to Expedite on the basis of a time-sensitive, yet implausible or fantastical remedy request. It may be that the test for a Request to Expedite is two-fold, being an analysis of the reasonableness and appropriateness of the requested remedy, alongside an analysis of the time-sensitivity of that requested remedy.

Parties who are late in filing their Applications after the incidents complained of will rarely if ever be granted an Order to Expedite: *Kwan v. Hospital for Sick Children*, 2009 HRTO 621 (CanLII) where the Applicant waited three months after termination from employment to file the Application.

What to Expect from Mediation

Mediations are not mandatory under the *Code* or under the *Rules of Procedure*. HRTO Members preside over mediations under the new system. HRTO Members are well-placed to provide a frank and confidential assessment of the strengths and weaknesses of your client's Application or Response, which may in turn assist the Applicant's or Respondent's counsel in managing their client's expectations, and/or assist in improving the presentation or theory of their case at the hearing. Try to make the most of a failed mediation by requesting that the mediator give the client a strengths and weaknesses evaluation of their case.

There is no provision in the *Rules* for the preparation of a mediation brief, so in many cases the Application and the Response will be the documents relied on at mediation. Nevertheless, it is often advantageous to prepare a mediation brief or some form of summary document setting out the Applicant's and Respondent's position at mediation. The next consideration is whether to serve that document on the HRTO Mediator and the other side, or whether to keep it confidential. Keeping the mediation objectives confidential may help in a situation where the mediation itself is very dynamic and turns out to be far different than what the parties had anticipated. In such cases, tabling a document beforehand may unnecessarily limit the Applicant's settlement options.

In cases where counsel receive specific instructions from the client to settle a matter on specific terms, it is strongly advised to contact the other party well in advance of the mediation to lay the groundwork for a settlement. This would include discussing with the other party your client's position going into the mediation, and streamlining the format for the mediation. Note that the HRTO schedules half-day mediations for the majority of Applications, so if settlement is a possibility, work relating to that settlement can be initiated beforehand which greatly increases the odds of leaving the HRTO with executed minutes of settlement, particularly in complex cases involving multiple parties.

Note that settlement monies can be structured at mediation in ways that may not be possible in an award from the HRTO. For this reason, among others, it is advisable not to get hung up on putting settlement monies into certain categories of damages for reasons relating to principle. Most of the time, from the Respondent's perspective, a dollar is a dollar. It may be possible to bridge the gap between two positions by offering a favourable tax structure. So long as it does

not stretch the bounds of credibility, and presuming there is a good faith human rights claim, nearly all or a significant part of the damages can be characterized as tax-free general damages.

It is also a good idea to consider other advantageous tax-treatments such as directing damages to unused RRSP contribution room or retiring allowances in employment cases, or in directing some damages to legal fees. Factoring in the diminishing returns associated with proceeding to a hearing, Applicants may be well-advised to accept a well structured settlement over the risks associated with having an unfavourable decision or inferior remedies imposed at a hearing.

Conclusion

In navigating the Tribunal's procedures, Respondent and Applicant counsel should remain aware of the differences between practice before the Tribunal and practice before the courts. There are arguably more opportunities in the civil litigation process to turn procedural advantages into substantive wins for the client. The Tribunal's *Rules of Procedure* were designed for lawyers and self-represented parties alike, and as such they only form a framework for the hearing of Applications. The final word on procedure comes from the Tribunal Members, who are prepared when necessary to tailor the procedural requirements to the circumstances of a particular case. Counsel and other parties would be well served to remember that the adjudicator's paramount concern is that the spirit of the *Rules* be followed.