



Law Society Tribunal
Tribunal du Barreau

Implementing Proportionality and Access to Justice In Tribunals: Examples from the Human Rights Tribunal of Ontario

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Goals of this Presentation

- ▶ Discuss some of the challenges facing tribunals in delivering accessible justice, particularly in a world of self-represented litigants
- ▶ Discuss legislative, jurisprudential and rule-related innovations, in particular at the Human Rights Tribunal of Ontario/ Social Justice Tribunals Ontario
- ▶ Invite a discussion about whether the duty of procedural fairness and its principles adequately respond to the challenges of access, proportionality and self-represented litigants



Duty of Procedural Fairness

Baker at para. 22:

[The] purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.



The Duty Assumes the “Trial Model” as the Ultimate in Fairness

Baker at para. 23:

The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness.



Baker

- ▶ **Greater** procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted (para. 24)
- ▶ The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the **more stringent** the procedural protections that will be mandated.



Like Courts, Access can be Affected By:

- ▶ Length of Hearings for Both Parties
- ▶ Physical Access (premises, location, environment of hearings, offices)
- ▶ Electronic Access (availability, accessibility of electronic information)
- ▶ Manner of writing materials/designing forms: plain language
- ▶ Conduct of hearings: openness
- ▶ Costs, filing fees



Building on Statutory Powers: Active Adjudication at the HRTO



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Human Rights Tribunal of Ontario: The Context

- ▶ Since 2008, direct access to an adjudicative tribunal
- ▶ No filing fees, no costs
- ▶ High number of self-represented litigants (varies depending upon the stage, up to 70% of applicants, 20% of respondents)
- ▶ High volume – 3,000-ish applications per year filed



Human Rights Tribunal of Ontario: The Context

- ▶ Most cases settle or are dismissed prior to a full hearing on the merits
- ▶ 100-ish decisions after a full hearing



Ontario *Human Rights Code*

41. This Part and the Tribunal rules shall be liberally construed to permit the Tribunal to adopt practices and procedures, including alternatives to traditional adjudicative or adversarial procedures that, in the opinion of the Tribunal, will facilitate fair, just and expeditious resolutions of the merits of the matters before it.
42. (1) The provisions of the *Statutory Powers Procedure Act* apply to a proceeding before the Tribunal unless they conflict with a provision of this Act, the regulations or the Tribunal rules.
- (2) Despite section 32 of the *Statutory Powers Procedure Act*, this Act, the regulations and the Tribunal rules prevail over the provisions of that Act with which they conflict.



Ontario *Human Rights Code*

43. (3) Without limiting the generality of subsection (1), the Tribunal rules may,
- (b) authorize the Tribunal to,
 - (i) **define or narrow the issues** required to dispose of an application and limit the evidence and submissions of the parties on such issues, and
 - (ii) **determine the order** in which the issues and evidence in a proceeding will be presented;
 - (c) authorize the Tribunal to **conduct examinations in chief or cross-examinations of a witness**;
 - (d) **prescribe the stages of its processes at which preliminary, procedural or interlocutory matters will be determined**;
 - (f) authorize the Tribunal to **require a party to a proceeding or another person to**,
 - (i) **produce any document, information or thing** and provide such assistance as is reasonably necessary, including using any data storage, processing or retrieval device or system, to produce the information in any form,
 - (ii) **provide a statement or oral or affidavit evidence**, or
 - (iii) in the case of a party to the proceeding, **adduce evidence or produce witnesses who are reasonably within the party's control**



HRTO Rules

1.7. In order to provide for the fair, just and expeditious resolution of any matter before it the Tribunal may:

g) **determine and direct the order in which issues in a proceeding, including issues considered by a party or the parties to be preliminary, will be considered and determined;**

h) **define and narrow the issues in order to decide an Application;**

i) **make or cause to be made an examination of records or other inquiries, as it considers necessary;**

j) **determine and direct the order in which evidence will be presented;**

k) **on the request of a party, direct another party to adduce evidence or produce a witness when that person is reasonable within that party's control;**



HRTO Rules

1.7. In order to provide for the fair, just and expeditious resolution of any matter before it the Tribunal may:

- l) permit a party to give a narrative before questioning commences;**
- m) question a witness;**
- n) limit the evidence or submissions on any issue;**
- o) advise when additional evidence or witnesses may assist the Tribunal;**
- p) require a party or other person to produce any document, information or thing and to provide such assistance as is reasonably necessary, including using any data storage, processing or retrieval device or system, to produce the information in any form;**
- q) on the request of a party, require another party or other person to provide a report, statement, or oral or affidavit evidence;**
- r) direct that the deponent of an affidavit be cross-examined before the Tribunal or an official examiner;**



Focus on Adducing Theories and Evidence at Early Stages

- ▶ Application, response and reply must include a full narrative of all the relevant facts
- ▶ Disclosure when hearing scheduled
- ▶ Full and detailed witness statements and all documents upon which the parties will rely must be filed 45 days prior to the hearing.



C.D. v. Wal-Mart

The exchange of documents (Rule 16) and witness statements (Rule 17) 45 days prior to the hearing is a critical part of the Tribunal's process. It ensures that each party fully understands the other side's case and enables the Tribunal to make Case Assessment Directions to structure the hearing. In appropriate cases, adoption of the witness statements may take the place of examination-in-chief of the witness. Witness statements should therefore be detailed and set out the particular evidence that the witness will give, rather than just general topics.



Hearing Techniques

- ▶ Question witnesses
- ▶ Adopt witness statements as evidence-in-chief
- ▶ Rule on relevance/probative value without objection
- ▶ Reverse the order of proceedings or hear from one witness first (ie decision maker)
- ▶ Request submissions on reasonable prospect of success



Pellerin v. Conseil Scolaire de district catholique Centre-Sud, 2011 HRTO 1777

The *Code* and the Tribunal Rules of Procedure require the Tribunal to apply its expertise in the resolution of human rights disputes in a manner that is principled, practical, proportionate and adapted to the dispute before it. The *Code* directs the Tribunal, in s. 41, to adopt procedures and practices that offer the best opportunity for a “fair, just and expeditious resolution of the merits of the matters before it” and this principle guides the interpretation of the Rules (Rule 1.1).



Pellerin v. Conseil Scolaire de district catholique Centre-Sud, 2011 HRTO 1777

These provisions...invite the Tribunal to apply its knowledge of human rights law and the types of disputes that come before it to decide what evidence it needs to hear in order to resolve a dispute, in particular one in which the connection to the *Code* seems weak... They suggest tailoring the procedure in a particular case to ensure that the applicant has a fair and appropriate opportunity, given the facts of the case, to obtain and present evidence that might prove, on a balance of probabilities, a link between a respondent's actions and the *Code* through disclosure or cross-examination. At the same time, in my view, the process must be structured so that the making of a bald allegation or a mere unfounded suspicion does not place inappropriate burdens on respondents, and so that an application or hearing is terminated when it is clear that there is no reasonable prospect an applicant can prove his or her allegations.



*Pellerin v. Conseil Scolaire de district
catholique Centre-Sud, 2011 HRTO
1777*

In my view, 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.



Questions

- ▶ Is legislation required to allow these innovations?
- ▶ Is there room within the concept of the duty of fairness to see them as enhancing fairness?



Drawing On Proportionality, Access and Power to Control Process to Develop Jurisprudence



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Vexatious Litigants:

Drenic v. Governing Council of the Salvation Army, 2010 HRTO 1667

- ▶ Applicant had filed 11 applications all dismissed, 4 no shows, used inappropriate language



Drenic

“As discussed above, s. 23 (1) of the *SPPA* allows the Tribunal to make orders necessary to prevent abuses of its process. Rule 1.1 of the Tribunal rules, reflecting s. 41 of the *Code*, provides that “liberally interpreted and applied by the Tribunal to facilitate an accessible process and to ensure the fair, just and expeditious resolution of the merits of the matters before it”. Rule 1.7 (v.1), which came into effect on July 1, 2010, enables the Tribunal to “make such orders or give such directions as are necessary to prevent abuse of its processes and ensure that the conduct of participants in Tribunal proceedings is courteous and respectful of the Tribunal and other participants”.

In my view, in controlling its process and preventing abuses of that process, the Tribunal can declare an individual a vexatious litigant, and prevent the filing of future applications without leave, on the basis of the filing of other applications that have led to the vexing of respondents and abuse of the Tribunal’s process. This also flows from the power of the Tribunal to ensure the fair, just and expeditious resolution of applications before it.”



Litigation Guardians

Yuill v. Canadian Union of Public Employees, 2011 HRTO 126

The values of the Convention [on the Rights of Persons With Disabilities], the *SPPA* and the *Code* suggest an interpretation of this legislation that facilitates access to the Tribunal process for persons with disabilities while also providing appropriate safeguards to prevent abuse (see Article 12(4) of the Convention and *Kacan, supra* at paras. 24–25). The HRTO and other tribunals covered by the *SPPA* are designed to facilitate access to justice in a more informal, tailored and faster process than the courts. Requiring persons with disabilities that affect their capacity to commence a court process in order to access the administrative justice system would hinder that access for them. The Tribunal's powers to determine its own procedures give it the power to appoint a litigation guardian.



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Adapting Rules to Facilitate Access and Proportionality



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Summary Hearings

Gill v. Hamilton (City), 2014 ONSC 1840:

The Tribunal has in fact made Rules that govern its own procedures and practices, and Rule 19A provides that the Tribunal may hold a Summary Hearing to determine whether an application should be dismissed in whole or in part because there is no reasonable prospect it will succeed.

This Rule is entirely appropriate for the Tribunal or any tribunal for that matter. The Tribunal is attempting to facilitate access to justice. It cannot use filing or other fees as a gatekeeping mechanism. At the same time the Tribunal does not have unlimited resources. Accordingly, one person's access to the Tribunal can only come at the expense of another's, unless the Tribunal has a very light case load, which it does not. Rule 19A is a responsible and rational attempt by the Tribunal to prudently use its limited resources to facilitate access for persons bringing applications that might reasonably succeed.



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Social Justice Tribunals Ontario

Common Rules

New rules instituted October 2013 for all tribunals in the cluster:

- ▶ Include power to appoint litigation guardian, declare vexatious litigant, exclude a representative who fails to comply with basic expectations
- ▶ General statement providing for rules to be interpreted in accordance with access, proportionality



Social Justice Tribunals Ontario

Common Rules

- A3. 1 The rules and procedures of the tribunal shall be liberally and purposively interpreted and applied to:
- (a) promote the fair, just and expeditious resolution of disputes,
 - (b) allow parties to participate effectively in the process, whether or not they have a representative,
 - (c) ensure that procedures, orders and directions are proportionate to the importance and complexity of the issues in the proceeding.



Questions for discussion

- ▶ Are such rules helpful for parties and tribunals? For courts on judicial review?
- ▶ How can a tribunal ensure consistent application of them among tribunal members?
- ▶ Is it overstretching to establish such rules without legislation giving specific authority to do so?

