

Human Rights and ADR in Ontario

By Daryl Landau

The McGuinty Government recently passed a *Human Rights Code Amendment Act*. The main purpose of the Act is to remove the Human Rights Commission from its role as case manager of human rights complaints, and instead to provide direct access to the Human Rights Tribunal. There are implications for ADR practitioners, and this is a good time for us to make our voices heard.

Under the current system, human rights complaints that come to the Commission are dealt with by public service mediators and/or investigators. Of the many hundreds of complaints, a small percentage of cases are referred on to the Tribunal. Some of these are successfully mediated by Tribunal Chairs, while the rest get their day in court in front of a Tribunal Chair.

There are also many human rights cases that are dealt with in other forums, including: private arbitration, mediation, or med-arb in the labour world; the Ontario Rental Housing Tribunal with public service mediators for landlord-tenant issues; and the civil courts for all manner of issues and appeals. These forums will not be greatly impacted by the proposed changes.

The purpose of the legislation is to speed up the handling of human rights applications, which currently can take a couple years to be investigated, and longer to be tried.

The question is, how will the government prevent a similar backlog at the Tribunal? The legislation leaves it to the Tribunal to figure out the logistics:

34. (1) *The Tribunal may make rules governing the practice and procedure before it.*
- (2) *Without limiting the generality of subsection (1), the rules may,*
- (d) *prescribe practices and procedures that are alternatives to traditional adjudicative practices and procedures.*

This section allows the Tribunal to decide what ADR processes it will use, and no doubt it will use ADR. Mediation has proven effective in the timely resolution of over a third of the Commission's human rights complaints, saving thousands of dollars for the taxpayers, and months of time for the parties. That number could be higher, except that a significant proportion of parties do not choose mediation. Of those that do choose it, over 60% settle.

As ADR professionals, we will need to present coherent proposals to help the Tribunal decide on the best system design. Here are just some of the questions that need consideration:

- Should the Tribunal have a voluntary “opt in” mediation process as is done at the Commission, or a mandatory mediation process (likely with the possibility of exemptions) as is used in other civil litigation?
- Should the providers of mediation be Tribunal Chairs, as is currently done, or salaried Mediation Officers as at the Commission, or “mediators of choice” hired by the parties, or some combination thereof?
- Should mediators be required to enforce the “public interest”, as is currently expected of Commission and Tribunal mediators?
- Should mediation be conducted by phone?
- Who should attend the mediation sessions?

Every choice has pros and cons. However, I will present the approach that best fits the circumstances we will be facing.

Assuming the volume of cases remains fairly constant, the Tribunal will be hard-pressed to prevent a big backlog. An “opt in” mediation system will not be sufficient. For that reason, mandatory mediation should be established. “Mandatory” refers to an obligation to appear at a mediation session; it does not require parties to remain, or to reach agreement. Is it reasonable for parties to reject out of hand the possibility of a mediated solution? Once they are at the table, with the help of a skilled mediator, there is always a chance that some meeting of the minds may result. It is also important to note that the parties will likely have the option of free mediation services, unlike in the civil system.

Some have raised the legitimate concern about harassment plaintiffs being forced to attend in the presence of the alleged harasser. Will they be re-victimized? To address this concern, it must be made easy for those plaintiffs to indicate their desire to opt out of mediation, or at least to not be in the presence of the other party. Such screening for safety and comfort is part of a mediator's duties. Furthermore, the process can be designed as a shuttle or teleconference. The Tribunal may have certain criteria for permitting an exemption from mediation. It ought to be a fairly simple, but not automatic, process to petition for this exemption.

Who should provide mediation services, and who should pay for them? Regarding the latter, the status quo is a free mediation service with a mediator who you do not choose. This free service stands in contrast to the civil

mandatory mediation process, with private providers and fees that are either regulated or unregulated. However, the public will expect that to continue, especially if it is a mandatory process.

If the providers of mediation continue to be Tribunal Chairs, that will deprive the system of those individuals who are needed to try the cases, especially since the same Chair who mediates does not (and likely should not) also act as judge. It would be more useful for the Tribunal to use public servants like those at the Commission. The twenty-plus Commission mediators who will lose their jobs as a result of the legislation should be hired on by the Tribunal.

However, will a similar complement of staff be sufficient for the number of cases? At the Commission, it takes about six months to get a mediation (and this is prior to any investigation or discovery process). Time can be of the essence in these cases, since the possibility of reintegration into the workplace is greater before the complainant's position is filled. To address these concerns, why not permit the parties the opportunity to use mediators of their own choosing, at their own expense? A mixed public/private system can address these problems.

Currently, staff mediators at the Commission, or Tribunal Chairs, have a responsibility to uphold the human rights law in any settlements. They would not approve of a settlement that simply paid the complainant to keep quiet about discrimination. Mediators at the Commission will sometimes tell a respondent that it has to develop a policy, or get human rights training – though more often the remedies are much weaker, like a promise to post a one-pager on the Human Rights Code. Should this public interest mandate continue, even with private mediators? This question leads to the debate between self-determination for the parties, and the impartiality of the mediator on the one hand, versus the public's interest in promoting human rights for all. Aside from the philosophic debate, there is a question of authority and practicality: parties that want to circumvent the public interest can always do so under any system. It is also problematic that a mediator, in order to advocate for the public interest, may need to 'pre-judge' that a respondent is guilty to some degree. The public does not need the mediator to safeguard its interests. The Commission is empowered to do so, as is the Tribunal, and the complainants and respondents themselves are often surprisingly in agreement about preventing future incidents. It is best for the mediator not to be burdened with the public interest mandate.

Should all mediations be face-to-face? Currently at the Commission, a lot of mediation is done "informally", simply by speaking to one party and then the other to reach a deal. The settlement rate for these cases is reasonable, though lower than face-to-face cases. This approach is best for those who simply want the case resolved quickly, with as little trouble as possible. The downside is that

there is little learning, and little transformative healing. Because of this, the only phone mediation that should be offered in the future is a teleconference for parties where a face-to-face meeting is not possible.

Who should attend mediation sessions? At the Commission, respondents decide who to send, and they often intentionally do not send the person about whom the complainant claimed discrimination. This approach can sometimes aid settlement, because it can take the emotions out of the negotiation, but it can also deprive the parties of any learning and healing. Another problem is that often one side arrives with counsel, and the other side is unrepresented. For these reasons, the Tribunal ought to require that parties provide to each other with their lists of attendees for the session, and that personal respondents must attend if the complainant requests their presence.

There are many uncertainties and possibilities regarding the future of human rights enforcement in our province. ADR practitioners need to have a voice, since our skills will be an important resource to make the new system work. Moreover, we should continue to evaluate the new system to ensure the public interest is being served.

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