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The New Ontario Human Rights System – Practice Tips and Case Update

By Patrick James and Christian Vernon*

* Patrick James is a Partner at the law firm Pinto Wray James LLP. Christian Vernon is an Associate with Pinto Wray James LLP. Pinto Wray James LLP represents both Respondents and Applicants in human rights and employment matters. The authors gratefully acknowledge the input of Andrew Pinto in developing this paper.

1. Introduction

The Ontario *Human Rights Code*, R.S.O. 1990, c. H.19 ("*Code*") underwent a major overhaul with the full coming into force of the *Human Rights Amendment Act*, S.O. 2006, c. 30, on June 30, 2008. Among other changes, these significant reforms have created a new human rights process which permits Applicants (formerly known as "Complainants") to file their Applications directly with the Human Rights Tribunal of Ontario ("HRTO" or "Tribunal").

This paper outlines important considerations to keep in mind prior to filing an Application, or a Response to an Application, and provides practical tips and analysis for both Respondents and Applicants relating to each procedural step leading to an eventual hearing before the HRTO.

Where applicable, this paper references sections of the *Code*, the HRTO's *Rules of Procedure* ("*HRTO Rules*"), and relevant case law to assist the reader in understanding the HRTO's process.

2. Early Dispute Resolution

For Applicants' counsel, when a client comes to see you alleging that he or she has suffered discriminatory treatment, consider whether the best strategy is to commence drafting an Application right away, or whether another approach may be more suitable from the outset to address the situation.

One option is to send a demand letter to a potential Respondent seeking to resolve the matter without resorting to the HRTO process.

A second option is to arrange a pre-filing meeting with the potential Respondent or their counsel to negotiate a resolution. This is suitable in cases where there is an on-going relationship to preserve. A quick meeting will often permit you to ascertain, in a cost-effective manner, whether an Application to the Tribunal or a civil action will be necessary.

Another alternative is for Applicants to commence an action before the Superior Court of Justice in cases where discriminatory treatment is coupled with other civil claims such as a wrongful dismissal or a tort claim such as intentional infliction of harm. This option may be particularly relevant where the case involves serious permanent injuries flowing from the discriminatory treatment and the quantum of damages sought exceeds what has traditionally been granted by Canadian human rights tribunals. Section 46.1 of the *Code* provides that a civil court can make monetary awards and can also order non-monetary restitution for violations of human rights, provided that there is an independently actionable wrong that forms the basis for the suit. Claiming relief in a civil proceeding

on the basis of s. 46.1 of the *Code* precludes your client from bringing an Application to the Tribunal at the same time. In making this determination, the Tribunal will look at the substance of the Statement of Claim to determine whether it describes a proceeding that is parallel to the Human Rights proceeding: *Beaver v. Hans Epp Dentistry Professional Corporation*, 2008 HRTO 282. Section 45.1 of the *Code* provides that the Tribunal may dismiss an Application, in whole or in part, if the HRTO is of the opinion that another proceeding has appropriately dealt with the substance of the Application.

It may still be possible, however, to initiate both a civil claim and an Application to the Tribunal arising out of the same facts. For example, in a case where a person's employment was terminated on the basis of prohibited ground, the civil claim can be framed solely in terms of wrongful dismissal damages for pay in lieu of notice. The Applicant could then draft an Application to the HRTO alleging discrimination on a prohibited ground under the *Code* and seek remedies such as mental distress damages, general damages, non-monetary remedies and special damages. Since pay in lieu of notice is not available under the *Code*, it could be argued that the Statement of Claim does not describe a parallel proceeding: *Smith v. Menzies Chrysler*, 2008 HRTO 37 (CanLII); *Baghdasserians v. 674469 Ontario*, 2008 HRTO 404 (CanLII). Initiating two proceedings may be an effective strategy for some Applicants; however, this may not be a realistic option for a client with limited resources.

In its Response, a Respondent will want to argue that an Applicant who has filed claims both in the human rights forum and in the civil courts is engaging in abuse of process or making a collateral attack, especially if parts of the civil claim echo the basis for remedies sought in the Application: see *Campbell v. Toronto District School Board*, 2008 HRTO 62 (CanLII); and *Molla v. Leisure Days RV Centre*, 2009 HRTO 716 (CanLII).

i. Demand Letter

Sending a demand letter to a potential Respondent may be a good option for people with limited resources and for whom the costs of beginning any formal process would be prohibitive, or where the client's claim is not time-sensitive (bearing in mind the one-year limitation imposed by the *Code*).[1] Prior to sending, determine whether or not it is likely that the potential Respondent will provide a substantive reply to a demand letter. In the pre-filing stage, the prospective Applicant is likely in the best position to assess the Respondent's attitude and appetite for settlement.

For the Applicant, initiating contact with a potential Respondent with a letter may also assist in establishing the record, and may demonstrate the Respondent's reluctance to address the discriminatory treatment or initiate or continue a serious investigation. If you are dealing with an employment situation, you may want to remind employers in the demand letter that they have an obligation to investigate allegations of human rights

[1] *Human Rights Code*, R.S.O. 1990, c. H.19, s. 34(1)(a).

abuses and to respond reasonably to such allegations: *Wall v. University of Waterloo* (1995), 27 C.H.R.R. D/44 at paras. 162-67 (Ont. Bd. Inq.).

In other cases, however, drafting a demand letter can be futile and only expend your client's resources without any guarantee of receiving a substantive response. Try to evaluate, based on your client's financial situation and the information your client provides about the potential Respondent, whether sending a demand letter will serve the purpose of assisting your client in advancing their interests or resolving their matter.

The Respondent's Perspective

From the Respondent's perspective, a demand letter presents both an opportunity and a challenge. For example, if the demand involves particular heads of damages, or if the merits of the Application are not clear, requesting key pieces of evidence at an early stage, or disclosing key facts or evidence to a prospective Applicant may aid the Respondent in deciding whether to seek a quick settlement of the matter or dispute the claim. In addition, an effective challenge at an early juncture may convince the Applicant not to file an Application. It may also provide an opportunity for the Respondent to make an appealing settlement offer to the prospective Applicant which again would help avoid a costly and unnecessary Application. For example, if the demand includes payment of damages for mental distress, a request for medical evidence supporting that claim would be reasonable before making an offer to settle. Furthermore, reframing the facts or setting out the Respondent's position in its response to a demand letter can make a prospective Applicant rethink his or her chances of success at a hearing.

Requesting evidence directly from the Applicant at an early stage also makes sense because once the Application has been filed, there is no requirement that the Applicant attach his or her supporting documents. Note that the parties are only required to disclose documents they intend to rely on at the hearing 45 days prior to the first hearing day.

Don't overlook the benefits of settling a matter prior to an Application being filed, as doing so will assist the Respondent in thwarting the unnecessary filing of a human rights Application and legal costs related thereto.

ii. Exhaust Internal Processes

Applicant's Perspective

In most cases, a client would be well-advised to exhaust all internal human rights processes prior to filing his or her Application. Certain organizations such as large unionized and non-unionized employers often have internal human rights processes that the client may not have considered accessing. It may be good advocacy in such cases to press a Union local to file a grievance as the Union may have an effective "right of first refusal" under the collective agreement in deciding whether to proceed with a human rights application on behalf of its members.

In addition, not exhausting internal human rights processes prior to filing an Application may provide the Respondent with valid grounds to request that the HRTO stay your Application pending the exhaustion of all internal human rights processes. Alternatively, not pursuing all prior internal processes may weaken the persuasive value of your client's case by making them seem unreasonable and quick to escalate a situation that may have been resolved at a lower level. In general, internal processes may provide the parties with greater privacy and flexibility to resolve their disputes without the "external" involvement of the HRTO or civil court system.

Respondent's Perspective

From the outset, the Respondent will want to ensure the Applicant has exhausted all internal human rights processes. For if the Applicant has not, the Respondent should file a Request to have the Application stayed pending exhaustion of all such processes. Second, the Respondent should seek to regularly and consistently apply its internal policies processes to ensure the credibility of these withstand scrutiny at a hearing.

If you are acting for a Respondent that has an internal human rights complaint or grievance procedure, determine whether the Applicant has initiated a claim under that procedure, and whether the procedure was followed. If the procedure has not been followed, determine with your client whether steps can be taken in the interim to regularize that procedure. A regularized internal complaint procedure may assist in resolving the Application at an early stage. It is important to advise institutional clients that a failure to adhere to their own internal procedures for handling human rights issues may be sufficient on its own to allow the Tribunal to make a finding of liability for a breach of the *Code*: *Abdallah v. Thames Valley District School Board*, 2008 HRTO 230 (CanLII). In *Abdallah*, for example, Vice-Chair Chadha found that the Board's investigation was faulty because senior Board administration did not adhere to the Board's own discrimination and harassment procedures" (at para. 89).

iv. Have other Proceedings been Initiated by the Applicant?

Prior to filing its Response, it is important for the Respondent to determine whether the human rights Application is the sole proceeding that has been commenced by the Applicant. For an individual who believes their rights have been violated may have commenced proceedings in another forum. For example, a former employee who believes he or she was discriminated against may have filed a grievance with their union and that grievance may be headed to arbitration. Similarly, an employee may have filed an ongoing claim with the Ministry of Labour under the *Employment Standards Act*, 2000, S.O. 2000, c. 41 or a WSIB complaint.

Under s. 45 or 45.1 of the *Code*, a Respondent can request a dismissal or deferral of an Application on the basis that (a) another proceeding has already addressed the issues raised in the Application, or (b) that another proceeding that is in progress will ultimately address the issues raised in the Application. However, it is important to know that not

every proceeding arising out of the same facts will likely lead to a dismissal or deferral of a human rights Application under s. 45 or 45.1 of the *Code*. One must determine whether the question that was or is before the other proceeding deals or dealt with the issue of discrimination: *Chen v. Harris Rebar*, 2009 HRTO 227 (CanLII). When presented with a prior finding of another tribunal on the same issue of discrimination, the Tribunal may dismiss the Application, or that part of the Application that has already been adjudicated.

However, even where the issue before the Tribunal is the same as the issue that was previously before a different tribunal, differences in the remedies available at those two tribunals may be relevant. Where the available remedies are different, there may exist grounds for not dismissing the human rights Application based on a previous decision. For example, a criminal proceeding resulting from a sexual harassment allegation may result in the conviction of an accused person, but will not provide any compensation to the victim. A human rights proceeding could, however, offer compensation. What the Tribunal may do in this type of scenario is issue an order accepting the facts as proven in the criminal proceeding, as discussed below.

From the perspective of both Applicants and Respondents, it is important to determine whether other proceedings have dealt with the same facts because there may be factual admissions or findings in the decision of another tribunal that could be imported into the human rights proceeding. For example, a criminal guilty plea may involve admissions of fact that could bear directly on the substance of a human rights Application: *Hughes v. 1308581 Ontario*, 2009 HRTO 341 (CanLII). Provided that the Tribunal is satisfied that the doctrine of abuse of process applies in the circumstances, the importation of proven or admitted facts from another proceeding may simplify the human rights adjudication process and possibly shorten the hearing. It may also assist in avoiding potentially conflicting factual conclusions between different adjudicative bodies.

v. Has the Applicant Signed a Release?

It sometimes happens that an Application will be filed against an employer by a former employee who has accepted a severance package after having signed a Release. For Respondents, the Release is key for if it is upheld, it may preclude the Respondent from having to substantively respond to the Application and can lead to a request for dismissal. Indeed, this can result in significant time and cost savings for a Respondent.

In the past, the Commission has been open to hearing a variety of arguments about why releases should not preclude human rights matters from being referred to the Board of Inquiry for a hearing. The current practice of the HRTO appears to be more restrictive. A majority of recently decided cases dealing with Release issues have resulted in Applications being dismissed (see for example, *Douse v. Hallmark Canada*, 2009 HRTO 1254, *Munro v. Halton Condominium Corporation No. 77*, 2009 HRTO 97, *Dube v. Rockhaven Recovery*, 2009 HRTO 53, *James v. Evonik Degussa Canada*, 2009 HRTO 555). One trend that comes out of these cases is that if mental duress is pleaded as a

factor militating against the enforceability of a Release, solid medical evidence will be required to establish that the Releasor was not competent to sign the document.

Nevertheless, it is important for institutions or individuals who may become Respondents in a potential human rights Application to not only ensure that a Release is thorough, but also to ensure that the presentation of the Release to a potential Applicant is sufficiently formal and thorough.

In the Tribunal case *Bielman v. Casino Niagara*, 2008 HRTO 378 (CanLII), the Tribunal considered a request made by an employer to dismiss the Application at an early stage because the Applicant had signed a Release. The Release in this case explicitly referred to Applications under the *Human Rights Code*.

In *Bielman*, the Tribunal declined to order early dismissal because (a) there was good evidence that the Applicant was distraught when she signed the Release; (b) the Applicant signed the Release without considering the implications; and (c) her mental condition was connected to the core allegation of discrimination on a prohibited ground.
The Ontario Human Rights Commission offers the following advice on drafting releases so as to increase the chances they will not be set aside by the Tribunal [http://www.ohrc.on.ca/en/resources/Guides/GuideHRReleaseComplaintENG]:

- at the time of termination, request in writing that the employee confirm whether there are any outstanding human rights issues or concerns;
- give the employee a reasonable opportunity to consult with a lawyer or advisor before having to answer this question and before signing a release;
- where the employee confirms that there is an outstanding human rights issue(s), the employer should ask for details, fairly assess what would be a reasonable offer for settling the human rights issue(s), and prepare minutes of settlement, and a release, which will expressly deal with the human rights issue(s);
- if the employee confirms that there is an outstanding human rights issue(s), the text of the release should include a clause that recognizes that there is a human rights issue(s) that has been finally resolved;
- where the employee states that there is no outstanding human rights issue(s), it is appropriate for the release to state that the employee has obtained independent advice, is aware of his or her rights under the *Code*, and warrants that he or she is not asserting such rights or advancing any human rights claim or complaint.

When a Respondent seeks to rely on a Release in a proceeding before the HRTO, an Applicant will sometimes argue that they signed the Release under economic duress and that it should therefore not be enforced. In *Kailani v. Securitas Canada*, 2009 HRTO 1183 (CanLII), the Tribunal observed that the test for economic duress is strict and that financial difficulty alone is not sufficient to establish duress.

In *Pritchard v. Ontario (Human Rights Commission)*, 1999 CanLII 15058 (Div. Ct.), another factor that was considered in determining the validity of a Release was the sufficiency of consideration. If a Release agreement promises nothing more than an employee's statutory severance entitlements in exchange for a waiver of liability, it may not be enforceable.

vi. Prepare Clients for a Lengthy Process

Advise your client as to how long the human rights process may take, even under the new HRTO process, before a hearing is scheduled. Hearings before the HRTO are currently being booked at least six months or more after a failed mediation, meaning that the entire process can still take over a year before an HRTO decision is rendered. This can be helpful for planning purposes and to assist in managing your client' s expectations.

3. Establish your Theory of the Case and Grounds of Discrimination

The Applicant and the Respondent in the pre-filing stage both need to determine, with some degree of precision, what the theory of their case will be. This in many ways will determine how persuasive the case will sound to the HRTO Member presiding at mediation or a hearing. For this reason, among others, it is critical to get the theory of the case right at an early stage as it will be difficult to deviate from this theory later in the process. In contrast, it is not difficult to flesh out, add more detail to, or add nuance to a properly developed theory as the case progresses towards a Tribunal hearing.

It is an established principle of human rights law that discrimination exists if a prohibited ground was one of several reasons for a decision or action (*Ontario (Human Rights Commission) v. Gaines Pet Foods Corp.* (1993), 16 O.R. (3d) 290 at 292 (Div. Ct.); *Dominion Management v. Velenosi* (1997), 148 D.L.R. (4th) 575 (C.A.)). Differential treatment need not be an explicit expression of racial animosity, for example, and the Applicant need not be completely blameless. The theory of the case, at a minimum, will need to show that there was an element of differential treatment on a prohibited ground in order to be plausible.

At the pre-filing stage, it is also important for Applicants and Respondents to keep in mind that differential treatment on a prohibited ground needs only to be a contributing factor. For Applicants, it is not necessary to ascribe discriminatory motives to a Respondent, nor is it necessary to attribute everything negative that happened to an Applicant to discrimination on a prohibited ground. For Respondents, it is important to remember that admitting that a consideration related to a prohibited ground played even a small part in the way the Applicant was treated would constitute an admission of liability.

In other cases, however, the intersectionality of grounds will be a live issue. This may be the case, for example, where it is difficult for an individual to ascertain whether the discriminatory treatment was due to race, place of origin, creed, gender, solely one of these grounds, or a combination thereof. In cases like these, the theory of the case will need to be elaborated on from the outset to demonstrate that the individual in question was marked as different in one or all of these ways and treated badly or treated differently from others as a result. In the past, the Commission has played a recognized role in filtering the intersectionality of grounds in terms of deciding whether to refer all possible

grounds of discrimination to the Tribunal, or instead limiting the referred Complaint to just the most relevant ground: *Berisa v. Toronto (City)*, 2008 HRTO 246 at para. 15. Under the current regime, this decision is the Applicant's to make, with the advice of counsel if the Applicant is represented.

In addition, it is important for Applicants to think carefully about the alleged grounds of discrimination prior to filing an Application. In some cases, a client will allege a host of different grounds of discrimination which they feel are all valid. In other cases, clients will want to allege multiple grounds of discrimination in the Application in the belief that citing more is better. At the pre-filing stage, it is imperative to have a frank discussion with your client to ascertain the applicable grounds of discrimination.

For Respondents, the difficulty will lie in defending *prima facie* cases of discrimination. As stated above, once the Applicant has proved differential treatment, it is enough that a prohibited ground of discrimination had *some* role to play in the differential treatment for the Tribunal to find liability. Therefore demonstrating to the Tribunal that the Applicant was not subject to differential treatment will go a long way for the Respondent in terms of rebutting the *prima facie* case and avoiding potential liability.

i. Preliminary Evidentiary Considerations

For both Applicants and Respondents, certain basic evidentiary issues also need to be considered at the pre-filing stage. The core evidence that the case is based on, such as medical reports in a disability accommodation case, need to be discussed at a general level. The particulars may be sorted out later. Be sure to advise your client that it can be detrimental to one's case for counsel to file an Application or a Response without understanding and evaluation what the core evidence will be and where the core evidence will come from.

Importantly, assess early on whether your client, or your client's agent, will be an effective and credible witness. This will assist you in determining at which point you should attempt to settle the case, or whether to recommend that your client proceed to a hearing.

ii. The Duty to Investigate & Duty to Inquire into Disability Accommodation: Heads of Liability not Contained in the *Code*

Although the duty to investigate a discrimination or harassment complaint is derived from *Code* principles, it is not explicitly cited in the *Code*. The duty to assess whether disability accommodation is required is similarly not contained in the *Code*. A breach of either the duty to investigate or the duty to inquire into disability accommodation, however, can give rise to a finding of liability that is independent of any other breach of the *Code*. For example, even where an allegation of harassment on the basis of an enumerated ground ultimately proves to be without merit, a failure to properly investigate that allegation can give rise to liability. Likewise, a failure to provide reasonable

assistance and cooperation to a disabled person who asks for accommodation, or who obviously requires accommodation, can also form the basis for a stand-alone breach of the *Code*.

The Duty to Investigate

This is a duty that is not found in the *Code*; rather, it has been developed gradually over time through decisions of the Tribunal. In the 2008 decision *Abdallah v. Thames Valley District School Board*, 2008 HRTO 230, the Tribunal held that the employer's failure to fully and properly investigate an allegation can constitute a stand-alone breach of the *Code*. This is especially true where an internal policy has not been followed.

As discussed in *Abdallah*, the Tribunal typically uses the following factors to assess an employer's investigation efforts:

(i) the response must be prompt;
(ii) there must be corporate awareness that the conduct complained of is prohibited;
(iii) the matter must be dealt with seriously;
(iv) there must be a complaint mechanism in place;
(v) the Respondent must act so as to provide a healthy environment; and
(vi) the Respondent must communicate its actions to the complainant.

The Duty to Assess a Request or Obvious Need for Accommodation

When a person makes a request for accommodation on the basis of disability, or where it is reasonably apparent that the person may require some form of accommodation for a disability, there is a positive duty on the part of the Respondent to explore what accommodation may be needed. This duty was recently recognized in *Lane v. ADGA Consultants Inc.*, 2007 HRTO 34. A failure to investigate and assess an accommodation request can also be found to be a stand-alone breach of the *Code* like a failure to investigate an allegation of harassment. In the employment context, discharging this duty includes obtaining all relevant and necessary information about the employee's functional restrictions and looking at all reasonable accommodation options.

There is a limit, however, as to how much an employer can probe into the disabled employee's health status and medical records. For example, an employer would need to know that an employee has low vision, but would not need to know that this condition is caused by diabetes. At a minimum an employer can expect the disabled person to cooperate in providing medical information relating to his or her functional restrictions.

4. Are you dealing with a Transitional or New Application?

For both Respondents and Applicants, it is important to ascertain whether you are dealing with a Transitional Application under s. 53(5), a Transitional Application under s. 53(3), or a new Application under s. 34. Section 53(3) Transitional Applications are called "Expedited Applications" and they conclude in a "Case Resolution Conference" as

opposed to a formal hearing. Section 53(5) Transitional Applications proceed in a manner similar to s. 34 Applications in terms of pre-hearing procedure and the hearing itself.

A Transitional Application is one which brings a Complaint filed at the Human Rights Commission into the new system. Transitional Applications were able to be filed up to June 30, 2009. Complaints that were not transitioned by this date are considered abandoned. What this means is that any new Application that is based on the same subject matter as a Complaint made under the old system is statute-barred by the operation of s. 53(8) of the *Code*.

Transitional Applications and Responses are different from s. 34 Applications and Responses in the following important ways:

- There is no requirement for documentary disclosure or witness disclosure on the Transitional Application and Response forms.
- There is no right of reply or obligation to reply to a Response to a Transitional Application.
- The original Complaint must be attached to the Transitional Application and forms part of the Transitional Application.
- The original Response to the Complaint must be attached to the Transitional Response.
- In the context of an Application or Response under the new system, you will need to do some more legwork up front in terms of assembling your documentary evidence in support, determining the names of the witnesses your client intends to call at the hearing, and fleshing out a narrative theory of the case.

Section 34 Application and Response forms also contain fields requesting details regarding the evidence that will be used to support the Application or Response, such as listing documents in support of your client's case, listing documents your client believes the other side has in support of their case, and listing the witnesses you intend to rely on at the hearing.[2] In the case of Transitional Applications under s. 53(5) and s. 53(3), you are not required to include this information in the Application or Response.

5. Evidence in Support of Applications and Responses

There are additional evidentiary considerations we recommend you keep in mind when gathering and evaluating evidence in support of Applications and Responses at the pre-filing stage:

- Ask the client for any contemporaneous notes they may have made. Clients will often make notes given the heated nature of the incident or occurrence at issue,

[2] Rule 6 of the HRTO *Rules of Procedure* for Applications under Part IV of the *Code*, provides that Applications under sections 34(1) or 34(5) of the *Code* be filed using Form 1.

but will often forget to mention that they have these notes because they think that they are not relevant.

- Ensure that any electronic records are preserved. Emails, calendar entries, voice mail messages on a mobile phone network, MSN messages and the like can disappear after a period of time, so have these printed in hard copy or obtain copies of recordings.
- Think about privilege. Litigation privilege and solicitor-client privilege are important considerations and ones that apply in the human rights context.
- Be sure your client's theory of the case does not contradict the evidentiary record that will be before the Tribunal. Moreover, ask your client to brainstorm as to whether the other side will be able to produce any documentary evidence that calls into question your client's theory of their case. If so, your strategy should be adjusted accordingly.

In addition, consider whether you should bring a motion compelling the other side to disclose any relevant documents, records or emails favourable to your case that have not been produced.[3] Consider obtaining summonses for key witnesses from the HRTO and serve these as soon as possible to ensure that you have the witnesses you need in order to proceed.[4] If a witness receives a summons and indicates that they will not attend at a hearing, consider whether it would be advisable to seek an Order from the HRTO compelling a reluctant witness to testify at the hearing if their testimony is essential to your case.[5] But prior to doing so, perform a cost benefit analysis to determine whether the benefits of calling such a witness outweigh the risks relating to their potentially unpredictable testimony.

6. Who is the Audience for the Application / Response?

Consider who the audience is for the Application or Response. There are multiple parties with differing interests who will read the pleadings. One audience is your opponent. Another is the Tribunal member presiding at the mediation. A third is the HRTO Member presiding at the hearing. When considering only your opponent as the audience, it sometimes makes sense to take a more aggressive stance in the pleadings. But when considering that the HRTO Member presiding at mediation or at the hearing will be also be reading the pleadings, it may make sense to adopt a more balanced approach.

7. The Naming of Personal Respondents

For Applicants, there are a number of advantages and disadvantages in deciding whether or not to name personal Respondents in addition to corporate Respondents. Below, we outline a few examples:

[3] Such a "motion" can be brought under Rule 9 of the *Rules of Procedure*, using Form 10.
[4] Rule 3 of the HRTO *Rules of Procedure*.
[5] Rule 19 of the HRTO *Rules of Procedure*.

Advantage: Naming a personal Respondent will get that person's attention, especially if he or she was centrally implicated in the alleged discrimination or harassment.

Disadvantage: Naming a personal Respondent can hinder settlement in some cases. For example, a corporate Respondent may be inclined to settle, but a personal Respondent may be disinclined if he or she has been separately named. In addition, a personal Respondent may approach the matter more emotionally and may want to proceed to a full blown hearing in order to vindicate him or herself.

Advantage: If you have a corporate Respondent that is in financial distress or on the verge of bankruptcy, it can be helpful to name a personal Respondent. This can ensure that the Application survives even if the corporate Respondent is subject to a stay of proceedings.

Disadvantage: If you name a personal Respondent and that person feels strongly about the case, they may go out and retain separate counsel. This can complicate the proceeding, increase costs, and present an impediment to settlement.

Advantage: If an individual has played a particularly egregious role, or if there is a chance that the corporate Respondent will ultimately disavow responsibility of the personal Respondent's actions, then a personal Respondent should probably be named.

Disadvantage: If, in an employment context, the personal Respondent was acting entirely in their employment capacity, *and where the case does not involve an allegation of harassment*, then naming a personal Respondent may hamper settlement, complicate the proceeding and appear vindictive to the Respondent and the HRTO.

Removing Personal Respondents

In cases where a personal Respondent has been named, there may be grounds to argue that the Respondent has been named improperly. A request can be made using a Form 10 – Request for an Order seeking an interim order removing one or more personal Respondents. In *Persaud v. Toronto District School Board*, 2008 HRTO 31 (CanLII), the Tribunal provided this non-exhaustive list of factors that the HRTO should consider in deciding whether to order that a personal Respondent be removed:

1) Is there 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 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?

Furthermore, in *Sigrist and Carson v. London District Catholic School Board,* 2008 HRTO 14 (CanLII), 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.

8. Witnesses in Support of Application or Response

i. Naming Witnesses

At several stages in the adjudication process, the issue of witnesses arises. In completing the Response or Application, you need to strike a balance between giving the Respondent or Applicant enough to work with in terms of knowing the case they have to meet, and not naming people prematurely or based on mistaken assumptions. Despite the requirement in Forms 1 and 2 to list witnesses, it will be generally better from a strategic perspective to anonymize third parties until the mediation or until pre-hearing disclosures are required.

Witnesses listed in the witness-table under s. 19 of Form 1 (Application) or s. 18 of Form 2 (Response) are not revealed to the other side.[6] However, third parties named in the narrative part of the Application under s. 8 of Form 1, or under s. 9 of Form 2, could potentially be contacted by the opposing party. This is an especially important consideration where the matter involves a workplace situation and some of the named third-parties remain employed in that workplace. The Tribunal has endorsed the common law principle that there is no property in a witness, so it is fair game for one party to attempt to interview the other party's witnesses, as long as this is done in a professional and courteous manner: *Lewis v. Markham Stouffville Hospital*, 2009 HRTO 258 (CanLII).

ii. How Many Witnesses?

In selecting witnesses, it is also advisable to think more generally about how many witnesses you want to name. Including a long list of witnesses in the Application or

[6] Rule 6.7 of the HRTO *Rules of Procedure*.

Response can unnecessarily lengthen an eventual hearing. Keeping the number of hearing days required to a minimum is advisable. For the Applicant, you typically want to get a hearing date as soon as possible to keep the pressure on the Respondent. If you propose a long list of witnesses, you risk unnecessarily increasing the number of hearing days, which in turn may delay the scheduling of your hearing since the Tribunal may have difficulty setting aside many consecutive hearing days. Similarly, multiple, non-consecutive hearing days will necessarily involve a longer timeframe from start to completion of the hearing.

9. Remedies

Consider what remedies your client is requesting and how he or she places a value on each remedy. Assign a specific and substantiated figure to the damages requested. For the Respondent, consider the remedies that the Applicant is requesting, paying particular attention to your client's ability to implement the specific remedies the Applicant seeks, if applicable. Also, it is worth spending time addressing the Applicant's remedy request when preparing the Response. Unrepresented litigants will often request remedies that are not available at law or that are too remote.

Form 1 now asks the Applicant to assign a specific dollar-value to the financial remedies that are requested. It is advisable for Applicants to substantiate the dollar-value of the requested remedies having regard to the evidence. Applicants should not simply assign a value to the remedy requested without some way of breaking that number down logically. For example, in employment matters, list how much the person was making, how long they were off work, whether and how they mitigated. But bear in mind that human rights law is not wrongful dismissal law. There is no pay in lieu of notice under the *Code*.

In addition, there is no cap on damages including mental distress damages under the new regime, but there are still practical limits. Asking for excessive monetary damages often affects the credibility of the claim in the eyes of the Respondent and/or the HRTO and may hinder the likelihood of a settlement early in the process.

i. General Damages

With respect to remedies, note that the most commonly awarded damages for a breach of the *Code* are general damages, which are awarded on a tax free basis. The Applicant does not need to prove financial loss or injury in order to be entitled to these damages. All the Applicant needs to prove is that his or her human rights were breached.

Although there is no cap on the awarding of general damages, awards currently range from $25,000.00 to $30,000.00 in the most extreme scenarios.[7] Most cases where liability is proven will see general damages awarded of less than $10,000.00.

[7] *Baylis-Flannery v. DeWilde (No.2)* (2003), 48 C.H.R.R. D/197 (total general damages of $35,000); *Arias v. Desai, (No.2)* (2003) 45 C.H.H.R. D/308 (HRTO) (total general damages of $25,000); *Curling v. Torimiro (No.4)* (2000), 38 C.H.R.R. D/216 (Ont. Bd. Inq.) (total general damages of $21,000); *Ketola v. Value Propane Inc. (No. 2)*, (2002), 44

Note that at mediation, allocating settlement money as general damages avoids income tax implications for the Applicant and may persuade him or her to accept a smaller overall figure in settlement.

The factors that the Tribunal considers in determining the quantum of general damage awards were canvassed in the 2005 Tribunal case of *Sanford v. Koop (No. 2)*. The factors used in assessing general damages are: humiliation, hurt feelings, loss of self-respect, loss of self-esteem and loss of confidence, as well as the experience of victimization and vulnerability of the Applicant: *Sanford v. Koop (No. 2)*, (2005), 55 C.H.R.R. D/102 (H.R.T.O.).

ii. Mental Distress Damages

A commonly sought type of remedy is mental distress damages. The cap on mental distress damages was formerly $10,000.00 but under the new HRTO system there is no cap. Do not, however, take this as an automatic invitation to claim mental distress damages in any amount. There must be solid evidence in support. First there must be evidence that the mental distress was caused willfully or recklessly, and second, that the mental distress itself has been objectively established: *Papa Joe's Pizza v. Ontario (Human Rights Commission)*, [2007] O.J. No. 2499 (Div. Ct.).

A review of recent cases under the new regime confirms that there has not been any increase in mental distress damage awards to date.

iii. Specific Relief

"Specific relief" describes a class of remedial orders that can require a Respondent to take some positive action in order to directly correct *Code*-related wrongdoing. This can involve reinstating a dismissed employee into his or her job, publishing a retraction of a discriminatory statement, allowing an evicted tenant to return to his or her tenancy, etc. For many Respondents, specific relief is the most unpredictable, difficult to understand, and potentially costly form of remedy. While for many Applicants, it is the relief that most often holds some possibility of correcting a perceived injustice, as opposed to merely compensating them for that injustice. For example, the Tribunal has the broad jurisdiction to order that a dismissed employee be reinstated in the workplace with back pay. For someone who was dismissed on the basis of a prohibited ground, this type of remedy most directly corrects the harm that was done.

iv. Public Interest Remedies

The Tribunal can also order that the employer implement an extensive human rights training program, develop an internal human rights and harassment policy, a complaints

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C.H.H.R.R. D/37 (Ont. Bd. Inq.) (total award of $20,000 for general damages and mental anguish); *deSouza v. Gauthier* (2002), 43 C.H.R.R. D/128 (Ont. Bd. Inq.) (total award of $25,000 for general damages and mental anguish)

procedure, or take other measures to change internal workplace policies. The Tribunal has in the past ordered Respondents to post *Human Rights Code* information posters in the workplace, or to open their operations to third-party investigators.

v. Special Damages

Another remedy that is often awarded are "special damages" for quantifiable and verifiable losses. Applicants have to prove special damages with objective evidence, and have a duty to mitigate these losses to the extent possible. Respondents can challenge whether special damages were caused by the alleged discrimination, or can challenge the amount claimed for special damages. Lost wages due to discriminatory dismissal are often claimed as special damages.

vi. Costs

The HRTO has no jurisdiction to award costs (*Dunn v. United Transportation Union, Local 104*, 2008 HRTO 405). This is an important consideration in assessing the desirability of reaching a mediated settlement.

The practice is somewhat different before the Canadian Human Rights Tribunal. Some Tribunal members have informally awarded costs to successful Applicants as part of a global "make-whole" remedy: *Nkwazi v. Correctional Service Canada* [2001] C.H.R.D. No. 29.

In any event, it is important for Applicants' counsel to advise clients at the mediation that if they are electing to refuse a settlement offer and to proceed to a hearing, they must consider whether there is likely to be more money awarded at the Tribunal than what is on the table at the mediation, factoring in the risk of losing one's case and the legal and emotional costs associated with proceeding to a hearing.

10. Filing the Application

For new Applications, the Applicant's responsibility is to file a complete Application at the HRTO. The HRTO then serves that Application, after checking it for completeness, on the Respondent and any other interested party such as a union.[8] If the Application is not complete, it is sent back to the Applicant for revisions; however the original filing date remains in place for the purposes of deciding limitations issues.[9]

The Respondents on a new Application have 35 days from when the Tribunal serves the Application on them to file their Response using Form 2. This must also be filed at the HRTO and the HRTO will then check the Response for completeness and serve it on the Applicants if it is indeed complete.[10]

[8] Rule 6.6 of the HRTO *Rules of Procedure*.
[9] Rule 6.5 of the HRTO *Rules of Procedure*.
[10] Rule 8.4 of the HRTO *Rules of Procedure*.

Transitional Applications and Transitional Responses are not served by the HRTO or checked by the Tribunal for completeness prior to service. It is the responsibility of the parties to serve these Transitional documents and to confirm delivery using the relevant Statement of Delivery form.[11]

When the *HRTO Rules* or *Transitional HRTO Rules* provide that the parties serve documents themselves, there are certain deemed delivery dates that apply depending on the method of service (i.e. by fax, courier, mail, etc.).[12]

If a matter settles after the Application and Response have been filed, Rule 10 provides that only the Applicant can withdraw the Application, and that this must be done using Form 9.[13] Note that Form 9 requires that grounds for withdrawal be stated. In withdrawing your client's Application, be sure not to inadvertently violate the terms of any confidentiality or settlement agreement that has been entered into. Simply stating in Form 9 that the matter has settled should be sufficient.

A. Seeking Interim Orders in the Case of Late Responses or Filings

If the Respondent does not file a Response within the 35-day prescribed time limit, there are strategic considerations for the Applicant to consider.

The Applicant can serve and file a Request for an Order using Form 10. 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.[14]

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. The HRTO tends to be lenient with self-represented Applicants in this regard, but is likely to restrict the evidence of a party who is represented, and where there is no valid reason for the delay.

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

[11] HRTO *Transitional Rules*.
[12] Rule 1.22 of the HRTO *Rules of Procedure*.
[13] Rule 10 of the HRTO *Rules of Procedure*.
[14] Rule 5 of the HRTO *Rules of Procedure*.

where the Respondent appears to have been delayed by inadvertence. As long as the Respondent can muster a plausible explanation for the delay, a more likely interim remedy for late-filing could 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 interim "no response" decision: *Hill-LeClair v. Booth*, 2009 HRTO 536; *Kearns v. 1327827 Ontario Ltd.*, 2009 HRTO 457.

11. Requests for Interim Orders or Interim Remedies

Interim Orders

A Request for an Order is akin to a motion in civil proceedings. Some common types of requests relate to amending Applications or Responses, requesting specific types of disclosures from another party, seeking a ruling on whether an Application should be deferred or dismissed at a preliminary stage, and several others. For s. 34 Applications, requests for Interim Orders are served by the parties directly on the other parties, and filed with proof of service at the HRTO.[15] If there is enough lieu time before the start of the hearing, these requests are made in writing using Form 10. Requesters are asked to explain in detail the nature of the order they seek, why they think such an order is warranted, and what evidence they have in support of the request. The party responding to a written Request for an Order has 14 days to file its Response, and to explain its position. Interim decisions are delivered to the parties in writing.

During a hearing a party may also make an oral request for an order, and in such cases it is not necessary to use Form 10. There may not be a separately issued set of reasons on the order requested at a hearing. Instead, the final decision in the matter may make mention of orders that were made during the proceeding.

Requests for Interim Remedies (New Power)

An interim remedy is distinct from an interim order in that the interim remedy is directly related to the ultimate issue in the matter. One can think of interim orders as motions in the civil litigation sense, and interim remedies as injunctions. In *Blanchette v. Oakville (Town)*, 2009 HRTO 703 (CanLII), the Tribunal discussed its newly granted power to make interim orders that are akin to injunctions at common law. This new power is based on Rule 23 of the *HRTO Rules of Procedure*. The HRTO has ruled that interim remedies are extraordinary and that the burden on the party seeking the remedy is very high: *Chopra v. Kratiuk*, 2009 HRTO 109 (CanLII). Common law principles relating to

[15] Rule 19 of the HRTO *Rules of Procedure*.

the granting of interlocutory injunctions can be of assistance in considering Requests for Interim Remedy under Rule 23. However, neither the *RJR-MacDonald* test, nor the common law approach to injunctions ought to be adopted in a wholesale way, or seen as determinative.

The HRTO *Rules of Procedure* sets out three factors that are to be considered in Rule 23.2 determinations. The first element is that the Applicant must prove that it has an arguable case and that the claim is neither frivolous nor vexatious. The second element is whether the harm the Applicant will suffer if the Request is not granted outweighs the harm to the Respondent if the Request is granted. The third element calls upon the Tribunal member to decide whether the request is necessary to further the remedial purposes of the *Code*, and is fair in all of the circumstances.

An Applicant will be required to demonstrate that all three elements are met before being entitled to the remedy requested. However, the three factors under r. 23.2 should not be seen as successive hurdles, where the Applicant must meet the first, before moving onto the next. Rather, the decision to grant or refuse the Request should consider the collective impact of all factors, and the purpose of the provision as a whole.

12. Expediting an Application

The new HRTO regime specifically provides for a mechanism whereby Applicants can request that their Applications be expedited due to extenuating circumstances.[16]

There is not yet a great deal of case law on the test to expedite but 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.[17] 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.

13. Making Amendments to the Application or Response

The first consideration when discussing amendments is whether you are dealing with a new Application or a Transitional Application. Amending a new Application will almost certainly require an Order of the Tribunal and/or the consent of the other party or parties: *Chrysler v. Aditya Birla Minacs*, 2008 HRTO 177.

[16] Rule 21 of the HRTO *Rules of Procedure*.
[17] Rule 21 of the HRTO *Rules of Procedure*.

In the case of a Transitional Application, the issue is a little less well defined because the original Complaint was never intended to form the basis of a proceeding in the way that a pleading would. Instead, it was meant to serve as a guidepost for the Commission in deciding whether to refer the matter. Making minor changes to the way a Complaint is drafted for the purposes of transitioning a Complaint to the new regime would not likely require an Order, depending of course on the extent and the substantive or non-substantive nature of the proposed amendments.

One issue that arises from time-to-time involves already-filed Applications that are later discovered to be deficient in some way. It is fairly well accepted that human rights Applications are not pleadings in the civil litigation sense and there is some greater flexibility in terms of amending the Application as the process unfolds. See *Musty v. Meridian Magnesium Products Ltd.*, [1998] O.H.R.B.I.D. No. 20 for a discussion of how amendments to Applications fall within the discretionary power of the Tribunal.

One scenario where the need for amendments arises is where a person with a self-drafted Application or Response later retains counsel or a representative. The newly retained representative may see weaknesses in the original Response or Application that are stylistic, linguistic, or strategic. Deciding on whether to make an amendment involves weighing the pros and cons of amending an Application or Response to make it clearer and stronger versus the additional work, time, and expense of reworking it.

In other situations, an Application or Response may need to be amended in order to change the grounds on which the discrimination is being alleged, or to change the remedies that are being requested, or to add additional facts or references to supporting evidence that were not known at the time the Application or Response were first filed. In such situations, it is likely more advisable to seek leave to amend the Application or Response pursuant to Rule 19 and to use Form 10 "Request for an Order". This process is superficially similar to bringing a motion to amend pleadings under the Ontario *Rules of Civil Procedure*. The HRTO has demonstrated a willingness in the past to permit the addition of additional grounds of discrimination, particularly reprisal, that have occurred after the initial filing of a Complaint: *Jeffrey v Dofasco* 2000 CanLII 20864 (ON H.R.T.), 2000 CanLII 20864; *Entrop v. Imperial Oil* (No. 3) (1994), 23 C.H.R.R. D/186; upheld at 2000 CanLII 16800 (ON C.A.), (2000) 50 O.R. (3d) 18 (ON C.A.).

14. Replies

Depending on whether the Application is a Transitional Application or a new Application, the Applicant may or may not have a formal right of reply.

With s. 34 Applications, Applicants do have a formal right to make a Reply pursuant to Rule 9. The Applicant's Reply must be in Form 3 and must be served within 14 days from the date when the Response was served. With Transitional Applications, there is no right of Reply.

Similar to a Reply in civil procedure, the Reply in a human rights proceeding is not an opportunity to revisit the Application or to raise new grounds or facts supporting the Applicant's allegations. The Reply is strictly intended to allow the Applicant an opportunity to reply to new allegations or new facts that appear in the Response.[18]

15. Preparing for the Mediation

Mediations under the new system are different from those under from the old system because under the new system everyone has direct-access to the HRTO. This means the hearing is always an imminent possibility.

As well, HRTO Members now preside at 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, 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 pleadings 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 assigns a three-hour limit for the mediation, 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 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 Respondents' 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

[18] Rule 9 of the HRTO *Rules of Procedure*.

presuming there is a good faith human rights claim, nearly all 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 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.

16. Case Resolution Conference

The *Transitional Rules* under the new system provide that s. 53(3) expedited Transitional Applications will not actually proceed to a full-blown hearing. If these Applications do not settle at mediation, then they proceed to what is known as a "Case Resolution Conference". A Case Resolution Conference is the final hearing in a matter. Despite what its name may suggest, it is not a mediation nor a pre-hearing meeting.

The Case Resolution Conference applies only to s. 53(3) Transitional Applications and involves a Vice-Chair or member of the HRTO in a small setting with the parties. In this context, the parties must make full disclosure 45 days prior to the Case Resolution Conference, and must rely only on evidence that has been disclosed. Witnesses must be brought to the Case Resolution Conference and counsel for the Applicant and Respondent should be prepared to ask questions of the witnesses and to enter all of their documents into evidence.

The decision that the HRTO Member makes at the Case Resolution Conference is final, although it is worth noting that decisions made under s. 53(3) are deemed to have no precedential value. It is important to adequately prepare for the Case Resolution Conference because this Conference is intended to be the final hearing in s. 53(3) Transitional Applications, unless the Tribunal orders otherwise.[19]

17. Preparing for the Hearing

When preparing for a hearing, an important factor to bear in mind is that the Tribunal has the power to decide in advance what the hearing will look like. This is what is now commonly referred to as the inquisitorial power of the HRTO.

Although the Applicant and the Respondent may have preconceived notions about the nature of the evidence and the procedure at the hearing, the HRTO has the power to narrow the issues, and to some extent modify the procedure at the hearing. The HRTO powers in this regard are confirmed under HRTO Rule 18.1, which states:[20]

[19] Rule 9 of the HRTO *Rules of Procedure* for Transitional Applications made under s. 53(3) and 53(5) of the *Code*.
[20] Rule 18.1 of the HRTO *Rules of Procedure*.

> 18.1 The Tribunal may prepare and send the parties a Case Assessment Direction where it considers it appropriate. The Case Assessment Direction may address any matter that, in the opinion of the Tribunal, will facilitate the fair, just and expeditious resolution of the Application and may include directions made in accordance with any of its powers under Rule 1.6 and 1.7.
>
> 18.2 At the hearing the parties must be prepared to respond to any issues identified in the Case Management Direction and to proceed with the directions set out in the Case Assessment Direction.

In other words, not only do the parties have limited control over the outcome at a hearing, they may also have less control than they thought over the issues and procedure at the hearing. What's more, Rule 18.2 requires the parties to prepare a response to any issues identified by the HRTO in the Case Management Direction, irrespective of how relevant a party deems that issue to be. Over the longer term, the HRTO's power to determine the content and form of the hearing may provide further incentive for Applicants and Respondents alike to settle matters prior to a hearing. The extent to which the HRTO Tribunal members actually use these inquisitorial powers in practice remains to be seen. One thing that should be expected is that the Tribunal member will question witnesses for both sides.

In addition, there are also specific disclosure deadlines that must be complied with in hearing preparation. The HRTO Rules provide that no later than 45 days before the first scheduled hearing date the parties must disclose their witness lists, witness statements, and any documents they intend to rely on. If the parties fail to do so, they may not be permitted to rely on such evidence unless the HRTO grants leave to do so.[21] The Tribunal is prepared to outright exclude evidence that has not been disclosed within the 45 day period – the closer the disclosure is to the first date of hearing, the more likely it is that the evidence will be excluded outright. If evidence is disclosed only a few days late, it may be admitted, subject to submissions on prejudice and weight at the end of the hearing.

The conduct of hearings may vary widely under the new HRTO regime given the wide-ranging backgrounds of HRTO Members themselves and their broad inquisitorial powers. Some come from private practice backgrounds, others from government, non-profit organizations, etc. As such, the nature of the hearing process may very much depend on the style of the individual HRTO Member.

Traditional questioning techniques used in civil litigation may have to be adapted to the human rights context. For example, HRTO Members may be inclined to take over the questioning of particular witnesses or may otherwise intervene in questioning such that a planned cross-examination strategy cannot be executed as desired. Under the new HRTO system, questioners will have to adopt a flexible approach and prepare accordingly.

Finally, it makes sense to draft "will say" statements in a persuasive manner so that they have the effect of convincing the HRTO of the merits of your evidence even prior to the hearing.

[21] Rule 16 of the HRTO *Rules of Procedure*.

A. Hearing Strategy

When planning your hearing strategy, it is helpful to work backwards from the closing statement. Plan out what you want to be able to say in your closing statement – preferably in terms of particular checklist items or things you were able to prove – and then think about how you can prove these items in the hearing through documentary evidence or *viva voce* testimony. Think in advance about what your strongest closing arguments are, but at the same time try not to tip your hand too much to the other side by including other arguments in your discussions. Don't lose sight of the fact that your goal should be to really hammer home your winning arguments at the end of the hearing.

When representing an Applicant, it likely makes the most sense to put the Applicant on the stand first. It is his or her Application and they know the essential allegations and surrounding facts better than anyone. One exception to this may be where the matter involves subtle adverse effects discrimination or systemic discrimination where an expert may be your strongest witness and the one you will want to lead with.

When representing a Respondent, particularly an organization with many managers and representatives, be sure to select as witnesses only those representatives with direct knowledge that is truly material to the allegations. In addition, avoid placing too many witnesses on the stand, especially where the witnesses are giving similar-type evidence. Favour witnesses who provide direct evidence. It is also advisable to avoid repetitive character witnesses as much as possible as this could annoy the presiding HRTO Member.

Be sure to spend time with the client and with the witnesses to prepare them for what the hearing will be like. Some clients will be surprised at a Witness Exclusion Order so explain what that means and why such an Order would be made.

If you have an emotional client, try to get them to contain expressions of anger or avoid blanket demonizations of the other side to the extent possible.

Think about the overall optics of your case. For example, if you are representing an Applicant in a workplace bullying case and you line up 15 witnesses, all of whom work at the Respondent's facility, this could hurt your case optically as it may appear that the Applicant is engaging in his or her own form of bullying. Likewise, if you are representing a Respondent, lining up 5 high-ranking male witnesses to deny an allegation of sexual harassment of a female employee may cause more harm than good to your case.

18. Conclusion

Contemplating, preparing, and then drafting an Application or Response under the new HRTO system is a dynamic process which requires the consideration of multiple variables prior to and after the filing of the pleadings. To be successful, one should not overlook the importance of careful planning and preparation prior to taking formal steps at the HRTO. This includes developing a keen understanding of the HRTO Rules and processes. As well, each important juncture after you file your Application or Response will require careful analysis and strategic thinking. For Applicants' counsel, selecting cases with strong facts and good evidence and developing a persuasive theory of your client's case will increase your chances of being successful in the new HRTO regime. For Respondents' counsel, being proactive in advising clients of their obligations under the *Code* and proactively using the new HRTO *Rules* to make Applicants procedurally accountable will certainly increase your client's odds of successfully defending against an Application.