



HRTO Supplementary Submission

Submitted to: Human Rights Tribunal of Ontario

Submitted by: Ontario Bar Association

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ONTARIO
BAR ASSOCIATION
A Branch of the
Canadian Bar Association

L'ASSOCIATION DU
BARREAU DE L'ONTARIO
Une division de l'Association
du Barreau canadien



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Executive Summary

The Ontario Bar Association ("OBA") appreciates that the Human Rights Tribunal of Ontario ("HRTO") extended the timeline for submissions for its consultation on updates to the Rules of Procedure. Given the extended timeline, the OBA takes this opportunity to provide a supplementary submission on the issue of mandatory mediation.

Ontario Bar Association

Established in 1907, the OBA is the largest and most diverse volunteer lawyer association in Ontario, with close to 16,000 members, practicing in every area of law in every region of the province. Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public and we deliver over 325 in-person and online professional development programs to an audience of over 20,000 lawyers, judges, students, and professors.

This submission was prepared and reviewed by members of the OBA's Alternative Dispute Resolution section. Members of this section include barristers and solicitors in public and private practice in large, medium, and small firms, and in-house counsel across every region in Ontario. These members have extensive experience dealing with all aspects of alternative dispute resolution and the benefits of mandatory mediation.



Comments & Recommendations

Process Design Matters

The OBA supports the inclusion of robust mediation processes within the HRTO's Rules of Procedure and the requirement that parties participate in mediation before proceeding to a merits hearing. Human rights matters engage parties' identities and issues of equality, respect, and dignity. This context must be respected in the design of the HRTO mandatory mediation process.

The human rights dispute resolution process must reflect the need for trauma-informed and culturally appropriate mediation processes, issues surrounding violence, duress and power imbalances, the need for parties to be heard, and the need to explore parties' goals and interests. It is important to avoid processes that focus narrowly on simply moving cases out of a backlogged human rights system through a transactional approach. In this regard, further consultation is required on the design of the HRTO's mediation process. The OBA would welcome the opportunity to participate in consultations on the design of the HRTO's mandatory mediation process so that mediation is conducted thoughtfully, appropriately, and at the highest standard.

Party Autonomy and Input in Design Process

The HRTO's mediation process must incorporate party choice on aspects of the mediation process. For example, in advance of mediation, parties should be able to determine whether documentary disclosure is required before mediation. If one or both parties want disclosure before mediation, the HRTO process should require documentary disclosure at least 30 days before a scheduled mediation session. Parties should also be able to determine whether a plenary session should occur. Party input on the process should be solicited through the inclusion of questions pertaining to mediation in the HRTO's Application and Response forms.



Early Availability

Mediation should be available early in the HRTO application process. In recent years there have been extraordinary delays in accessing mediation and hearing dates at the HRTO. These delays do not support respect for human rights in the province and directly undermine access to justice. The HRTO must establish a service standard providing for the scheduling of mediation, subject to party and representative availability, within six months of the filing of a Respondent's Response.

Appropriate Supports

The HRTO should create resources and tools to support parties in participating meaningfully in mediation. For example, the HRTO should develop video and other resources that explain what mediation looks like, how to prepare for a mediation, and what to expect at mediation. Given that parties are often self-represented at the HRTO, it is important that a baseline level of information be provided to participants to facilitate meaningful participation.

Mediator Expertise

The HRTO must use mediators with expertise in interest-based mediation and human rights law. The *Human Rights Code of Ontario* (the "Code") legislates a merit-based selection process for members of the HRTO. Section 32 of the *Code* states that the criteria "shall" include "experience, knowledge or training with respect to human rights law and issues" and "aptitude for applying the alternative adjudicative practices and procedures that may be set out in the Tribunal rules." The credibility of any HRTO mandatory mediation process is dependent on the quality of the mediators engaged by the HRTO. In this regard, the HRTO must engage only highly qualified, culturally competent mediators who are respected and acceptable to stakeholders in the human rights community.



Case Management

In cases that do not settle, mediation sessions should also be used to narrow issues, deal with disclosure issues, streamline cases, and generally assist parties to obtain an efficient result.

The OBA would be pleased to discuss this further and answer any questions that you may have.