WORDS OF CAUTION FOR APPLICANT COUNSEL

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Introduction

Applicant counsel must always be aware that references to “access to justice”, “timely adjudication” and “minimizing expense to litigants” as reflected in Tribunal Rules and the application of those Rules, exist primarily to benefit Respondents.

With respect to application of the Rules, the fundamental problem appears to be a result of the Tribunal denying itself any sanction to address Respondent misbehaviour. Applicants must, like Caesar’s wife, be above reproach under threat of dismissal, while Respondents routinely disregard Tribunal orders with impunity. To cite one example:

> The Applicant filed witness statements and expert reports. The Respondent missed three deadlines for witness statements and expert reports and did not file its key expert report until after the commencement of the hearings. Not only was no provision made for the hardship caused to the Applicant, but the Tribunal entertained Requests to remove witnesses who were to reply to those of the Respondent based on the Applicant’s expert reports without response .

The Rules themselves are also one-sided. Rule 19A was added because Respondents felt they should not be compelled to participate in a hearing or adjudicate an issue that has no reasonable prospect of success. To do so would place undue costs on Respondents and the Tribunal and bring human rights into disrepute by inducing nuisance settlements. At the time it was understood that the same could and would work in reverse: defences which have no reasonable prospect of success cause nuisance withdrawals, as well as wasting scarce Applicant and Tribunal resources. That has proven not to be the case. In one case, the Applicant who had endured a Respondent year-long “investigation”, achieved a finding of discrimination by the employer retained investigator, taped the Respondent adopting these findings, make no specific denials of facts found by the investigator in the Response or on a Request for Order. Whereas Applicants must produce evidence on a R.19A, the Tribunal relied exclusively on the onus of proof, a “duty of fairness” and the silence of the Rules to deny an Applicant a remedy that would have substantially shortened a hearing.

The Rules of Civil Procedure make no such distinction. Issues can be decided and defences struck on motion. Fairness requires the HRTO Rules be amended. In the meantime, Applicants must endure a one-sided approach.

Applicant counsel owes a duty to their clients to advise them that the HRTO is increasingly denying Applicants accessible justice, particularly in large or systemic cases. Clients need to be advised that a comparably increasing number of cases should proceed by way of action on application based on s.46 in part of the Human Rights Code and/or s.15 of the Charter of Rights and Freedoms. It's shocking, but true, that in many cases the courts are more accessible then the HRTO. In part this is because of the client's costs for their own counsel, additionally it is because court's recognize public interest involved in such cases and effectively issue 1-way cost wards and finally because the court's award significantly higher general damage awards.

Costs

The evidence is conclusive that Respondents before the HRTO are virtually without exception, represented by counsel. There are far more self-represented applicants before the Tribunal at the hearing stage.

The Pinto Report recognized the dramatically uneven abilities of Applicants and Respondents to be represented by counsel, a factor linked directly to costs, required further review by the Attorney General. This review has never taken place, nor has any indication been given that it will.

Due to the staggering potential for cost liability in the Superior Court, compared for example to the Federal Court, clients must, in addition to being advised about relative legal bills, be fully aware of the potential for favourable and adverse awards of costs. It is not a panacea, particularly in non-public interest cases. There was a time when it was recognized as being in the public interest for the Human Rights Commission to provide applicants [complainants] with public interest representation which effectively met an individual's need for representation at tribunal.

The Tribunal has the authority to address the issue within its Rules. The Tribunal is not bound by the SPPA and could issue a Rule tomorrow which would place Applicants on ane equal footing with (1) complainants under the former system who could accept representation by Commission counsel acting in the public interest, (2) complainants raising human rights

issues under the *Canada Labour Code* or (3) those receiving representation under the current Code from the HRLSC.

The Rule need only say one way costs to successful Applicants[with perhaps SPPA costs to Respondents] and Applicants would be represented by counsel as frequently as Respondents. With SPPA costs to Respondents the number of trivial and vexatious applications would drop, saving the Tribunal valuable hearing time and converting it from being an application dismissing body to a human rights adjudication body.

The issue is fundamentally one of access to justice. The Tribunal routinely dismisses applications for lack of expert evidence, with no regard to the fact that the cost of the expert reports and testimony that an Applicant must secure exceeds the very low general damage awards being made by Tribunals, the level of which was criticized in the Pinto Report.

The Tribunal has greased the slope for dismissal, and apparently is oblivious to how many properly advised persons have declined to serve the public interest because going to the Tribunal does not make sense. These cases don't appear in HRTO statistics, but they are real nonetheless.

Applicant counsel have an obligation, on behalf of their clients, to advocate for reasonable general damage awards and one-way cost awards. No amendments to the *Code* are necessary to achieve this. They are matters entirely within the discretion of the Tribunal.

Pleadings and Ongoing Duty of Disclosure

Much hinges on the application. Nothing hinges on the response. Applications that are not sufficiently particular are sent back for more details. Responses that say no more than "allegation denied and the Applicant put to the strict proof of" receive no sanction. Many claims are "ongoing" up to the date of the hearing. Even if applications indicate the discrimination is "ongoing", in the absence of constantly updated pleadings, up to the minute disclosure, constantly amended witness statements and responses to narrowing respondent demands for particulars, the Tribunal will refuse to accept the evidence. So beware.

Respondents, on the other hand, provide vacuous witness statements describing "topic areas" rather than particularize facts to be proven, issue blanket denials in their pleadings, fail to provide ongoing disclosure, and produce documents for the first time throughout the hearing. You are on a short leash, however respondent counsel are permitted to call whatever evidence

they wish. They are permitted to raise undue hardship defences without pleading them or making “all arguably relevant” disclosure

R.19A at Hearings

Respondents are permitted to bring R.19A applications during the Applicant’s case at hearing without being put to an election as would occur in a civil trial. There is no downside risk to respondents, meaning they can still call a defence if their request to dismiss is denied. Applicant’s meanwhile experience the disruption and delay of the entire hearing being thrown off schedule, compelling evidence to be called out of sequence, summonsing respondent witnesses and attempting to make them part of their case and disrupting the schedules of applicant witnesses.

There are no costs or other consequences to respondents: even those who repeatedly bring these requests as a first step in the process or bring requests that are demonstrably frivolous, the applicant must bear the cost of paying their legal counsel, which in the absence of any other explanation would appear to be the purpose. The Tribunal is apparently powerless to prevent such abuses.

How is this possible? Because the respondent is not required to disclose its case and bring a R.19A request on a timely basis, and the Tribunal permits it to bring it at a time and in a manner that causes maximum disruption to the Applicant’s case. Applicants can be so upset by a decision to entertain a R.19A at a hearing that they admit themselves to hospital in life threatening circumstances and allow themselves to be pressured into unfavourable settlements or withdraw their applications altogether.

Bifurcation, Trifurcation, and Beyond

Bifurcation occurs when the Tribunal makes an order to split the case between liability and remedy. Sometimes trifurcation is ordered, dividing liability into prima facie case and defences.

Tribunals issue such orders without prior notice, and sometimes without even an impromptu discussion during a case conference. The decision is simply issued in a Case Assessment Direction.

This never happens, in my experience, on the request of the applicant. Perhaps applicants should perhaps make more astute use of the orders, but it escapes no one’s

attention that bifurcation offers a tempting opportunity to shorten hearings by dismissing applications at an early stage.

Unlike respondents, which generally have the resources to pay substantial retainers to experts, applicants are frequently dependent on experts who are prepared to offer their time *pro bono*. Try and explain to such experts that they must return a second or even a third time to give their testimony.

If the experts balk at returning, the case can be irrevocably damaged. The Tribunal's response that evidence should be forced by summons demonstrates a lack of experience with *pro bono* experts. If counsel senses such a disaster may be imminent, and asks that such a witness be accommodated in the interest of access to justice, be prepared for a rebuke from the Tribunal. Applicant counsel, who hope to argue and win systemic cases, must continue to educate Tribunals about the hardship such orders create for applicants.

Evidence by Skype or Teleconference

Where credibility is truly at stake, the Tribunal may, in such extraordinary circumstances, refuse to accept evidence by teleconference pursuant to HRTO Rule 35; however, that should rarely be an issue with expert testimony and less frequently in other situations where access to justice is an issue. A practice of refused hearings by alternative means should not be refused based on the mere preference of respondent counsel. True experts will be in demand internationally and therefore routinely be unavailable in Ontario during the narrow windows available for hearings on dates convenient for busy legal counsel.

Despite the clear wording of the Rule, contemplating hearings being conducted "by telephone, or by other electronic means", the Tribunal has categorically stated "the Tribunal does not conduct hearings on Skype" [1]. Generally cross-examining counsel in civil proceedings prefer hearings by Skype rather than teleconference. Neither the referenced decision, nor the authority upon which it is based, offers an explanation. The *Golec* decision is also notable because the Applicant sought to participate by Skype as an accommodation based on disability. There may be appropriate circumstances where Skype may be a worthy alternative to receiving evidence by teleconference, particularly where the outcome might be to refuse relevant evidence altogether.

[1] *Golec v. Pfenning's Organic Vegetables Farm Inc*. 2012 HRTO 372

Tribunals such as the HSARB have gone much further than the SJT in recognizing experts for both sides are prohibitively expensive to procure at hearing, and routinely accept such evidence by teleconference, thereby making justice more accessible by assisting the parties to provide the Tribunal with valuable evidence in a cost effective manner. This is particularly an issue for whichever party has the shallowest pockets, which is almost always the applicant.

Medical Reports and Tribunal Expertise

Parties are encouraged by s.52 of the *Ontario Evidence Act* to file reports rather can call *viva voce* evidence from members of colleges covered by the *Regulated Health Professions Act*, 1994 or comparable legislation in other parts of Canada.

Provided the report has been provided to the parties 10 days before it is to be adduced at a hearing, the report can be admitted as an exhibit with leave. The opposing party may require that instead of making the report an exhibit, that the person be required to give evidence in person.

The intent of the law is made clear in s.35(5) which states that where a "practitioner" is required by either party to give evidence and the adjudicator is of the opinion that the evidence could have been produced as effectively by way of report, the adjudicator may order the offending party to pay costs. This sanction is ineffective before the HRTO because it has not issued a Rule giving itself the power to award costs.

The *Evidence Act* provision has to date been misapplied by the Tribunal. In *L.B. v. TDSB*[2], the Applicant had comparable reports prepared independently, by a psychologist and child psychiatrist. The reports both indicated that L.B. required accommodation of his disability that was available at a private school, but which, to the knowledge of mother or either specialist, was unavailable from the Board.

The Tribunal admitted the report of the child psychiatrist, meaning the practitioner could not testify without leave, but in its decision said scant weight had been attached to the report because she did not testify. In this way the Tribunal completely undercut the purpose of the *Evidence Act*, which was to enhance access to justice.

[2] 2015 HRTO 1622 upheld on reconsideration 2016 HRTO 336.

The Tribunal, in the absence of any evidence to the contrary from the Respondent, then went on to state that it would rely on its expertise to reject all evidence from the Applicant and conclude that the Board might have had a program that would have met L.B.'s accommodation requirements, without giving parties prior notice of its decision, and without indicating in its decision what the Applicant's accommodation requirements were, or the placement in which it foresaw those needs being met.

Moreover, there was no assurance the program would have admitted the Applicant, assuming it existed at all.

This decision has been overturned in part by the Divisional Court and leave to appeal to the Supreme Court of Canada is currently being sought.

Assuming the Tribunal's right to reject all evidence to the contrary, based on its claim to expertise and without notice to the parties is upheld, it would appear counsel may be obligated to ask the Tribunal at every hearing, and before closing the Applicant's case, to disclose what special expertise it claims, and what conclusions it was inclined to draw based on its purported expertise. Assuming the Tribunal was forthcoming, counsel would then be obliged to request an adjournment to be able to assemble and call the evidence necessary to rebut the Tribunal's "expert" but erroneous conclusion.

Narrowing the Issues and Reducing Witness Lists

The Tribunal has clear authority to determine issues and refuse to hear witnesses.

Assuming, without it having been proven, respondents may call large numbers of witnesses providing redundant or repetitive testimony, or testimony of marginal or no relevance whatsoever. There was a time under previous Legislation that the Tribunal would passively allow Respondents to call everyone from the custodian to the lunch room attendant in an education case. In one case, for example, the complainant called 3 days of testimony and the Respondent was permitted to call 58 days of evidence in response.

Thankfully those days are past. Both applicants and respondents can be challenged by Tribunals to justify their proposed witnesses. Such challenges can be premature where, for example, a respondent challenges an applicant's witnesses when it hasn't even provided its own expert reports, as has occurred.

It does beg the question how and when such challenges should be initiated by the parties. As usual, it's always open season on applicants, who must therefore prepare more than an opening statement for the commencement of the hearing. Applicant counsel must be prepared to define what the issues are, and how each witness's testimony is directed forwards proving the applicant's case. If this "weeding out" exercise is being undertaken, applicant's counsel should as well be prepared to address respondent witnesses at the same time, since the applicant is entitled to know and address the case it must meet before it begins its case.

To date Tribunals have avoided addressing respondents proposed witnesses in any substantive way except where provoked by outrageous lists such as that encountered in the 58 endurance test that no privately represented Applicant could ever endure. Even now the Tribunal rarely issues orders clearly identifying the issues in the case or directing that specific witnesses may or may not testify. More usually it encourages the respondent to do the right thing and drop certain witnesses. More confident Tribunals may go further and volunteer that they don't need to hear from certain witnesses which it suggests may "not be helpful". Fortunately such moral suasion is usually successful; however the process is not as transparent or judicially reviewable as a ruling stating what the issues are in the case and which witnesses have relevant and necessary evidence to address those issues, which should be the gold standard for adjudicators.

My advice, particularly in large or complex cases is to provide an opening in writing well before the hearing, addressing not only the Applicant's case but the Respondents. The Tribunal routinely declines to compel the respondent to do likewise, allowing it to make a vacuous oral opening, consistent with the Tribunal's procedures and rulings which allow the Respondent to "hide its cards" until after the Applicant has closed its case. Be prepared to rely on the rule in *Browne v. Dunn.* If this practice is allowed to continue, all that can be said is that having raised it at the outset and been passively allowed to define issues and call evidence directed at making such a case, the Tribunal should feel hard-pressed not to address the issue at the outset of the Respondent's case. At minimum, fairness would require the Applicant be given the widest possible scope to prepare and call reply evidence having been compelled to close its case without proper identification of issues and permissible evidence.