



Alternative Dispute Resolution

The ADR Section Considers An Act to Amend the Human Rights Code

*Barry B. Fisher**

In December of 2006, the Ontario Legislature passed Bill 107, *An Act to Amend the Human Rights Code*. The major focus of the Bill was to allow for direct access to the Human Rights Tribunal, thereby eliminating the previous procedure where the Human Rights Commission in effect had carriage on any case before the Tribunal.

Our Section saw this as a major opportunity to improve on the ADR components of the new procedure. We have therefore developed a position paper which we will be presenting to the OBA for their approval and then for submission to the Human Rights Tribunal as part of its public consultation process in developing the Tribunal Rules of Procedure.

The ADR Section proposes that the Bill and the Tribunal Rules incorporate the following proposal.

1. Mediation of all disputes would be mandatory, subject to exemption by the Tribunal, and therefore no hearing before the Tribunal could be started unless a mediation had already been held.
2. The Tribunal would provide the parties with the services of a Tribunal member at no cost to conduct the mediation. However, if all the parties wanted to use a mediator of their own choice, they would be free to do so, but the cost of doing so would be borne by the parties.

We will now explain in more detail these proposals:

Mandatory v Voluntary Mediation

The existing practice of the Commission and the Tribunal is to offer, but not require, mediation. According to the 2005-2006 Annual report of the Ontario Human Rights Commission, only in 1096 cases of the 2399 cases filed did the parties agree to conduct an early mediation without investigation. This means that only 45% of the cases filed actually went to mediation at the Commission. Once at mediation the success rate was quite high, in that 71 % of the cases were then settled.

We believe that under the new proposed scheme of direct access to the Tribunal it will be extremely important to develop new processes that will reduce the number of actual Tribunal hearings, or to limit the length of those hearings. We submit that the cornerstone of these processes should be mandatory mediation. If the settlement figures achieved through the existing voluntary mediation process carry forward to a mandatory system then presumably 70% of all cases will settle at mediation, whereas under the present system only 34.4% do so. Mandatory mediation would therefore substantially reduce the number of cases that actually proceeded to a Tribunal hearing. It is also reasonable to assume that the number of

complaints filed will increase as the introduction of direct access to the Tribunal will hopefully dramatically shorten the time it takes to get to a hearing. It is well understood that the present undue delay in processing a human rights complaint undoubtedly discourages many complaints from even being filed.

Mandatory mediation has been proven to be an effective way of resolving disputes in Ontario where there is direct access to a tribunal or a Court. The Ontario Mandatory Mediation Program, (OMMP) set out in Rules 24.1 and 78 of the Rules of Civil Procedure, has dramatically changed the legal landscape of litigation in those areas that it is in force (Toronto, Ottawa and Windsor). An important reason for the program's success has been the element of mandatory mediation. Without mandatory mediation, parties may tend to consider requesting or agreeing to mediation as a sign of weakness. Once mandatory mediation becomes part of the legal culture, lawyers quickly become very skilled in reaching settlements at mediation. It should also be noted that in the OMMP, the highest rate of settlement has been in the employment field. Since the majority of the complaints filed under the Ontario Human Rights Code are also work related, we have good reason to believe that the successful integration of mandatory mediation under the OMMP would carry forward in a mandatory mediation model for human rights complaints.

In order to enforce mandatory mediation, the Tribunal Rules would have to provide for a number of related issues.

First, it is recognized that even in a mandatory mediation process, there must be a mechanism for exempting those cases where mediation is not appropriate. The parties would have to apply to the Tribunal for an exemption from mediation. Consent of the parties alone would not constitute a sufficient reason for exemption. This is similar to Rule 24.1.05 of the Rules Of Civil Procedure which reads as follows:

EXEMPTION FROM MEDIATION

24.1.05 The court may make an order on a party's motion exempting the action from this Rule.

Second, the Tribunal Rules would have to determine the date by which the mediation would have to occur and provide for a "gate keeper" process to insure compliance.

There are competing interests at stake here.

On the one hand, the parties should be given the flexibility to determine when they think it is best to conduct the mediation in accordance with their right of self determination of their own dispute.

On the other hand, it has been shown that early mediation, especially in employment or labour related disputes, is very important and can result in more meaningful settlements. As it stands now, although the Tribunal has the power to reinstate employees as a remedy, it is a power rarely exercised, largely because by the time the Tribunal hears the case many years have passed, making reinstatement virtually impossible. Requiring that the parties engage in a mediation at an early stage, especially when the prospect of a Tribunal hearing is in the near future, will enhance the parties ability to negotiate meaningful reinstatement agreements.

Moreover, there is another important consideration as to the timing of the mediation. On the one hand the parties need to be properly informed of the relevant facts of the case before they can be expected to settle their case at a mediation. On the other hand the longer the case remains unresolved, the higher the costs to the parties (and to the Tribunal) and the less likely that certain remedies will remain useful.

The Tribunal will undoubtedly be developing rules in regards to the production of documents, witness statements and other issues of disclosure. The timing of the mediation should be tied to the requirement of disclosure and production. We therefore recommend that the Rules provide that the mediation must take place no later than a specified number of days after the

end of the production / disclosure stage.

In order to enforce the rule that mediation is mandatory, it is important for the Tribunal to have the ability to ensure that no case is heard by it, unless it has either been mediated or been previously exempted. Our recommendation is that this be determined at the time that the Tribunal schedules cases for a hearing. In other words, the parties would have to show the Tribunal that they have either had a mediation or have a scheduled date for mediation before the Tribunal will schedule a hearing date.

Delivery of Mediation Services

We recommend that the parties be able to conduct a mediation in one of two ways:

1. By using a Tribunal member at no cost to the parties, or
2. By using a mediator of their choice, with the cost of the mediator being borne by the parties.

Our rationale behind these submissions are as follows:

As our proposal would make mediation compulsory, it is important that the parties have access to qualified mediators at no cost to them.

There are two ways in which this could be provided; by using Tribunal members to mediate cases or by using staff mediators.

We submit that the preferable model is to utilize Tribunal members as mediators rather than staff mediators. Our reasoning is as follows:

1. Flexibility:

There are many models of alternative dispute resolution other than mediation. Many of these other models involve skills quite different from those usually found in those whose only practice is mediation. For instance there is a popular form of dispute resolution commonly used in the labour relations world called MedArb, which provides that the same person performs both the function of a mediator and an arbitrator. The Tribunal is mandated by Section 43(a) to provide procedures that are "alternatives to traditional adjudicative practices and procedures". If staff mediators are utilized, the Tribunal would not be able to use MedArb as a dispute resolution technique, as only Tribunal members have adjudicative powers. Therefore if staff mediators were employed, they could only do traditional mediations and Tribunal members would have to be used to do many other forms of ADR. This splitting of ADR functions will undoubtedly lead to institutional inefficiencies and therefore backlog. By providing that Tribunal members would provide all the state funded dispute resolution functions, you increase the efficiency and the time frame in which disputes can be resolved.

2. Attracting High Quality Tribunal Members

Section 32(3)3 of the Code provides that one of the criteria in choosing Tribunal members shall be "aptitude for applying the alternative adjudicative practices and procedures that may be set out in the Tribunal rules."

This means that Tribunal members must be more than traditional adjudicators; in fact one can easily imagine the Tribunal consisting of skilled ADR professionals with expertise in many different dispute resolution techniques. People of that nature will want to do mediations and therefore the ability to perform both mediations and adjudicative hearings will attract the best candidates. If potential candidates for Tribunal positions are told that the job consists only of endless hearing dates interrupted by writing days, this will not entice the same quality of candidate who is told that the position consists of a mix of mediating, adjudicating and writing.

It is critical to the success of the Tribunal that they attract excellent candidates. We know that the monetary compensation being offered for these positions does not compare with what a comparable lawyer could make in private practice, therefore quality of life and job satisfaction will go a long way to ensuring that the Tribunal attracts the best qualified candidates.

3. Credibility

There is certainly no question that one does not have to be a Tribunal member to be an effective mediator just like you don't have to be a judge or former judge to be an effective mediator of civil disputes. However, we must remember that a large number of parties to these proceedings may well be self-represented. It would probably enhance the overall settlement rate, especially of those cases involving self represented parties, if they were aware of the fact that the person mediating their dispute was also a Tribunal member.

4. Cost Effectiveness:

Whether the mediations are performed by Tribunal members or staff mediators, the Province will still be paying for those services. We would imagine that the direct staffing costs of a Tribunal member as opposed to a staff mediator would show the Tribunal member as being more expensive. However, we suggest that when you look at the larger picture, the staffing costs may be very similar. For example, staff mediators would have to be supervised by a body of supervisors, managers and directors. Tribunal members on the other hand do not have such management oversight and supervision, as the Chair of the Tribunal is more like a "first among equals. Thus, the total staffing costs of the two models may in fact be quite similar. Moreover, if the settlement rate of Tribunal members conducting mediations was higher than that of staff mediators, then overall it may well turn out that the use of Tribunal members to conduct mediations (and thus less hearing days) would be more cost effective.

However, we also submit that the Tribunal mediator model not be the only acceptable mediation model, but that the parties also be able to engage their own mediator of choice if they agree to do so. Our reasons for proposing this additional delivery model are as follows:

1. Allowing the parties to choose their own mediator has a significant positive effect on the settlement rates. In other words, when parties choose their own mediator instead of having one assigned to them, they are more likely to settle. This is because mediation is an intensely human process, and not surprisingly, the personality and techniques of the mediator is highly relevant to the outcome. Some mediators are known as being highly facilitative, others more evaluative, some are fairly formal in their mediations, others are more "laid back". One mediator may be seen as being very effective on age discrimination cases but not as effective on sexual harassment cases. Where lawyers are involved in the process, they have a wealth of knowledge as to the perceived strengths and weaknesses of mediators and spend a lot of effort in negotiating with the other parties the right mediator for their case.
2. As this mediator by choice would only be available if all of the parties agreed, there is no worry that one side could bully the other into choosing a mediator that they did not really agree to as that party could always insist on a staff mediator being assigned to the case. Moreover if the parties could not agree on a mediator, then a staff mediator would be assigned.
3. As the entire cost of the mediator by choice would be the responsibility of the parties, the Tribunal would save staffing costs every time the parties opted not to use a staff mediator. This could provide considerable relief to the Tribunal's staffing budget.
4. At present, many human rights complaints are done at the same time as other legal proceedings such as court litigation or labour arbitrations. Since the parties may well be in a regime of mandatory mediation in the other proceedings, to require the parties to repeat the process using a staff mediator would be extremely unproductive. The chances of settling a case that is before two or more adjudicative bodies without the matters being discussed before a single mediator for all aspects of the case are slim to none. It would not be realistic to expect the staff mediators to mediate these types of

disputes as their experience and training has not been focused on these non-human rights matters. Just as knowledge of human rights law is an essential prerequisite to mediating human rights matters, so too does a knowledge of other areas of law act as a prerequisite for other types of cases that form part of the overall dispute.

5. The Tribunal should set standards of eligibility over these mediators of choice as they would be performing a function required by the Tribunal Rules.

The sort of matters that could be regulated by the Tribunal could include requiring that each mediator of choice:

- Be a member in good standing of a professional mediation organization that requires adherence to a Code of Conduct, e.g. the Ontario Bar Association – ADR Section or the ADR Institute of Ontario.
- Undertake in writing to adhere to a specific Code of Ethics approved by the Tribunal. For example the Tribunal could designate an existing Code of Conduct for this purpose, such as has been done under the Ontario Mandatory Mediation Program (“the OMMP”). Currently, the CBAO “Model Code of Conduct” applies in its entirety to all mediators under the OMMP.
- Carry satisfactory errors & omissions insurance coverage.
- Have sufficient experience in and/or have taken an approved set of courses in human rights law.

These types of oversight functions are similar to those governing mediators under the OMMP.

6. To facilitate the creation of clear standards of competence for the selection of mediators of choice, we recommend that the Tribunal establish and maintain a roster of mediators who meet certain criteria, including the criteria set out above. The roster would be posted on the Tribunal website. These measures would allow the public to choose a mediator who meets certain required criteria and ensure that any mediation conducted by a roster mediator would qualify as a mandatory mediation under the Tribunal Rules, thereby allowing the matter to be scheduled for a hearing, in the event a mediated resolution is not achieved.

Conclusions:

1. Mediation of human rights complaints should be mandatory, requiring a Tribunal order if the parties want to be exempted. Case exemptions should only be made in exceptional circumstances.

2. The mediation should be required to be held no later than within a fixed number of days after the production, disclosure and investigative requirements have been completed.

3. The Tribunal would not schedule a hearing date unless the parties have already held or have scheduled a mediation, or have been exempted from mediation.

4. Tribunal members would conduct the mediations at no cost to all parties.

5. The parties would be at liberty to agree to use a mediator of their choice who was not a Tribunal member as long as they paid the mediator themselves.

6. The Tribunal would set standards for eligibility of the mediators of choice in order to protect the public and maintain a Web based public roster of those mediators.

* *Barry B. Fisher, Barry B. Fisher Mediation & Arbitration, (416) 585-2330, barryfisher@rogers.com. Barry is the Past Chair of the Alternative Dispute Resolution Section.*