Court File No. 699/22

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

KELLY LYNN DONOVAN

Applicant

-and-

HUMAN RIGHTS TRIBUNAL OF ONTARIO,
THE REGIONAL MUNICIPALITY OF WATERLOO REGIONAL POLICE SERVICES BOARD and BRYAN LARKIN

Respondents

FACTUM OF THE RESPONDENT
HUMAN RIGHTS TRIBUNAL OF ONTARIO

July 13, 2023

TRIBUNALS ONTARIO
LEGAL SERVICES
15 Grosvenor Street, Ground Floor
Toronto, ON., M7A 2G6

Brian A. Blumenthal, LSO# 34571P
Tel: 416.709.6968
Fax: 416.314.2379
Brian.Blumenthal@ontario.ca

Lawyer for the Respondent
Human Rights Tribunal of Ontario

TO: **REGISTRAR**
Divisional Court
Superior Court of Justice
Osgoode Hall
130 Queen Street West
Toronto, ON., M5H 2N5
scj-csj.divcourtmail@ontario.ca

AND TO: **Kelly Donovan**
#148 – 36 Hayhurst Road
Brantford, ON., N3R 6Y9

Tel: 519.209.5721
Email: donovandih@gmail.com

Self- Represented Applicant

AND TO: **FILION WAKELY THORUP ANGELETTI LLP**
Bay Adelaide Centre
333 Bay Street, Suite 2500, Box 44
Toronto, ON., M5H 2R2

Donald B. Jarvis LSO#: 28483C
E-mail: djarvis@filion.on.ca

Clifton Yiu LSO#: 79860J
E-mail: cyiu@filion.on.ca

Tel: 416-408-5516 / 416-408-5501
Fax: 416-408-4814

Lawyers for the Respondents, Regional Municipality of Waterloo Regional Police Services Board and Bryan Larkin

Contents

PART I – OVERVIEW

[1] The applicant's Application alleging a contravention of settlement under the *Human Rights Code,* R.S.O. 1990, c. H19, as amended ("*Code"*), on its face, contained an allegation that fell outside of the six-month limitation period prescribed by the *Code.* In controlling its own process, the Human Rights Tribunal of Ontario ("HRTO") made a number of procedural and substantive orders that allowed it to case manage this Application, in conjunction with the respondents' Application alleging contravention of settlement and an ongoing Court action between the parties. This included, amongst other orders, issuing a Notice of Intent to Dismiss ("NOID") on the basis of delay, permitting the applicant to amend her Application to include a timely incident and directing a preliminary hearing to determine if all, or part, of the applicant's Application should be dismissed on the basis of delay or abuse of process. In dismissing the untimely allegation, the HRTO held that the applicant did not have a "good faith" explanation for the delay, as that term has been interpreted by the HRTO. The HRTO dismissed a subsequent Request for Reconsideration of that decision that also found there was no "series of incidents" that would make the allegation timely. The issue before this Court is whether those decisions are reasonable and whether there has been a breach of procedural fairness in how the two Applications for contravention of settlement have been processed and heard by the HRTO.

[2] The HRTO takes the following positions on this application for judicial review:

- The Court of Appeal for Ontario in *Ontario (Health) v. Association of Midwives* held that the standard of review of HRTO decisions under s.45.8 of the *Code* is reasonableness;

- HRTO decisions are to be reviewed on the deferential standard of reasonableness consistent with the approach to reasonableness review set out in Vavilov. The highest degree of deference is to be accorded to the HRTO's decisions on factual determinations and the interpretation and application of human rights law in light of the specialized expertise of the Tribunal;

- Deciding whether a human rights application is untimely is a determination that is at the heart of its specialized expertise in the adjudication of disputes under the Code, falling entirely within the HRTO's scope of adjudication;

- The Court has repeatedly endorsed the HRTO's power to control its processes and how it conducts hearings in a fair, just and expeditious manner;

- The level, or content, of procedural fairness is a flexible and variable standard and one that requires a contextual analysis to assess the adequacy of procedural fairness. There is no standard of review analysis for an allegation of a breach of procedural fairness;

- Allegations of reasonable apprehension of bias must be substantial and require cogent evidence to rebut the strong presumption of independence and impartiality; and

- The HRTO has exercised its discretion to make rules of practice for reconsideration of its decisions and has issued a practice direction describing its practice and procedure. Reconsideration is not an appeal of a decision and is a highly discretionary decision. The HRTO will only reconsider a decision where it finds that there are compelling and extraordinary circumstances for doing so and where these circumstances outweigh the public interest in finality of orders and decisions.

PART II – STATEMENT OF FACTS

[3] The HRTO takes no position on any facts in dispute between the parties. The following statutory and procedural context is relevant to this appeal.

(A) Relevant Statutory Context

[4] Section 45.9 of the *Code* allows for a party to a previously settled application to file a contravention of settlement application with the HRTO where a party believes that another party has contravened a term or condition of the settlement. Section 45.9 provides, as follows:

> **Settlements**
>
> **45.9** (1) If a settlement of an application made under section 34 or 35 is agreed to in writing and signed by the parties, the settlement is binding on the parties.
>
> **Consent order**
>
> (2) If a settlement of an application made under section 34 or 35 is agreed to in writing and signed by the parties, the Tribunal may, on the joint motion of the parties, make an order requiring compliance with the settlement or any part of the settlement.
>
> **Application where contravention**
>
> (3) If a settlement of an application made under section 34 or 35 is agreed to in writing and signed by the parties, a party who believes that another party has contravened the settlement may make an application to the Tribunal for an order under subsection (8),
>
> (a) within six months after the contravention to which the application relates; or
>
> (b) if there was a series of contraventions, within six months after the last contravention in the series.
>
> **Late applications**
>
> (4) A person may apply under subsection (3) after the expiry of the time limit under that subsection if the Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.
>
> **Form of application**
>
> (5) An application under subsection (3) shall be in a form approved by the Tribunal.

Parties

(6) Subject to the Tribunal rules, the parties to an application under subsection (3) are the following:

1. The parties to the settlement.

2. Any other person or the Commission, if they are added as a party by the Tribunal.

Intervention by Commission

(7) Section 37 applies with necessary modifications to an application under subsection (3).

Order

(8) If, on an application under subsection (3), the Tribunal determines that a party has contravened the settlement, the Tribunal may make any order that it considers appropriate to remedy the contravention.

***Human Rights Code*, R.S.O. 1990, c. H. 19, as amended, s. 45.9, HRTO Factum, Schedule B**

[5] Section 34 of the *Code* requires an application to the HRTO to be made within one year of the last incident of discrimination or within one year after the last incident in a series of alleged discrimination. If an application is commenced outside of the one-year limitation period, the HRTO has the discretion to permit the application to proceed, provided it is satisfied the delay was incurred in good faith and will not result in substantial prejudice to any party affected by the delay:

34 (1) If a person believes that any of his or her rights under Part I have been infringed, the person may apply to the Tribunal for an order under section 45.2,

(a) within one year after the incident to which the application relates; or

(b) if there was a series of incidents, within one year after the last incident in the series.

(2) A person may apply under subsection (1) after the expiry of the time limit under that subsection if the Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.

***Human Rights Code*, RSO 1990, c. H. 19, as amended, s. 34, HRTO Factum, Schedule B**

[6] The HRTO has jurisdiction to determine all questions of fact or law that arise in any application before it.

> ***Human Rights Code*, R.S.O. 1990, c. H. 19, as amended, s. 39, HRTO Factum, Schedule B**

(B) HRTO Rules of Procedure

[7] The HRTO may make rules to govern the practice and procedure before it.

> ***Human Rights Code*, R.S.O. 1990, c.H.19, s. 43, HRTO Factum, Schedule B**

[8] The HRTO has a broad range of powers to permit it to adjudicate and resolve disputes. Section 40 of the *Code* directs the HRTO to adopt practices and procedures in its rules, or otherwise available to it, which offer the best opportunity for a fair, just and expeditious resolution of the merits of the application.

> The Tribunal shall dispose of applications made under this Part by adopting the procedures and practices provided for in its rules or otherwise available to the Tribunal which, in its opinion, offer the best opportunity for a fair, just and expeditious resolution of the merits of the applications.
>
> ***Human Rights Code*, R.S.O. 1990, c.H.19, as amended, s. 40, HRTO Factum, Schedule B**

[9] To further facilitate this goal, section 41 of the *Code* authorizes the HRTO to adopt practices and procedures that are an alternative to traditional adjudicative or adversarial procedures, and which allow the HRTO to control how an application is processed, heard, and decided, either on a preliminary basis or following a hearing on the merits.

> This Part and the Tribunal rules shall be liberally construed to permit the Tribunal to adopt practices and procedures, including alternatives to traditional adjudicative or adversarial procedures that, in the opinion of the Tribunal, will facilitate fair, just and expeditious resolutions of the merits of the matters before it.
>
> ***Human Rights Code*, R.S.O. 1990, c.H.19, s. 41, HRTO Factum, Schedule B**

HRTO Rules of Procedure, Rules 1.7 (g), (h), (i), (n), HRTO Factum, Schedule B

[10] The HRTO's broad rule-making authority also includes the power to prescribe the stages of its processes at which preliminary, procedural or interlocutory matters will be determined, define and narrow the issues required to dispose of an application, limit the evidence and the submissions of the parties on such issues and determine the order in which evidence will be presented. The HRTO's Rules prevail over any conflicting provisions in the *Statutory Powers Procedure Act*.

> 43(3) Without limiting the generality of subsection (1), the Tribunal rules may
>
> …
>
> (b) authorize the Tribunal to,
>
> (i) define or narrow the issues required to dispose of an application and limit the evidence and submissions of the parties on such issues, and
>
> (ii) determine the order in which the issues and evidence in a proceeding will be presented;
>
> …
>
> (d) prescribe the stages of its processes art which preliminary, procedural or interlocutory matters will be determined;
>
> ***Human Rights Code*, R.S.O. 1990, c. H. 19, as amended, ss. 40, 42, s. 43(3)(b) (d), HRTO Factum, Schedule B**
>
> **HRTO Rules of Procedure, Rules 1.7 (g), (h), (j), (n) HRTO Factum, Schedule B**

Reconsideration

[11] Section 45.7 of the *Code* provides the HRTO with the statutory authority to reconsider final decisions, or decisions that finally dispose of part of an Application, in accordance with its Rules of Procedure.

> 45.7(1) Any party to a proceeding before the Tribunal may request that the Tribunal reconsider its decision in accordance with the Tribunal rules.
>
> (2) Upon request under subsection (1) or on its own motion, the Tribunal may reconsider its decision in accordance with its rule.
>
> ***Human Rights Code*, R.S.O. 1990, c. H. 19, as amended, s. 45.7, HRTO Factum, Schedule B**

[12] The HRTO's Rules of Procedure require a party to seek reconsideration within 30 days of the date of the decision, subject to an extension of time based on good faith considerations. To ensure finality in the decision-making process, the HRTO will not grant a request for reconsideration unless satisfied that one of the following criteria is met:

> 26.5 A Request for Reconsideration will not be granted unless the Tribunal is satisfied that:
>
> a. there are new facts or evidence that could potentially be determinative of the case and that could not reasonably have been obtained earlier; or
>
> b. the party seeking reconsideration was entitled to but, through no fault of its own, did not receive notice of the proceeding or a hearing; or
>
> c. the decision or order which is the subject of the reconsideration request is in conflict with established jurisprudence or Tribunal procedure and the proposed reconsideration involves a matter of general or public importance; or
>
> d. other factors exist that, in the opinion of the Tribunal, outweigh the public interest in the finality of Tribunal decisions.
>
> **HRTO Rules of Procedure, Rule 26.1, Rule 26.5, and Rule 26.5.1, HRTO Factum, Schedule B**

[13] The HRTO's Practice Direction on Reconsideration highlights the extraordinary nature of reconsideration.

> Reconsideration is a discretionary remedy; there is no right to have a decision reconsidered by the HRTO. Reconsideration is not an appeal or an opportunity for a party to change the way it presented its case.
>
> The rules for reconsideration are found in Rule 26 of the Rules of Procedure. A request for reconsideration will only be granted if the request meets one of the requirements in Rule 26.5.

HRTO Practice Direction on Reconsideration, HRTO Factum, Schedule B

(C) Two Privative Clauses and Standard of Review

[14] The *Code* provides that decisions made by the HRTO are final, binding and subject only to judicial review on the standard of unreasonableness.

> The decision of the Tribunal is final and not subject to appeal and shall not be altered or set aside in an application for judicial review or in any other proceeding unless the decision is patently unreasonable.
>
> ***Human Rights Code*, R.S.O. 1990, c. H. 19, as amended, s. 45.8, HRTO Factum, Schedule B**

[15] The *Code* includes a second privative provision specifically applicable to review of the HRTO's decisions under its Rules and the exercise of its discretion.

> Failure on the part of the Tribunal to comply with the practices and procedures required by the rules or an exercise of a discretion by the tribunal in a particular manner is not a ground for setting aside a decision of the Tribunal on an application for judicial review or any other form of relief, unless the failure or the exercise of discretion caused a substantial wrong which affected the final disposition of the matter.
>
> ***Human Rights Code*, R.S.O. 1990, c.H.19, as amended, s. 43(8), HRTO Factum, Schedule B**

PART III – ISSUES AND THE LAW

(A) Standard of Review

[16] The Court of Appeal for Ontario decision in *Ontario (Health) v. Association of Midwives* held that the standard of review of HRTO decisions under s.45.8 of the *Code* is reasonableness.

> ***Ontario (Health) v. Association of Ontario Midwives*, 2022 ONCA 458, HRTO Authorities**

[17] The Court of Appeal for Ontario in *Midwives* endorsed this Court's approach to review of the HRTO's decisions and affirmed that the *highest* degree of deference is owed to the HRTO's interpretation and application of human rights law. This deference is owed in recognition of the HRTO's specialized expertise. This standard of reasonableness applies to review of the HRTO's interpretation and application of the *Code*.

> ***Shaw v. Phipps*, 2012 ONCA 155, at para. 10, HRTO Authorities**

[18] In describing the general approach to a reasonableness standard of review, the Court of Appeal for Ontario in *Midwives* stated at paras. 85 and 89, as follows:

> Ultimately, the question for this court is whether the Adjudicator's decision as a whole is reasonable. While reasonableness review is not a "rubber-stamping" process and is a robust form of review, it finds its starting point in judicial restraint: *Vavilov*, at para. 13. As *Vavilov* instructs, at para. 85, "a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and the law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision" (emphasis added). To determine whether a decision is reasonable, "the reviewing court asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether [the decision] is justified in relation to the relevant factual and legal constraints that bear on the decision": *Vavilov*, at para. 99.
>
> […]
>
> It is helpful to start with a return to paras. 102-104 of *Vavilov,* where the majority explains the proper approach to assessing whether a decision is based on internally coherent reasoning. A reviewing court must not set out on a "treasure hunt" to identify missteps in the decision maker's reasoning: *Vavilov*, at para. 102. Rather, the reviewing court must remain focussed on the task at hand, determining if the reasons are rational and logical by tracing the decision maker's reasoning to see whether there are any fatal flaws in the overarching logic: *Vavilov*, at para. 102. A decision will be unreasonable if its reasons, "read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis", or where "the conclusion reached cannot follow from the analysis undertaken … or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point": *Vavilov*, at para. 103. *At the end of the day*, the reasoning must "add up": *Vavilov*, at para. 104.
>
> ***Ontario (Health) v. Association of Ontario Midwives*, 2022 ONCA 458 at paras. 85 and 89, HRTO Authorities**

[19] In performing a reasonableness review, in accordance with the decision in *Vavilov,* a reviewing court should respect administrative decision makers having regard to the record, history of the proceedings and their institutional expertise and experience. While reasonableness review is a "robust form of review", "respectful attention" must be given to the reasons given for an administrative decision. Reasons and the decision actually made by the decision maker are the focus of the review. They must be read together with the outcome in assessing the reasonableness of the result and whether the decision falls within the range of reasonable outcomes that are justifiable. A reviewing court should not focus on how it would have resolved the issue but should rather focus on whether an applicant has demonstrated that the decision is unreasonable. The Court in *Vavilov* highlighted this approach at para. 15, as follows:

> In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from a correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place.
>
> ***Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 15, see also paras. 75, 85, 93, HRTO Authorities**
>
> ***Imperial Oil Limited v. Haseeb*, 2023 ONCA 364 at paras. 43 & 46, HRTO Authorities**

[20] This approach set out in *Vavilov* is consistent with previous court decisions on the content of reasonableness review and HRTO decisions.

> The only issue on judicial review was whether the Vice-Chair's decision fell within the range of reasonable outcomes. On judicial review it is not enough that the reviewing court be persuaded that one could arrive at a different decision based on the same evidentiary record. To succeed on judicial review in this case, it was necessary to show the tribunal could not reasonably arrive at the decision it did.

***Peel Law Association v. Pieters*, 2013 ONCA 396 at para. 132, HRTO Authorities**

[21] Under a reasonableness review, the onus is on the party challenging the decision to demonstrate that it is unreasonable and that "any shortcomings or flaws relied on … are sufficiently central or significant to render the decision unreasonable." A reasonable decision is "one that is based on an internally consistent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision."

> A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review". *(Vavilov,* at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov,* at para. 99, citing *Dunsmuir,* at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District),* 2012 1 S.C.R. 5, at para. 13).
>
> ***Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 85, 100, 102 - 104, HRTO Authorities**
>
> ***Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67 at para. 32, HRTO Authorities**

[22] Reviewing courts are not to hold up the written reasons against a standard of perfection or conduct a "line-by-line treasure hunt for error". If the reasons are read holistically and contextually and allows for the understanding of the basis on which a decision was made, they shall be considered reasonable.

> ***Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 91, 97, HRTO Authorities**

[23] The “legal and factual constraints that bear on the decision” can, subject to context, include the following relevant considerations: the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; past practices and decisions of the administrative body; and, the potential impact of the decision on the individ*ual to whom it applies.*

> ***Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 106, HRTO Authorities**

[24] The Court’s decision in *Vavilov* held that the most salient aspect of legal context is the governing statutory scheme - that a discretionary decision must comply “with the rationale and purview of the statutory scheme under which it is adopted.” Furthermore, it held that a discretionary decision “must comport with any more specific constraints imposed by the governing legislative scheme, such as statutory definitions, principles or formulas that prescribe the exercise of a discretion.”

> ***Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 108, HRTO Authorities**

[25] While “expertise” of decision makers in administrative tribunals was previously relevant as part of the contextual analysis in determining the standard of review, the decision in *Vavilov* confirms that expertise is now a relevant factor in how a reviewing court is to undertake a reasonableness review.

> We wish to emphasize that because these reasons adopt a presumption of reasonableness as the starting point, expertise is no longer relevant to a determination of the standard of review as it was in the contextual analysis. However, we are not doing away with the role of expertise in administrative decision making. This consideration is simply folded into the new starting point and, as explained below, expertise remains a relevant consideration in conducting a reasonableness review.

> […]
>
> An administrative decision maker may demonstrate through its reasons that a given decision was made by bringing that institutional expertise and experience to bear: *see Dunsmuir,* at para. 49. In conducting reasonableness review, judges should be attentive to the application by decision makers of specialized knowledge, as demonstrated by their reasons. Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision. This demonstrated experience and expertise may also explain why a given issue is treated in less detail.
>
> ***Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 31& 95, HRTO Authorities**

[26] Consistent with *Dunsmuir,* the Court in *Vavilov* also confirmed that absent exceptional circumstances, a reviewing court will not interfere with factual findings. A reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker." With respect to human rights statutes, the Supreme Court in *Stewart v. Elk Valley Coal Corp.* emphasized that factual determinations remain the domain of human rights tribunals and cautioned reviewing courts to approach the decisions of tribunals under human rights statutes with considerable deference.

> Reviewing courts generally approach the decisions of tribunals under human rights statutes with considerable deference. It is the tribunal's task to evaluate the evidence, find the facts and draw reasonable inferences from the facts. And it is the tribunal's task to interpret the statute in ways that make practical and legal sense in the case before them, guided by applicable jurisprudence. Reviewing courts tread lightly in these areas.
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> ***Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 125 - 126, HRTO Authorities**
>
> ***Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 at para. 20, HRTO Authorities**
>
> ***Gale v. College of Physicians and Surgeons of Ontario*, 2015 ONSC 1981 at para. 8, HRTO Authorities**

[27] The Court of Appeal for Ontario has confirmed that the HRTO's factual determinations are to be accorded the highest degree of deference.

> … [U]nder the reasonableness standard, as also articulated in *Taylor-Baptiste*, at para. 40, "the decisions of the Tribunal on determinations of fact and the interpretation and application of human rights law are entitled to the highest degree of deference having regard to the Tribunal's expertise and specialization."
>
> ***Hamilton-Wentworth District School Board v. Fair*, 2016 ONCA 421, at para. 41, HRTO Authorities**

[28] Post-*Vavilov*, this Court has continued to give deference to the HRTO's findings of fact.

> ***Walker Real Estate Inc. v. D'Alesio*, 2020 ONSC 947 *at* paras. 3-4, HRTO Authorities**

[29] In applying the reasonableness standard this Court has said that "[i]n assessing the grounds on which the applicants attack the decision of the [HRTO], it must be emphasised that the grounds for reviewing the Tribunal's decision are narrow."

> ***Big Inc. v. Islam*, 2015 ONSC 2921 (Div. Ct.) at para. 10, HRTO Authorities**

[30] This Court has traditionally accorded the highest degree of deference to the HRTO on how the HRTO controls its own process and on reviewing reconsideration decisions. The discretionary decisions on requests for reconsideration are based on an assessment of the particular facts of each case, the grounds for review as set out in HRTO Rules of Procedure and, as noted above, are typically accorded the highest degree of deference from this Court.

> ***Paul James v York University and Ontario Human Rights Tribunal*, 2015 ONSC 2234 (Div. Ct.) at paras. 56 – 60, HRTO Authorities**
>
> ***Xia v. Board of Governors of Lakehead University*, 2020 ONSC 6150 (Div. Ct.) at. paras. 39 – 40, HRTO Authorities**

***Mohmand v. Human Rights Tribunal of Ontario and Ultimate Currency Exchange*, 2021 ONSC 528 (Div. Ct.) at para. 19, HRTO Authorities**

(B) HRTO Controlling Own Processes

[31] The *Code* permits the HRTO to use alternatives to traditional adjudication or adversarial procedures. This allows the HRTO to ensure that its hearings proceed in a fair, just and expeditious manner and includes the ability of HRTO members to manage the processing and hearing of application and to prescribe the stages of its processes at which preliminary, procedural or interlocutory matters will be determined, define and narrow the issues required to dispose of an application, limit the evidence and the submissions of the parties on such issues and determine the order in which evidence will be presented.

HRTO Rules of Procedure, Rules 1.7 (g), (h), (i), (n), HRTO Factum, Schedule B

***Gill v. Human Rights Tribunal of Ontario et al.*, 2014 ONSC 1840 at paras. 9-14, HRTO Authorities**

***Murray v. HRTO*, 2018 ONSC 2953 at paras. 15 - 22, HRTO Authorities**

***Mohmand v. Human Rights Tribunal of Ontario*, 2021 ONSC 528 (Div. Ct.) at para. 19, HRTO Authorities**

[32] It is well settled that a tribunal is the "master of its own procedure" or "master of its own house."

City of Toronto v. Avenue ***Road Eglinton Community Association*, 2019 ONSC 146 at para. 54 (Div. Ct.), HRTO Authorities**

***Knight v. Indian Head School Division*, 1990 CanLII 138 at para. 49, (SCC), HRTO Authorities**

***Prassad v. Canada (Minister of Employment and Immigration)*, 1989 CanLII 131 at paras. 16-17, (SCC), HRTO Authorities**

[33] In explaining the rationale for this principle, this Court has stated, as follows:

> The Board has considerable experience and expertise in conducting its own hearings and determining who should not participate, who should participate, how and to what extent. It also has considerable experience and expertise in ensuring that its hearings deal with the issues mandated by the Act in a timely and efficient way.
>
> […]
>
> In short, whether an agency's procedural arrangements, general or specific, comply with the duty of fairness is for a reviewing court to decide on the correctness standard, but in making that determination it must be respectful of the agency's choices. It is thus appropriate for a reviewing court to give weight to the manner in which an agency has sought to balance maximum participation on the one hand, and efficient and effective decision-making on the other…. (emphasis added.)
>
> ***Rogers Communications Partnership v. Ontario Energy Board*, 2016 ONSC 7810 at paras. 17-18 (Div. Ct.), quoting *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245 at para. 72 and *Re: Sound v. Fitness Industry Council of Canada*, 2014 FCA 48 at para. 42**

(C) Delay, Series of Incidents and Good Faith Explanation

[34] As this Application demonstrates, there are circumstances where the HRTO directs a preliminary inquiry where the fair, just and expeditious resolution of an application requires a finding on whether all or part of an application should be dismissed on the basis of delay and whether there is a good faith explanation for the delay.

[35] When an applicant alleges a "series of incidents", the HRTO is required to assess whether the timely and untimely allegations constitute a series of incidents consistent with the factors set out in the HRTO decision in *Garrie v. Janus Joan Inc.*. The HRTO has held that to constitute a "series of incidents", allegations of discrimination must have some connection or nexus, such that they may reasonably be viewed as a pattern of conduct with a common theme, similar parties and/or circumstances, as opposed to events that are comprised of incidents relating to discrete and separate issues with some connection

or nexus. *Garrie* held that the following factors will generally be relevant to the Tribunals determination of whether allegations may be deemed timely because they relate to a "series of incidents":

> a. What is the last alleged incident of discrimination to which the Application relates?
>
> b. Do the allegations relate to a series of separate and independent incidents of discrimination or do they relate to the continuing effect of a single incident of discrimination?
>
> c. What is the nature or character of the alleged discrimination and is it part of a pattern or series of incidents of a similar nature or character?
>
> d. What is the temporal gap between alleged incidents of discrimination?
>
> ***Garrie v. Joan Janus Inc.*, 2012 HRTO 1955 at paras. 29 – 46, HRTO Authorities**
>
> **See Also:**
>
> ***Association of Ontario* Midwives *v. Ontario (Health and Long Term Care)*, 2014 HRTO 1370, at paras. 34 – 41, HRTO Authorities**

[36] Related to the series of incidents analysis set out above is whether the timely incident, or other incidents, have no reasonable prospect of success as an allegation that has no reasonable prospect of success cannot form part of a series of incidents. This Court has found HRTO decisions that have adopted this approach to assessing delay and "series of incidents" to be reasonable.

> ***Chappell v. Securitas Canada Limited*, 2012 HRTO 874 at paras. 5 – 6, 9, 11, HRTO Authorities**
>
> ***Garland v. Canusa-CPS*, 2012 HRTO 1309 at paras. 11 - 14, HRTO Authorities**
>
> ***Xia v. Board of Governors of Lakehead University*, 2020 ONSC 6150 (Div. Ct.) at paras. 35 – 38, HRTO Authorities**

[37] The onus is on an applicant under both ss. 34(2) and 45.9(4) of the *Code* to satisfy the HRTO that the delay in filing an application was incurred in good faith. This requires that an applicant provide some reasonable explanation for the delay:

> The fundamental question, which the HRTO must deal with when confronted with a request to extend the one year limitation period set forth in section 34(1) of the *Code*, is whether the applicant has presented a "reasonable explanation" for the delay.
>
> ***Paul James v. York University,*** **2015 ONSC 2234 at para. 46, HRTO Authorities**

[38] This Court has repeatedly confirmed the HRTO's approach to deciding issues of delay and good faith, expressly recognising the importance of deciding human rights claims expeditiously.

> ***Colhoun v. Hydro One Networks Inc.,*** **2014 ONSC 163, at para. 12, HRTO Authorities**
>
> ***Selkirk v. Trillium Gift of Life Network,*** **2014 ONSC 7174, at paras. 8-9, 12, 14, HRTO Authorities**
>
> ***Cain v. City of Toronto,*** **2011 ONSC 2578, at paras. 7-9, HRTO Authorities**

(D) Reconsideration

[39] Discretionary findings with respect to requests for reconsideration in applications under the *Code* is an area of expertise unique to the HRTO, the adjudicative tribunal mandated to adjudicate claims of discrimination under the *Code.*

[40] The discretionary decisions on requests for reconsideration are based on an assessment of the particular facts of each case, the grounds for review as set out in the HRTO Rules of Procedure and are typically accorded the highest degree of deference from this Court.

> ***James v. York University and Ontario Human Rights Tribunal*, 2015 ONSC 2234 (Div. Ct.) at paras. 56 – 60, HRTO Authorities**
>
> ***Xia v. Board of Governors of Lakehead University*, 2020 ONSC 6150 (Div. Ct.) at paras. 39 – 40, HRTO Authorities**

(E) Procedural Fairness

[41] As the applicant is alleging a breach of procedural fairness or natural justice, there is no need to undertake an assessment of the standard of review. Where requirements of natural justice and procedural fairness have not been met, the Court will intervene.

> ***Graham v. New Horizon System Solutions,* 2023 ONSC 310, HRTO Authorities**

[42] In *Baker v. Canada (Minister of Citizenship and Immigration) ("Baker")* the Supreme Court of Canada confirmed that the duty of procedural fairness may apply in a variety of circumstances, but that the content of the duty is not uniform. In determining the content of the duty of procedural fairness, the Court held:

> Although the duty of procedural fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected...the purpose of the participatory rights contained within it is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker.
>
> ***Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817, at para. 22, HRTO Authorities**

[43] The Court in *Baker* identified several factors as relevant to determining the content of the duty of fairness, including: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the

individual or the individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the agency itself. The Court held that this was not an exhaustive list of factors.

> ***Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 23 - 27, HRTO Authorities**

[44] The Court in *Baker* described the fifth factor, the choices of procedure made by the agency itself, in the following manner:

> Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedures made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: Brown and Evans, *supra,* at pp. 7-60 to 7-70. While this of course is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: *I.W.A. v Consolidated-Bathurst Packaging Ltd.,* [1990] 1 S.C.R. 282 per Gonthier J."
>
> ***Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 27, HRTO Authorities**

[45] Therefore, when assessing the applicant's claim of breach of procedural fairness including, the Court must have regard to the history of the proceeding, the context of the case and the HRTO's procedures for the fair, just and expeditious resolution of applications made to it.

[46] The HRTO addressed the applicant's allegation of procedural unfairness in its reconsideration decision. It stated while the applicant's request to dismiss the respondent's Contravention of Settlement application on the basis of no merit or having been commenced in bad faith remains extant, it would be addressed in due course as determined by the Tribunal. The applicant's request is substantive in nature. It is related

to the merits of the respondent's Application, as opposed to jurisdictional issues, the latter of which, is appropriately determined before a hearing on the merits. In any event, there is no requirement under the HRTO Rules of Procedure or the duty of procedural fairness that similar Requests to dismiss an application be heard and decided at the same time, or at all, before a hearing on the merits. Indeed, the applicant acknowledges in her factum at para. 80 that she was advised by the HRTO Member that her Requests would be dealt with at the merits hearing of the respondent Board's Application.

> **HRTO Record of Proceedings, Reconsideration Decision at para. 38, Vol.7, pp. 3084**

[47] Whether to direct a hearing on a preliminary issue is a discretionary matter that directly engages the procedural choices of the Tribunal in how it controls its own process. This is particularly so in the circumstances of this case in light of concurrent Applications before the HRTO alleging Contravention of Settlement and an ongoing Court action that raise a multitude of issues, both procedural and substantive around the processing and scheduling of both Applications.

Reasonable Apprehension of Bias

[48] It is well established that the grounds for finding bias, or a reasonable apprehension of bias must be substantial and require cogent evidence to rebut the strong presumption of impartiality. The question of reasonable apprehension of bias requires a highly fact-specific and contextual inquiry.

> ***Hazelton Lanes Inc. v. 1707590 Ontario Limited*, 2014 ONCA 793 at paras. 58 - 65, HRTO Authorities**
>
> ***Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at paras. 20 - 30, HRTO Authorities**

[49] The statutory context in the *Code* is that the HRTO may adopt practices and procedures that are an alternative to traditional adjudicative or adversarial procedures, or active adjudication. The other important contextual factor in this case is that one party was self-represented. While self-represented parties actively participate in a proceeding, they may request, but not dictate, to the Tribunal the manner or process in which an application is to be decided. That remains the purview of the Tribunal.

[50] In *Clayson-Martin v. Martin,* the Court of Appeal for Ontario noted that a high conflict, protracted trial will be made more difficult for the parties and the judge when one of the two opposing parties is self-represented. The Court acknowledges the "truly challenging" task of maintaining trial efficiency and effectiveness in those circumstances and considers this when assessing challenges to impartiality. Further, in that case, where the judge was required to determine the best interests of the child the Court was "particularly reluctant to criticize" the judge's questions to witnesses.

> I would begin with the observation that this was a long and difficult trial. This was a particularly high conflict custody battle where emotions ran high and the consequences for the parties were enormous. There is no question these are difficult trials not only for the parties but also for the trial judges who must preside over them. The difficulties are enhanced where one party is, as here, self-represented.
>
> […]
>
> It is crucial for trial judges to maintain their independence and impartiality throughout; the process depends on it. When one party is self-represented, balancing trial efficiency and effectiveness with the appearance of independence and impartiality can be truly challenging.
>
> In this case, the trial judge's primary obligation was to determine the children's best interests. In this context, I am particularly reluctant to criticize him for questioning witnesses in an attempt to get to the truth.
>
> ***Clayson-Martin v. Martin*, 2015, above, at paras. 74, 108 and 109, HRTO Authorities**

[51] The Supreme Court confirmed in *Wewaykum Indian Band v. Canada* the existence and importance of a strong presumption of judicial or quasi-judicial impartiality. In order to overcome the presumption, the party alleging a reasonable apprehension of bias must establish the presence of serious grounds. The inquiry is fact-specific and contextual.

> [i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary" (Canadian Judicial Council, Ethical Principles for Judges (1998), at p. 30). It is the key to our judicial process, and must be presumed. As was noted by L'Heureux-Dube J. and McLachlin J. (as she then was) in S.(R.D.), *supra* at para. 32, the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption.
>
> […]
>
> the standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality.
>
> […]
>
> this is an inquiry that remains highly fact-specific. … [the inquiry] must be addressed carefully in light of the entire context. There are no shortcuts."
>
> ***Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259 at paras. 59, 76 & 77, HRTO Authorities**

[52] The Court of Appeal for Ontario has noted that unsubstantiated bias claims have negative implications for the proper administration of justice.

> In my view, a judge is best advised to remove himself if there is any air of reality to a bias claim. That said, judges do the administration of justice a disservice by simply yielding to entirely unreasonable and unsubstantiated recusal demands. Litigants are not entitled to pick their judge. They are not entitled to effectively eliminate judges randomly assigned to their case by raising specious partiality claims against those judges. To step aside in the face of a specious bias claim is to give credence to a most objectionable tactic.
>
> ***Beard Winter LLP v. Shekhdar*, 2016 ONCA 493, at para. 10, HRTO Authorities, Schedule A**

[53] The threshold for a finding of real or perceived bias is high. There must be more than mere suspicion but, rather, a "real likelihood or probability of bias". A judge's or adjudicator's individual comments during a trial or hearing should not be assessed in isolation, but rather in light of the whole proceeding. It is the *cumulative effect* of all of the conduct, comments and interventions by a judge or adjudicator that must be assessed to rebut the strong presumption of impartiality.

> ***Canadian College of Business and Computers Inc. v. Ontario (Private Career Colleges)*, 2010 ONCA 856 at paras. 20-28, HRTO Authorities, Schedule A**
>
> **Hazelton Lanes, at paras. 58 – 65, 102, HRTO Authorities, Schedule A**

[54] It is not bias for an adjudicator to control the process before the HRTO or interpret evidence. Nor is the mere fact that an adjudicator has made decisions adverse in interest to a litigant a sufficient basis to establish bias or rebut the strong presumption of impartiality and neutrality. It is well established that "[b]y itself, an adverse decision does not rebut the strong presumption of impartiality." Additionally, "even downright rudeness" does not necessarily dispel the strong presumption of impartiality.

> ***Taucar v. Human Rights Tribunal of Ontario*, 2017 ONSC 2604 (Div. Ct.) at paras 84-85, HRTO Authorities**
>
> ***Kelly v. Palazzo*, 2008 ONCA 82 at paras. 20-21, HRTO Authorities**

[55] Interventions and questioning witnesses by a trial judge or adjudicator is not in and of itself reflective of bias, particularly when an adjudicator is attempting to guide the parties towards the relevant issues and evidence in dispute. While repeated interventions and questions by a trier of fact may disclose impatience with a witness, counsel or party, or skepticism of a witness and his/her evidence, the overriding concern is whether in light

of the trier of fact's words and conduct the reasonable and informed person would nonetheless conclude that he or she is open to the evidence and the arguments presented.

> …it is clear that judges are no longer required to be as passive as they once were; to be what I call sphinx judges. We now not only accept that a judge may intervene in the adversarial debate, but also believe that it is sometimes essential for him to do so for justice in fact to be done. Thus a judge may and sometimes must ask witnesses questions, interrupt them in their testimony and if necessary call them to order.
>
> ***Brouillard v. The Queen*, [1985] 1 S.C.R. 39 at p. 44 per Lamer J, HRTO Authorities**

***Miglin v. Miglin*, (2000) 53 O.R. (3d) 541 (Ont. C.A.) at paras. 29 - 30, revs'd on other grounds, [2003] S.C.R. 303, HRTO Authorities**

***R v. Felderhof*, 2003 CanLII 37346 (Ont. C.A.) at para. 40, HRTO Authorities**

***Children's Aid Society of the United Counties of Stormont, Dundas and Glengarry v. S.V.D.*, 2016 ONSC 350 (Div. Ct.), at para. 94, HRTO Authorities**

***Paul v. Wollen*, 2015 ONSC 1458 (Div. Ct.), at paras. 5 and 6, HRTO Authorities**

(F) Summary

[56] It is respectfully submitted that all of the above supports deference in the judicial review of the HRTO's decisions. The HRTO is protected by the strongest of privative clauses. This Court has acknowledged that HRTO members have expertise in the substance, the appropriate legal analysis, and procedure of statutory human rights law, both through their backgrounds and experience hearing applications and mediating in a high volume, direct-access system. The HRTO's statutory mandate is to resolve, in a fair, just and expeditious manner, the applications made to it. Such disputes, including the dispute at issue in the present case, and the procedures for resolving them, are highly contextual, fact-based and require finality.

PART IV – ORDER REQUESTED

[57] The HRTO takes no position with respect to the orders sought by the applicant other than if the application for judicial review is allowed, the HRTO asks that the application be remitted to it.

[58] The HRTO does not seek its costs of this proceeding and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

July 13, 2023

Brian A. Blumenthal

Lawyer for the Respondent
Human Rights Tribunal of Ontario

Court File No. 699/22

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

KELLY LYNN DONOVAN

Applicant

-and-

HUMAN RIGHTS TRIBUNAL OF ONTARIO,
THE REGIONAL MUNICIPALITY OF WATERLOO REGIONAL POLICE SERVICES BOARD and BRYAN LARKIN

Respondents

RESPONDENT'S CERTIFICATE RESPECTING TIME
HUMAN RIGHTS TRIBUNAL OF ONTARIO

The Respondent, Human Rights Tribunal of Ontario, certifies that:

i. 15 minutes will be required for oral argument.

July 13, 2023

TRIBUNALS ONTARIO LEGAL SERVICES
15 Grosvenor Street, Ground Floor
Toronto, ON., M7A 2G6

Brian A. Blumenthal, LSO# 34571P
Tel: 416.709.6968
Fax: 416.314.2379
Brian.Blumenthal@ontario.ca

Lawyer for the Respondent
Human Rights Tribunal of Ontario

SCHEDULE A – LIST OF AUTHORITIES

1. *Ontario (Health) v. Association of Ontario Midwives*, 2022 ONCA 458
2. *Shaw v. Phipps*, 2012 ONCA 155
3. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65
4. *Imperial Oil Limited v. Haseeb*, 2023 ONCA 364
5. *Peel Law Association v. Pieters*, 2013 ONCA 396
6. *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67
7. *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30
8. *Gale v. College of Physicians and Surgeons of Ontario*, 2015 ONSC 1981 (Div. Ct.)
9. *Hamilton-Wentworth District School Board v. Fair*, 2016 ONCA 421
10. *Walker Real Estate Inc. v. D'Alessio*, 2020 ONSC 947 (Div. Ct.)
11. *Big Inc. v. Islam,* 2015 ONSC 2921 (Div. Ct.)
12. *Gill v. Human Rights Tribunal of Ontario et al.*, 2014 ONSC 1840 (Div. Ct.)
13. *Xia v. Board of Governors of Lakehead University*, 2020 ONSC 6150 (Div. Ct.)
14. *Murray v. HRTO*, 2018 ONSC 2953 (Div. Ct.)
15. *Mohmand v. Human Rights Tribunal of Ontario*, 2021 ONSC 528 (Div. Ct.)
16. *City of Toronto v. Avenue Road Eglinton Community Association*, 2019 ONSC 146 (Div. Ct.)
17. *Knight v. Indian Head School Division*, 1990 CanLII 138
18. *Prassad v. Canada (Minister of Employment and Immigration)*, 1989 CanLII 131
19. *Rogers Communications Partnership v. Ontario Energy Board*, 2016 ONSC 7810 (Div. Ct.)
20. *Garrie v. Joan Janus Inc.* 2012 HRTO 1955

SCHEDULE B – LEGISLATION

1. *HUMAN RIGHTS CODE*, R.S.O. 1990, C. H. 19, AS AMENDED

34 (1) If a person believes that any of his or her rights under Part I have been infringed, the person may apply to the Tribunal for an order under section 45.2,

(a) within one year after the incident to which the application relates; or

(b) if there was a series of incidents, within one year after the last incident in the series.

(2) A person may apply under subsection (1) after the expiry of the time limit under that subsection if the Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.

. . .

39. The Tribunal has the jurisdiction to exercise the powers conferred on it by or under this Act and to determine all questions of fact or law that arise in any application before it.

. . .

40. The Tribunal shall dispose of applications made under this Part by adopting the procedures and practices provided for in its rules or otherwise available to the Tribunal which, in its opinion, offer the best opportunity for a fair, just and expeditious resolution of the merits of the applications.

. . .

41. This Part and the Tribunal rules shall be liberally construed to permit the Tribunal to adopt practices and procedures, including alternatives to traditional adjudicative or adversarial procedures that, in the opinion of the Tribunal, will facilitate fair, just and expeditious resolutions of the merits of the matters before it.

. . .

42 (1) The provisions of the Statutory Powers Procedure Act apply to a proceeding before the Tribunal unless they conflict with a provision of this Act, the regulations or the Tribunal rules. 2006, c. 30, s. 5.

(2) Despite section 32 of the Statutory Powers Procedure Act, this Act, the regulations and the Tribunal rules prevail over the provisions of that Act with which they conflict. 2006, c. 30, s. 5.

. . .

43 (1) The Tribunal may make rules governing the practice and procedure before it. 2006, c. 30, s. 5.

(2) The rules shall ensure that the following requirements are met with respect to any proceeding before the Tribunal:

1. An application that is within the jurisdiction of the Tribunal shall not be finally disposed of without affording the parties an opportunity to make oral submissions in accordance with the rules.

2. An application may not be finally disposed of without written reasons. 2006, c. 30, s. 5.

Same

(3) Without limiting the generality of subsection (1), the Tribunal rules may,

(a) provide for and require the use of hearings or of practices and procedures that are provided for under the *Statutory Powers Procedure Act* or that are alternatives to traditional adjudicative or adversarial procedures;

(b) authorize the Tribunal to,

(i) define or narrow the issues required to dispose of an application and limit the evidence and submissions of the parties on such issues, and

(ii) determine the order in which the issues and evidence in a proceeding will be presented;

. . .

(d) prescribe the stages of its processes at which preliminary, procedural or interlocutory matters will be determined;

. . .

43. (8) Failure on the part of the Tribunal to comply with the practices and procedures required by the rules or the exercise of a discretion under the rules by the Tribunal in a particular manner is not a ground for setting aside a decision of the Tribunal on an application for judicial review or any other form of relief, unless the failure or the exercise of a discretion caused a substantial wrong which affected the final disposition of the matter.

. . .

45.7 (1) Any party to a proceeding before the Tribunal may request that the Tribunal reconsider its decision in accordance with the Tribunal rules. 2006, c. 30, s. 5.

Same

(2) Upon request under subsection (1) or on its own motion, the Tribunal may reconsider its decision in accordance with its rules. 2006, c. 30, s. 5.

. . .

45.8 Subject to section 45.7 of this Act, section 21.1 of the Statutory Powers Procedure Act and the Tribunal rules, a decision of the Tribunal is final and not subject to appeal and shall not be altered or set aside in an application for judicial review or in any other proceeding unless the decision is patently unreasonable.

. . .

45.9 (1) If a settlement of an application made under section 34 or 35 is agreed to in writing and signed by the parties, the settlement is binding on the parties.

(2) If a settlement of an application made under section 34 or 35 is agreed to in writing and signed by the parties, the Tribunal may, on the joint motion of the parties, make an order requiring compliance with the settlement or any part of the settlement.

(3) If a settlement of an application made under section 34 or 35 is agreed to in writing and signed by the parties, a party who believes that another party has contravened the settlement may make an application to the Tribunal for an order under subsection (8),

(a) within six months after the contravention to which the application relates; or

(b) if there was a series of contraventions, within six months after the last contravention in the series.

(4) A person may apply under subsection (3) after the expiry of the time limit under that subsection if the Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.

(5) An application under subsection (3) shall be in a form approved by the Tribunal.

(6) Subject to the Tribunal rules, the parties to an application under subsection (3) are the following:

1. The parties to the settlement.
2. Any other person or the Commission, if they are added as a party by the Tribunal.

(7) Section 37 applies with necessary modifications to an application under subsection (3).

(8) If, on an application under subsection (3), the Tribunal determines that a party has contravened the settlement, the Tribunal may make any order that it considers appropriate to remedy the contravention.

2. HRTO RULES OF PROCEDURE

RULE 1 GENERAL RULES

1.7 In order to provide for the fair, just and expeditious resolution of any matter before it the Tribunal may:

lengthen or shorten any time limit in these Rules;

allow any filing to be amended;

determine and direct the order in which issues in a proceeding, including issues considered by a party or the parties to be preliminary, will be considered and determined;

define and narrow the issues in order to decide an Application;

make or cause to be made an examination of records or other inquiries, as it considers necessary;

determine and direct the order in which evidence will be presented;

limit the evidence or submissions on any issue

…

Form of Proceedings

3.5 The Tribunal may conduct hearings in person, in writing, by telephone, or by other electronic means, as it considers appropriate. However, no Application that is within the jurisdiction of the Tribunal will be finally disposed of without affording the parties an opportunity to make oral submissions in accordance with these Rules.

…

RULE 26 REQUEST FOR RECONSIDERATION

26.1 Any party may request reconsideration of a final decision of the Tribunal within 30 days from the date of the decision.

…

26.5 A Request for Reconsideration will not be granted unless the Tribunal is satisfied that:

there are new facts or evidence that could potentially be determinative of the case and that could not reasonably have been obtained earlier; or

the party seeking reconsideration was entitled to but, through no fault of its own, did not receive notice of the proceeding or a hearing; or

the decision or order which is the subject of the reconsideration request is in conflict with established jurisprudence or Tribunal procedure and the proposed reconsideration involves a matter of general or public importance; or

other factors exist that, in the opinion of the Tribunal, outweigh the public interest in the finality of Tribunal decisions.

26.5.1 A Request for Reconsideration made more than 30 days following the Decision will not be granted unless the Tribunal determines that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.

3. **HRTO PRACTICE DIRECTIONS**

Practice Direction on Recording Hearings

The Human Rights Tribunal of Ontario (the HRTO) has developed the following approach to recording hearings. The procedure outlined below provides general information only. It is not a rule within the meaning of the HRTO's Rules of Procedure. The HRTO may vary the approach to recording hearings where appropriate.

General Practice on Recording

The HRTO does not normally record or transcribe its proceedings, but may record a proceeding at its own discretion.

It has been recognized that transcription and recording of hearings may make proceedings more formal and expensive in administrative tribunals. Recordings may lengthen proceedings if parties ask to replay evidence. Adjudicators often travel and hold hearings in various locations without staff to assist them, so equipment problems may arise and it is impossible to guarantee a quality recording. Therefore, many tribunals including the HRTO do not record or transcribe their proceedings.

Recording as Accommodation for *Code*-related Needs

The HRTO will record a hearing when it is necessary to accommodate the needs of the panel, a party or a representative under the Human Rights Code. Please contact the Registrar as soon as possible if you require accommodation.

Self-recording and Transcription

If a party wishes to record a hearing to supplement his or her notes, he or she must get the permission of the panel and provide a copy of any recording or transcription to the other parties and the HRTO (on a USB device or CD). Such recordings or transcriptions do not form part of the HRTO's record of proceedings, including the record filed in court in respect of any application for judicial review. The recording or transcription may not be publicized or used for any purpose other than in the proceeding before the Tribunal

Use of a Court Reporter

The HRTO may permit a party to have a court reporter record the hearing at the party's expense, upon request and at its discretion. This practice is discouraged because court reporters may lead to more formality, cause delay and many parties lack the financial resources

to obtain a court reporter or order a transcript. When a court reporter is permitted, to ensure that all parties and the tribunal member have the ability to access the transcript, the party that has obtained the court reporter must normally have transcripts produced and provide copies to the Tribunal and the other parties at its own expense. The HRTO may waive this requirement, or make directions about the date the transcript must be produced. The official transcript will normally be considered part of the HRTO's record of proceedings and be included in the record filed in court in respect of any application for judicial review.

B E T W E E N:			Court File No. 699/22
Kelly Lynn Donovan Applicant	v.	**Human Rights Tribunal of Ontario et. al.** Respondents	
			ONTARIO **SUPERIOR COURT OF JUSTICE** **(DIVISIONAL COURT)**
			FACTUM OF THE RESPONDENT **HUMAN RIGHTS TRIBUNAL** **OF ONTARIO**
			Tribunals Ontario **Legal Services** 15 Grosvenor Street, Ground Floor Toronto, ON., M7A 2G6 Fax: 416-314-2379 **Brian A. Blumenthal, LSO# 34571P** Tel: 416-709-6968 E-mail: Brian.Blumenthal@ontario.ca Lawyer for the Respondent Human Rights Tribunal of Ontario