The Guardians of the Human Rights Tribunal of Ontario

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The Human Rights Tribunal of Ontario ("Tribunal") is in crisis. The problem is structural. While the Tribunal boasts a "simplified dispute resolution" model, its approach to dispute resolution is borrowed from the former Ontario Human Rights Commission ("the former Commission"). Both define mediation as a matter of interests and timing. Both use fact-finding as an extension of Alternative Dispute Resolution ("ADR"). There is a twist, of course. The Tribunal conducts mediation with adjudicators. It intervenes as a neutral third party and its fact-finding process pits self-represented applicants against respondents with counsel. The result is a mirror image of the former Commission. While both systems confront bottlenecks at fact finding, the Tribunal becomes a forum where power relations between parties are managed by themselves. This imbalance of power undermines the potential for settlement and creates a blueprint for an applicant's alienation. This article suggests that the Tribunal needs to adopt a new approach to ADR, abandoning a mechanical response where the default setting for complex disputes is fact finding. In short, it is argued that the Tribunal must develop interventions where ADR is tailored to an understanding of the dispute at the outset.

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Le Tribunal des droits de la personne de l'Ontario (le « Tribunal ») est en crise. Le problème est structurel. Bien qu'il se réclame d'une « procédure simplifiée de règlement des différends », le Tribunal emprunte son approche à cet égard à celle de l'ancienne Commission ontarienne des droits de la personne (la « Commission »). Les deux entités définissent la médiation comme une question tributaire des intérêts en cause et du calendrier, et utilisent la recherche des faits comme une extension du mode substitutif de résolution des différends. Il y a, bien sûr, une différence entre les deux puisque le Tribunal a recours à des arbitres pour mener la médiation. Il intervient en tant que tiers neutre, et au cours du processus de recherche des faits, les requérants autoreprésentés se retrouvent opposés aux défendeurs assistés d'un avocat, comme c'était le cas de la Commission. Bien que les deux entités se heurtent à des blocages au moment de la recherche des faits, le Tribunal devient, quant à lui, un forum où les parties gèrent entre elles leurs relations de pouvoir. Ce déséquilibre entre les pouvoirs compromet les possibilités de règlement et crée une situation propice à la mise à l'écart ou à l'exclusion du requérant. L'article suggère que le Tribunal devrait adopter une nouvelle approche en matière de mode substitutif de règlement des différends et, ce faisant, abandonner une procédure rigide où la recherche des faits est le mécanisme par défaut de règlement des affaires complexes. En bref, le Tribunal devrait mettre en place des interventions où le mode substitutif de règlement des différends est modulé en fonction d'une compréhension des affaires dès le départ.

> *People wait up to five years to have a complaint heard and that is not going to change just by throwing money at the Commission. If you've got a broken engine, you don't fix it by putting more gasoline in it. First, you need to fix the engine and then you need to make sure it has enough gas.*[1]
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> — Attorney General Michael Bryant

I. Introduction

On June 30, 2008, the Ontario Human Rights Commission ("the former Commission") closed its doors.[2] A Leviathan was slayed. It was a time for celebration.[3] Parties to a human rights dispute were offered the ability to control the litigation before a new Human Rights Tribunal of Ontario ("Tribunal"), where a simplified dispute resolution system promised to resolve disputes efficiently. Today, it is difficult to tell the difference. Like the former Commission, outcomes at the Tribunal are defined by excessive delay.[4] Even the rhetoric has a familiar ring as Tribunal advocates blame the government for chronic understaffing.[5] They argue that a Conservative government's reductions in Tribunal staff have caused an inventory of applications to mushroom out of control.[6] But this perspective

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1 Attorney General Michael Bryant, "November 10, 2006 - Media Coverage from the Nov. 9, 2006 Bill 107 News Conference" (10 November 2006), at 1000, online: <aodaalliance.org/ontario-human-rights/november-10-2006-media-coverage-from-the-november-9-2006-bill-107-news-conference/> [perma.cc/6JY7-AHLB].

2 Tiffany Tsun, "Overhauling the Ontario Human Rights System: Recent Developments in Case Law and Legislative Reform" (2009) 67:1 UT Fac L Rev 115 at 118.

3 Mary Cornish et al, "Transitioning to Ontario's New Human Rights System: What Do You Need to Know?" Part 1 Overview (2008), online: <cavalluzzo.com/resources/publications/details/transitioning-to-ontario's-new-human-rights-system-what-do-you-need-to-know-part-i> [perma.cc/DF75-RSJC]; Ontario, Ministry of Citizenship, Pol'y Services Branch, Achieving Equality: A Report on Human Rights Reform (Toronto: Queen's Printer, 1992) (Chair: Mary Cornish) at 95 ["Cornish Report"].

4 Tribunal Watch Ontario, ''Statement of Concern: Human Rights Tribunals Ontario" (May 2022) at 1, online (pdf): <tribunalwatch.ca/wp-content/uploads/2022/05/Statement-of-Concern-about-the-HRTO-May-2022.pdf> [perma.cc/5R8F-59XF] ["Tribunal Watch 2022"].

5 It is reported that the HRTO had a total of 22 vice chairs in 2020 as opposed to 57 in 2018. See Tribunal Watch Ontario, ''Statement of Concern about Tribunals Ontario" at 9, online (pdf): <tribunalwatch.ca/wp-content/uploads/2020/05/statement-of-concern-may-14.pdf> [perma.cc/ZX3W-TSZW].

6 The criticism of staffing levels has parallels to the former Commission, which was chronically understaffed. Shelagh Day noted that "until [1986], the Ontario Human Rights Commission had a staff of 65 and a budget less than the Ontario government spent at the same time on moose management." See Tribunal Watch 2022 *supra* note 4 at 1; Also see Shelagh Day, "Impediments to Achieving Equality" in *Equality and Judicial Neutrality,* Sheilah L Martin and Kathleen E Mahoney, eds, (Toronto: Carswell, 1987) 402 at 406.

overlooks an inconvenient truth, for two-thirds of the Tribunal's inventory was stockpiled before the election of a Conservative government on June 6, 2018, and precedes any reduction in staff.[7]

Hauntingly, Ontario has once again reached a point where it is prudent to "check the engine" of its human rights system, and so the natural question arises: does the Tribunal have a flaw in its design?[8] This article unpacks the design of the Tribunal's simplified dispute resolution model, excavating its approach to dispute resolution and unearthing its tactics to resolve disputes. This article argues that, while the Tribunal is often described as a "rights-based model" that offers parties the autonomy to control their litigation, it still retains the spirit of the former Commission — creating a forum which emphasizes dialogue and resolution over litigation and enforcement.[9] While the dispute resolution system is streamlined, given the addition of a robust preliminary/summary judgement process and the elimination of an investigation into probable cause, the Tribunal adopts a familiar formula. Like the former Commission, the Tribunal offers an interest-based mediation early on and uses fact-finding as an extension of Alternative Dispute Resolution ("ADR") to bring about negotiated settlement.[10] The impetus for settlement is enhanced through a design which pivots around a hearing, not an investigation.[11] The processes of mediation and fact-finding are presided over by experts in the field, which lends a persuasive appeal to authority.[12]

However, this article argues that while this design is grounded in well-established ADR principles, the approach is not effective for human rights disputes. The problem lies in the formula. An interest-based model is not well-suited to complex human rights disputes, especially when there is an imbalance of power between parties. The result is a system that mirrors the

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7 *Cf* Graham Slaughter, "Doug Ford's Progressive Conservatives win majority in Ontario" (7 June 2018), online: <globalnews.ca/news/4260716/doug-ford-pcs-win-majority-government/> [perma.cc/ETJ9-HN4H]; Bryant, *supra* note 1; *infra* note 67.

8 Bryant, *supra* note 1.

9 Walter Surma Tarnopolsky, "The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation" (1968) 46 Can Bar Rev 565 at 572-73.

10 Ontario, MAG, Report of The Ontario Human Rights Review 2012 (Toronto: Queen's Printer, 2012) (by Andrew Pinto) at 38–66 ["Pinto"].

11 This observation is based on the Author's experience at the Tribunal and review of the Tribunal's structure. Pinto also supports this view through his description of the nature of adjudication playing an "active" role in the Tribunal. See *ibid* at 66–68.

12 *Ibid* at 61–66.

experience of the former Commission, where the default setting for complex cases with protracted parties is fact-finding. While the Tribunal uses fact-finding as a form of ADR, the fairness of this process is undermined by a forum where self-represented applicants square off against respondents with counsel. The effects of the new design are unpacked through a descriptive analysis of Tribunal outcomes, which illustrates that Tribunal settlements negotiated during a hearing are resolved where one of the parties is at a distinct disadvantage.[13] Further, while the Tribunal equips its adjudicators with inquisitorial powers, these powers do not offset the asymmetric power differential between parties because the adjudicators must remain impartial throughout the proceedings.[14] The result is a system where the established power relations between parties manage themselves.[15]

Still, the purpose of this article is not to advocate for a return to the former Commission. The deficits of the previous administration are accepted.[16] But this does not mean that Ontario's experiment with direct access is a resounding success. On the contrary, the maintenance of the current model — even with a restoration of earlier staffing levels — will still adversely affect self-represented applicants. While a new blueprint is beyond the scope of this article, it argues that, as a first step, the Tribunal must abandon its current approach to dispute resolution. This approach defines mediation solely as a matter of interests and early intervention, and relies on fact-finding as a vehicle to challenge perspectives. The Tribunal would benefit from creating a system that evaluates disputes at the outset, from the perspective of ease or difficulty of resolution, and intervening with a diversified approach. Implicit within this recommendation is the need to develop a dispute resolution model which staggers mediation, before and after production, and tailors the type of ADR interventions to an understanding of the dispute presented in the application.

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13 For the full data set used for the analysis of cases, see Stephen Flaherty, "Does the Ontario Human Rights Tribunal have a Reasonable Prospect of Success?" (2022) 35 (2) CJALP 231 Codification of Cases, online: <humanrightstrends.com> [perma.cc/V2WP-TLYH].

14 Pinto, *supra* note 10 at 67.

15 Douglas Litowitz, "Foucault on Law: Modernity as Negative Utopia" (1995-6) 21 Queen's LJ 1 at 8–10.

16 Cornish Report, *supra* note 3 at 95; PAN Gupta, "Reconsidering Bhadauria: A Re-examination of the Roles of the Ontario Human Rights Commission and the Courts in the Fight against Discrimination" (LLM Thesis, UT Fac L 1993) [unpublished] ch 1–3.

II. The Iron Hand in the Velvet Glove Reconfigured

When the Ontario human rights system was first conceived, it was predicated on a philosophy known as the "iron hand in the velvet glove."[17] This is an approach which blends a sociological understanding of discrimination with legal process, incrementally increasing the pressure to settle by nudging complaints slowly towards the falls of litigation. It is grounded in the understanding that right-minded individuals, who are offered an appreciation of the relevant issues and facts, will eventually make the right decision.[18] Professor Tarnopolsky explains:

> To put it more bluntly, human rights legislation is a recognition that it is not only bigots who discriminate, but fine upright, gentlemanly members of society as well. It is not so much out of hatred as out of discomfort or inconvenience, or out of fear of loss of business, that most people discriminate. As far as possible, these people should be given an opportunity to re-assess their attitudes, and to reform themselves, after being given the opportunity of seeing how much more severe is the injury to the dignity and economic well-being of others than their own loss of comfort or convenience. However, if persuasion and conciliation fails, then the law must be upheld, and the law requires equality of access and equality of opportunity. This is the 'iron hand in the velvet glove.'[19]

The former Commission expressed this principle in a design which filtered complaints through a series of processes moving from advice to early intervention and mediation, then to investigation and conciliation, and finally to litigation.[20] At the conclusion of each resolution process, the former Commission intervened to discuss settlement and encourage introspection.[21] Litigation was reserved for those stubborn few who refused to act reasonably.[22]

The Tribunal simplifies this dispute resolution model, eliminating an elaborate government bureaucracy which intervened into human rights disputes, controlling the disposition of complaints as matters of community interest. The effects are striking. The former Commission is no longer a

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17 Tarnopolsky, *supra* note 9 at 572–73.
18 *Ibid.*
19 *Ibid.*
20 Tsun, *supra* note 2 at 121; Rosanna L Langer, "Law and Social Meaning: Defining Rights and Wrongs through Administrative Processing" (PHD Thesis, Osgoode Hall Law School 2003) [unpublished] at 124–33.
21 Tarnopolsky, *supra* note 9 at 572–73.
22 *Ibid.*

centralized hub which has the authority to accept, resolve, investigate and litigate complaints. Forms are found online, and parties are offered "direct access" to the Tribunal.[23] Decisions to litigate are not determined through an investigation into probable cause. Instead, the Tribunal offers four discrete pathways to litigation, all of which can be final. Applications are either deferred (because they are better handled in another jurisdiction), ejected on a preliminary or summary basis (because they lack the requisite particulars to warrant Tribunal jurisdiction), mediated (where the parties provide their consent), or they proceed directly to a hearing.[24]

It is a bold strategy which is designed to increase efficiency. The incremental approach of gradually ratcheting-up pressure to settle is replaced with two points of contact prior to a hearing: mediation and mediation-adjudication. Mediation is offered within 150 days of an application being filed, as early intervention is known to increase the potential for settlement given that legal costs and emotional investment are low.[25] If this system is bypassed or breaks down, the Tribunal attempts to set a date for a hearing, ideally within 180 days of an application being filed.[26] The system is spring-loaded. The early scheduling of a hearing triggers disclosure obligations and an earnest preparation, maintaining pressure on the parties.[27] This enables the Tribunal to convert a first day of hearing into mediation-adjudication, where parties' consent to the adjudicator doubling as a mediator, with the understanding that parties who prepare for a hearing can be more reasonable given a greater awareness of the frailties of their respective cases.[28]

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[23] Cornish et al, *supra* note 3 at 1.

[24] Human Rights Tribunal of Ontario, *Rules of Procedure* (30 April 2014), r 14–15, 19A, 21; *Ontario Human Rights Code*, RSO 1990, c H19, ss 40, 451 ["*Code*"]. Also see Pinto, *supra* note 10 at 38–66 for a good overview of the Tribunal's processes.

[25] The 150 days target is found in HRTO Annual Reports. See, for example, Tribunals Ontario, "Social Justice Tribunals Ontario 2015-2016 Annual Report" (31 March 2016) at 28, online: <tribunalsontario.ca/documents/sjto/2015-16%20Annual%20Report.html> [perma.cc/DPE4-YUF8] ["SJTO, 2015-2016 Annual Report"]; Tribunals Ontario, "Social Justice Tribunals Ontario 2017-2018 Annual Report" (2018) at 25, online: <tribunalsontario.ca/documents/sjto/2017-18%20Annual%20Report.html> [perma.cc/75WV-4BSB] ["SJTO, 2017-2018 Annual Report"]; Nancy H Rogers et al, *Designing Systems and Processes for Managing Disputes* (New York: Walters Kluwer Law & Business, 2013) at 127–28.

[26] Tribunals Ontario, "Social Justice Tribunals Ontario 2014–2015 Annual Report (2015) at 19–20, online: <tribunalsontario.ca/documents/sjto/2014-15%20Annual%20Report.html#hrto10> [perma.cc/KB9X-CFTZ] ["SJTO, 2014–2015 Annual Report"].

[27] Pinto, *supra* note 10 at 36; *Code, supra* note 24, r 16–17.

[28] The rationale is found in Lon L Fuller, "*Panel Discussion: The Role of the Lawyer in Labor Relations*" [1954] ABA Sec Lab Rel L Proc 23 at 23 ["Fuller, Panel Discussion"].

Nevertheless, the principle of the "iron hand in the velvet glove" is not abandoned altogether.[29] While the Tribunal employs an abbreviated dispute resolution system which eliminates an investigation into probable cause, it retains the process of looping back to discuss settlement with one important adjustment. The Tribunal limits the function of looping back to discuss settlement within the context of a hearing, focusing on complaints that contain the necessary particulars to warrant Tribunal jurisdiction. The irony here is that the Tribunal conducts its merit hearings much like the former Commission conducted its investigations. The objective in both cases is not to declare a winner and loser, but rather to use the facts to encourage settlement.[30] This is illustrated in the small number of merit awards released each year. Even at its peak, the Tribunal released, on average, 110 merit awards per year.[31] This is less than 3% of its caseload.[32] It is comparable with the former Commission, which advanced less than 4% of all complaints to Boards of Inquiry.[33]

These parallels underscore an important similarity between the two systems that is often obscured by a desire to describe the former Commission as an inquisitorial system while describing the Tribunal as a rights-based model. This is not accurate.[34] The Tribunal pivots around a cadre of adjudicators that intervene as inquisitors rather than as "neutral arbiters". Their role is clearly modelled on the former Commission investigator. Like investigators, they are masters of their own procedure and have the authority to decide the order, and in fact, the substance of the evidence, as well as the right to ask any question they deem necessary.[35] This format offers them the ability to create efficient proceedings and incisively cut to the heart of the matter, creating dramatic moments upon which to offer parties respites for reflection. It mirrors the process of the former

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29 Tarnopolsky, *supra* note 9 at 572–73.

30 Pinto, *supra* note 10 at 61.

31 Tribunal Watch 2022, *supra* note 4 at 1.

32 The 3% was calculated by dividing 110 merit award cases (on average per year) by the average number of applications received (3798) as reported in JSTO Annual reports of 2015–2016, 2016–2017 and 2017–2018. Tribunal Watch 2022, *supra* note 4 at 2; SJTO, 2017–2018 Annual Report *supra* note 25 at 25.

33 Langer, *supra* note 20 at 100; Kaye Joachim, "Reform of the Ontario Human Rights Commission" (2000) 13 CJALP 51 at 73. Joachim reports that through the mid 1990's the former Commission referred fewer than 2% of its complaints for Boards of Inquiry.

34 J Manuel Mendelzon, "Rights, Remedies and Rhetoric: On a Direct Access Model for Human Rights Complaints in Ontario" (2008) 6:1 J & L & Equality 51 at 61–65.

35 Pinto, *supra* note 10 at 66–67.

Commission investigators, who used their discovery of an important fact as an impetus to initiate settlement discussions.[36]

The Tribunal attempts to improve upon the former Commission process by changing the forum for the conversation. Tribunal settlement discussions occur during a hearing, where a judgement is pending.[37] This change demands that the adjudicator, who engages the parties, acts impartially to protect the integrity of the hearing.[38] The requirement of impartiality underscores a fundamental difference in approach. The former Commission asked its investigators to wear "two hats," reconciling a duty to advocate for complainants while ensuring that they acted in the public interest.[39] These dual loyalties proved to be too complicated. Advocacy often blurred the former Commission's capacity for impartiality and caused arbitrary investigation findings.[40] Worse, there was no easy way to reconcile public and private interests when they diverged, other than the interests of the community trumping those of the individual.[41] In contrast, while a Tribunal adjudicator may have inquisitorial powers, they are not intended to be used to advocate for the applicant.[42]

The Tribunal sits at the apex of the Direct Access Model, which erases the overlapping duties of the former Commission through a tripartite structure that redistributes the functions of public and private advocacy and dispute resolution between three independent institutions.[43] Under this model, the Human Rights Legal Support Centre ("Legal Support Centre") advises and represents applicants, while the Commission focuses exclusively on matters of public interest and the Tribunal houses the dispute

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36 A critique of this process is found in Tarnopolsky *supra* note 9 at 577. A description of the process is also found in Philip Bryden & William Black, "Mediation as a Tool for Resolving Human Right Disputes: An Evaluation of the BC Human Rights Commission's Early Mediation Project" (2004) 37 UBC L Rev 73 at para 10. My understanding is also based on my experience as a former Commission investigator.

37 Tribunals Ontario, "Application and hearing process" (last visited 1 January 2025) at no 6, online: <tribunalsontario.ca/hrto/application-and-hearing-process/#p6during> [perma.cc/6SX6-PSC7].

38 Pinto, *supra* note 10 at 66–67.

39 Gupta, *supra* note 16 at 43–50.

40 *Ibid*.

41 See *Johnson* v *Hamilton (City),* [1991] OJ No 1077 and commentary in Langer, *supra* note 20 at 84, n 243.

42 Pinto, *supra* note 10 at 66–67.

43 Tsun, *supra* note 2 at 118.

resolution system.[44] This design attempts to overcome complaints, which undermined the legitimacy of the former Commission, by separating advocacy from dispute resolution and divorcing public and private interests.

III. A Question of Two Hats

Nevertheless, the Tribunal clearly returns to a principle that was originally intended for the former Commission, insisting that Tribunal mediators/adjudicators possess a requisite expertise in human rights. The return to this principle represents a lesson learned from 19th and 20th century Canadian jurisprudence, where appeals to judicial independence and neutrality resulted in recycled dominant societal beliefs.[45] The recognition of this experience provided the impetus to manage human rights disputes through an administrative agency, with the objective that staff possess a demonstrated expertise in the subject matter. This principle is reiterated in the eligibility criteria set out at s. 32(3) of the amended *Code,* which requires eligible candidates for Tribunal appointments to possess an expertise in human rights, a capacity for impartiality and an aptitude for Alternative Dispute Resolution ("ADR").[46] The inclusion of this minimum standard in the *Code* helps circumvent a criticism frequently leveled against former Commission staff for lacking expertise.[47] To enhance this objective, Tribunal appointments are made through Orders in Council which requires that the biographies of these appointments be published for transparency.[48]

The Direct Access Model appeals to the familiar concept of the Platonic Guardian. That is, a cadre of experts who are specially chosen to selflessly

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[44] Fay Faraday, Kate Hughes & Jo-Anne Pickel, "Enforcing Human Rights: Choices and Strategies Under the New Human Rights Code" (5 February 2007) at 1–3, online (pdf): <cavalluzzo.com/docs/default-source/publications/2006-02-05-enforcing-human-rights-choices-and-strategies-under-the-new-human-rights-code-(kate-hughes)---human-rights.pdf?sfvrsn=3f155d5_2> [perma.cc/5878-NRVY].

[45] Gupta provides a snapshot of Canadian judges' unfortunate record of handling human rights cases in the decades prior to the consolidation of the *Code* in 1961. Gupta, *supra* note 16 at 1–5.

[46] *Code, supra* note 24, s 32.

[47] Gupta, *supra* note 16 at 49–50.

[48] Stephen Flaherty, "Does the Ontario Human Rights Tribunal have a Reasonable Prospect of Success?" 35 CJALP 231 at 236 ["Flaherty, Reasonable Prospect"].

lead individuals to the truth given their education, training and experience.[49] There is a twist, however, as Tribunal staff are charged with the express responsibility of helping parties to negotiate resolutions. They are Guardians, not in the Platonic sense, but as redefined by legal scholar Lon Fuller — who is often regarded as the parent of ADR. In the mid-1950s, Fuller invited lawyers to abandon their roles as "zealous advocates" and become "counsellors" who assisted parties to resolve their problems through negotiation.[50] It was a radical proposition. Fuller argued that lawyers needed to distance themselves from client interests, adopting an objective perspective, which was guided by an understanding of the facts and the law.[51] In retrospect, it has obvious parallels with the former Commission and critics responded in a similar fashion, underscoring the competing roles of advocacy and impartiality, and the divergence between public and private interests.[52] But the Direct Access Model escapes this criticism because its adjudicators are not advocates. Rather, they are neutrals who, like lawyers, are trained to appreciate a problem from competing perspectives while foreseeing the likely outcome at hearings.[53]

There is just one problem: Tribunal staff still wear two hats. Although the Direct Access Model successfully eliminates the overlapping roles of advocate and decision maker, it creates a combination of adjudicator and mediator. This is intended to create certain efficiencies, such as staff fulfilling multiple roles, and also has its origins in the former Commission. Part-time adjudicators preside over preliminary and summary judgement processes and intervene as mediators much like the former Commission mediators who administered the s. 34 preliminary/summary objections in addition to their mediation responsibilities.[54] Full-time staff model their intervention on former Commission investigators, using fact-finding as a

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[49] The reference to truth is based on the writings of Plato, who believed that there was an objective immutable truth which existed independently of the world around us. Plato argues in *The Republic* that the state should be governed by a class of individuals born with a superior intellect who are specially educated to lead society to Truth. Plato, *The Republic,* 2nd ed trans Henry Desmond Pritchard Lee (London: Penguin Books, 1974) at 520 b.

[50] Lon L Fuller, "Philosophy for the Practicing Lawyer" in *The Principles of Social Order: Selected Essays of Lon L Fuller,* Kenneth I Winston ed (Durham, NC: Duke University Press, 1981) at 288–89.

[51] *Ibid.*

[52] David Luban, "Rediscovering Fuller's Legal Ethics" in Willem J Witteveen & Wibren van der Burg, eds, *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press, 1999) 223–24.

[53] Pinto, *supra* note 10 at 49.

[54] Ontario Human Rights Commission, "Annual Report 2002-2003: Mediation and Investigation Branch" (last visited 15 March, 2025), online: <www3.ohrc.on.ca> [perma.cc/W78A-U4ZJ]

process to negotiate settlement, short-circuiting the need for a prolonged hearing. But this combination creates its own complications, for an adjudicator who mediates carries a ready-made appeal to authority which could sway parties, especially if they are self-represented.

The Tribunal attempts to overcome this problem with an interest-based mediation program, where Tribunal mediators separate the parties from the problem — gently steering the conversation toward resolution while generating options for settlement.[55] This format actively mutes Tribunal expertise, for the objective is not to render an evaluation. Rather, it invites the mediator to use their catalogue of other known files to educate parties on the obstacles at a hearing and provide a range of possible options for settlement given their understanding of similar disputes.[56] The Tribunal's mediation format reinforces these objectives through its schedule which deliberately ensures that mediation occurs prior to disclosure. This discourages parties from getting bogged down in details and ensures that the mediator has a partial perspective on the dispute, which is underwritten by a review of the pleadings and an attached generic list of documents.[57] A half-day time slot for mediation compliments these objectives because it reinforces the need for parties to focus on resolution, as there is little time for a discussion of the problem and there are no other opportunities for settlement prior to a hearing.

While both the former Commission and the Tribunal use fact-finding as a form of ADR, the Tribunal's model has two important ingredients that were unavailable to the former Commission. First, the settlement discussions occur within the context of a hearing which gives them a sense of urgency as an award is pending. Second, the facts that provide adjudicators with a reason for raising the possibility of settlement unfold before all parties at the same time, during the hearing. This escapes the criticism levelled at the former Commission, where investigators who initiated settlement discussions on the footsteps of "new information" were regarded as biased.[58] At the same time, the Tribunal process has obvious

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55 Roger Fisher, William Ury & Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In*, 2nd ed (Toronto, ON: Penguin Books, 1991) 76–77.

56 *Ibid.*

57 HRTO, "A Guide to Mediation at the Human Rights Tribunal of Ontario" at 2, online: <tribunalsontario.ca/documents/hrto/Guides/HRTO_A_guide_to_mediation.html> [perma.cc/MH5S-AY79]; Pinto, *supra* note 10 at 60-62.

58 Tarnopolsky, *supra* note 9 at 577.

constraints because settlement discussions occur within the context of a hearing. If settlement discussions break down, adjudicators must resume the hearing, which necessitates that they maintain an appearance of impartiality throughout the proceeding, and the heavy lifting of settlement is delegated to the parties.[59]

This approach is reminiscent of labour arbitration, where arbitrators frequently toggle between mediation and adjudication. It is not surprising. Labour relations and human rights share common objectives, as both emphasize a need to preserve relationships, which creates a preference for win/win solutions that reinforce the mutual benefits of the relationship between parties.[60] The intervention of an expert reinforces these objectives because it offers an appeal to authority and encourages the parties to be practical.[61]

IV. An Imperfect Analogy

Labour arbitration differs from human rights disputes in several important respects. To begin, the parties to a labour dispute are typically represented by counsel who understand the legal concepts and use the same language as the arbitrator, ensuring that everyone at the table shares an understanding of the legal parameters of the dispute. This is not the case at the Tribunal. Over 30% of applicants attend Tribunal mediations as self-represented parties where they confront respondents with counsel 87% of the time.[62] The situation is even worse on a first day of hearing, where over half the applicants appear as self-represented parties and confront respondent counsel most of the time.[63] This is a significant difference because the asymmetric power differential between parties can scuttle the

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[59] Fisher, *supra* note 55 at 99–102.

[60] These objectives are emphasized by various Human Rights and Labour related bodies. See e.g. Ontario, Ontario Labour Relations Board, *Mandate* (2013) at 1, online (pdf): <olrb.gov.on.ca/Documents/Accountability/Mandate-EN.pdf> [perma.cc/3R32-HHF4]; Employment and Social Development Canada, "Information on LABOUR STANDARDS: UNJUST DISMISSAL – MEDIATION PROCESS" (2018) at 2, online (pdf): <epe.lac-bac.gc.ca/100/201/301/weekly_acquisitions_list-ef/2018/18-30/publications.gc.ca/collections/collection_2018/edsc-esdc/Em7-1-8-1-2018-eng.pdf> [perma.cc/B75L-DTYN].

[61] Lon L Fuller, "Mediation—Its Forms and Function" (1971) 44 S Cal Reve 305 at 308 ["Fuller, Mediation"].

[62] The numbers are consistent for three years from 2015–2016 to 2017–2018 inclusive. See SJTO, 2017–2018 Annual Report, *supra* note 25 at 25.

[63] *Ibid* at 28; Pinto *supra* note 10 at 45.

potential for settlement. Professor Ury refers to it as a "power paradox."[64] He explains that it does not matter whether the more powerful party shows their strength or acts magnanimously because the weaker party can reject reasonable offers of settlement either out of distrust or an affront to dignity.[65]

This is the unfortunate by-product of the Direct Access Model design. While the Direct Access Model provides applicants with a Legal Support Centre, from which applicants can seek advice and representation, the Legal Support Centre is not intended to provide all services to all applicants.[66] It operates on a fixed budget which requires the Legal Support Centre to allocate financial resources prudently, presumably to where they will have the most impact by offering the greatest good to the greatest number.[67] To achieve this objective, the Legal Support Centre evaluates prospective applicants in terms of social and economic need and the likelihood of success, vetting applicants prior to granting them assistance.[68] Andrew Pinto underscores this point in his analysis of the Legal Support Centre's support for applicants at merit hearings. He describes a system which suggests that the Legal Support Centre rationalizes its resources in such a way as to concentrate them on the applications which have the best chance of success:

> The Centre represented 14% of all applicants in the 143 cases. The Tribunal found discrimination in 50 cases (35%); and no discrimination in 93 cases (65%). Out of the 50 cases in which the applicant won, the Centre represented 34% of applicants; while out of the 93 cases in which the applicant was unsuccessful, the Centre represented 3% of applicants.
>
> What do these statistics mean? I could draw the conclusion that an applicant is more likely to lose because the Centre has refused the case, and that had the Centre provided representation, the case would have been won; however, I could also draw the conclusion-and I prefer this approach-that the Centre is selecting meritorious cases for full hearing and declining involvement in the rest. Indeed, the Centre explicitly states that its role in a publicly funded system is to provide representation to applicants that proper advice and direct them out of the human rights system.[69]

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64 William Ury, *Getting Past No Negotiating in Difficult Situations* (New York, Bantam Books, 1993) at 131–32.

65 Ibid.

66 Pinto, *supra* note 10 at 89. For a detailed discussion of how these services are broken down see Flaherty, Reasonable Prospect, *supra* note 48 at 239.

67 *Code, supra* note 24, s 45.12.

68 HRLSC: Human Rights Legal Support Centre, "Eligibility Criteria" (last visited 11 August 2020), online: <hrlsc.on.ca/eligibility-criteria/> [perma.cc/8VYC-W4DZ].

69 Pinto, *supra* note 10 at 107–08.

If Pinto is right, applications where the merits are unclear are more likely to proceed to mediation and a first day of hearing with self-represented applicants, where the power paradox can flourish.[70]

The use of an interest-based negotiation model complicates this problem because interest-based negotiations work best where the parties are engaged in a long-term relationship and recognize the mutual benefits of their interdependency.[71] These criteria create an "internal pull", where parties to a dispute are encouraged to search for practical solutions to a problem intended to preserve the mutual benefits of their relationship. But there is no guarantee that the parties to a human rights dispute are either engaged in a long-standing relationship, or even if they are, that they recognize the mutual benefits of their relationship.[72] Some human rights disputes, such as those applications involving a failure to hire or a denial of service, involve the failure to form a relationship, which erases the applicability of either criteria. Some human rights disputes turn on matters of identity, where perceptions of events are triggered by past emotional trauma, creating an emotional quality where disputes can quickly devolve into moral claims of right and wrong.[73]

These problems are likely more pronounced at the Tribunal's mediation-adjudication process, which is undermined by a problematic premise. This process assumes that parties who prepare for a hearing are more amenable to settlement because the parties are in a better position to appreciate the frailties of their respective cases. This may be true in instances where the parties to a dispute have legal representation. But parties who are self-represented lack the education, training and experience to properly evaluate the likelihood of success. Fuller illustrates this point when he draws an analogy between a labour lawyer and a labour relations professional:

> From the first year of law school on, the lawyer has been trained to look at both sides of the controversy. Even as a partisan advocate he must constantly try to see the case from the viewpoint of his opponent; if he fails in this he will be confronted with arguments for which he is unprepared. When a labor dispute is submitted to

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70 This sounds very similar to the former Commission, which was accused of siphoning off cases purely on their chances of success. See Gupta, *supra* note 16 at 54.

71 Fuller, Mediation, *supra* note 61 at 308–09.

72 Stephen Flaherty, "The Ontario Human Rights Tribunal under Bill 107: Truth or Dare? The move from Paternalism to Self-Regulation with Important Implications for Alternative Dispute Resolution" [unpublished, Osgoode Hall, 2016] at 73.

73 Karen Schucher, "Pathways to 'The Iron Hand in the Velvet Glove': Historical Underpinnings of the Ontario Human Rights Commission as Law Enforcer" (2014) 18 CLELJ at 80.

> arbitration after the evidence is all in, and the arguments on both sides have been heard, I do not think there is likely to be a very great difference between the reaction of the lawyer and layman, assuming each has an equal experience in labor relations. *But I think the lawyer is much more apt to be able to anticipate how the case will look after it has been argued* [emphasis added].[74]

Self-represented applicants at the Tribunal are even more disadvantaged. They are outsiders to the legal forum within which they are asked to engage. It is 'fanciful' to expect that they can assess the respective outcome of their application given their inexperience.[75]

The Tribunal does not overcome these problems with its appeal to expertise. In fact, the Tribunal's format for the selection of adjudicators and mediators undermines this appeal. Unlike labour arbitration, parties to a human rights dispute do not choose Tribunal mediators/adjudicators given an understanding of their experience and skills.[76] Tribunal staff are appointed, and their backgrounds are unknown to the parties.[77] This is especially true for the self-represented applicant. As a result, Tribunal staff must earn the parties' trust during the settlement discussion. This is fraught with difficulty because their expertise is muted by the need to protect party agency. While experts can offer an educated guess as to the outcome or options for resolution based on their understanding of similar disputes, they neither have the time nor the ability to unpack assumptions, as mediation is scheduled for a half-day session before disclosure has occurred.

Thus, despite the structural changes to the simplified dispute resolution model, the Tribunal replicates the experience of the former Commission, as

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74 Fuller, Panel Discussion *supra* note 28 at 23.

75 Dr. Groarke makes a similar point about self-represented parties at the Canadian Human Rights Tribunal after the Supreme Court decided the *Canadian Human Rights Act*, RSC, 1985, c H6 could not be interpreted to award legal costs in *Canada (Canadian Human Rights Commission) v Canada (AG),* [2011] 3 SCR 471. Dr. Paul Groarke, "*Canadian Human Rights Commission v Canada (AG)*: SCC Decision Shapes Dim Reality for Human Rights Complainants" The Court (30 October 2011), online: <thecourt.ca/canadian-human-rights-commission-v-canada-ag-scc-decision-shapes-dim-reality-for-human-rights-complainants/> [perma.cc/U9AT-NCXP].

76 Ontario *Labour Relations Act*, 1995, SO 1995 C1 Sch A, s 48(4)–(5).

77 For further details on staff independence and appointment, see e.g. Tribunals Ontario, "Appointees" (last visited 1 January 2025) online: <tribunalsontario.ca/en/about/appointees/#process> [perma.cc/985K-STKW]; Human Rights Tribunal of Ontario, "Guide to Preparing for a Hearing before the Human Rights Tribunal of Ontario" (last visited 1 January 2025), online (pdf): <tribunalsontario.ca/documents/hrto/Guides/Guide%20to%20Preparing.html#11> [perma.cc/M4NP-K5EP].

fact-finding becomes the default setting for complex cases with protracted parties.[78]

V. Back to the Future

There were early warning signs that the Tribunal's approach to ADR was not working. In his 2011-2012 review of the Ontario human rights, Andrew Pinto [as he then was], referenced how the Tribunal mediation program's resolution and participation rates lagged the companion model of the former Commission:

> It must be acknowledged that waiting an average of 9 months to get to mediation, 16.5 months to get to a hearing and almost 2 years to get to a Tribunal decision is not ideal, particularly for human rights disputes. I am concerned as well that the resolution rate for mediations under the current system, which is about 65%, is lower than 70% rate that was typically achieved at Commission mediations in the previous system."[79]

Pinto did not focus on the mediation model, however. He was satisfied that it was able to handle the volume if it was used properly. He suggested that the Tribunal's mediation program could be improved if the Tribunal increased its capacity to offer early intervention and adopted a practice of anonymously publicizing its settlements in an effort advertise its results.[80]

This is understandable. For the first time in decades, the human rights system measured file closures in days; not months or years and the Tribunal announced that it closed more files than it opened.[81] This optimism, however, ignored the inventory which the Tribunal inherited when it commenced operations. Between 2011-2012 and 2014-2015, this inventory was approximately three thousand (3,000) files.[82] Given a surge in applications between 2016-2018, this inventory ballooned to double that

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78 Pinto, *supra* note 10 at 36; Joachim, *supra* note 33 at 69–70.

79 Pinto, *supra* note 10 at 43.

80 *Ibid* at 61–65.

81 The Tribunal reports that the average number of days to resolve a file was 387 days. The median was 326 days. This is compared with the former Commission which in 2006–2007 (just prior to the introduction of the Direct Access Model) reported that a typical complaint took 1002 days (33.4 months) prior to being referred to the Tribunal. Tribunals Ontario, "Social Justice Tribunals Ontario 2011–2012 Annual Report" (2012) at 14, online: <tribunalsontario.ca/documents/sjto/2011-12%20Annual%20Report.html#hrto> [perma.cc/CZF4-C2JV] ["SJTO, 2011-2012 Annual Report"]; See also Tsun, *supra* note 2 at 123.

82 Tribunals Ontario, "Social Justice Tribunals Ontario 2012–2013 Annual Report (2013) at 11, online: <tribunalsontario.ca/documents/sjto/2012-13%20Annual%20Report.html#hrto> [perma.cc/B2F7-5AYJ] ["SJTO, 2012-2013 Annual Report"]; SJTO, 2015–2016 Annual Report, *supra* note 25 at 28.

size.[83] *Figure 1* illustrates the number of active files (inventory) between 2011-2012 and 2017-2018.

Figure 1[84]

HRTO's Annual Inventory from 2011-12 to 2017-18							
	2011 - 12	**2012 - 13**	**2013 - 14**	**2014 - 15**	**2015 - 16**	**2016 - 17**	**2017-18**
Applications Received	2,740	2,837	3,242	3,259	3,357	3,585	4,425
Applications Reactivated	40	27	31	28	18	22	27
Active Cases at Prior Year End (Backlog)	2,780	3,302	3,061	2,993	3,101	3,242	4,696
Subtotal of Active Files	**6,666**	**6,166**	**6,334**	**6,280**	**6,476**	**6,849**	**9,148**
Cases Closed	(3,364)	(3,105)	(3,341)	(3,179)	(3,234)	(2,880)	(3,137)
Active Files/Inventory	**3,302**	**3,061**	**2,993**	**3,106**	**3,242**	**4,696**	**6,011**

[83] Social Justice Tribunals Ontario, "2018–2019 Annual Report: Human Rights Tribunal of Ontario" (28 June 2019) at 46–49, online: <tribunalsontario.ca/documents/sjto/2019_11_19-Tribunals_Ontario_Annual_Report.html> [perma.cc/6PA4-D253] ["SJTO, 2018-2019 Annual Report"].

[84] The SJTO reported "active cases at year end" each year between 2011–2012 and 2016–2017. The calculation of "Active Files/Inventory" was based on the number of applications received, plus the number of reactivations, plus the number of active cases at the previous year end, less the number of cases closed. The inventory for 2017–2018 is an estimate, as the Tribunal no longer reported the active cases at year end for 2017–2018. This calculation uses the formula described above based on the number of active cases SJTO reported for 2016–2017. SJTO, 2011–2012 Annual Report, *supra* note 81 at 13–14; SJTO, 2012–2013 Annual Report, *supra* note 82 at 11; Tribunals Ontario, "Social Justice Tribunals Ontario 2013–2014 Annual Report (2014) at 15, online: <tribunalsontario.ca/documents/sjto/2013-14%20Annual%20Report.html> [perma.cc/G8KZ-5ELR] ["SJTO, 2013–2014 Annual Report"]; SJTO, 2014–2015 Annual Report, *supra* note 26 at 6; SJTO, 2015–2016 Annual Report, *supra* note 25 at 28; Tribunals Ontario, "Social Justice Tribunals Ontario 2016–2017 Annual Report (2017) at 27, online: <tribunalsontario.ca/documents/sjto/2016-17%20Annual%20Report.html> [perma.cc/RD7U-RUZG] ["SJTO, 2016–2017 Annual Report"]; SJTO, 2017–2018 Annual Report, *supra* note 25 at 25; SJTO, 2018–2019 Annual Report, *supra* note 83 at 49.

Tribunal reports for 2016-2017 record its inventory at 4,696.[85] A year later, this line item was removed. A reconstruction of Tribunal numbers suggests that by 2017-2018, the inventory had reached 6,011 files, which is approximately two thirds of the inventory in 2023. The Annual Report for 2023 records an active case load of over 9,000 files.[86]

The election of a Conservative government on June 6, 2018, eclipsed an understanding of this problem, when the newly elected government froze Tribunal appointments.[87] Public attention focused on staffing when the Conservative government tinkered with Orders in Council and started to appoint adjudicators for terms of less than one year.[88] This raised concerns that the new Tribunal mediators and adjudicators would lack the requisite skills to perform the job.[89] Critics highlighted this problem by pointing to a mounting backlog.[90] By December 31, 2021, there were 8,979 active files.[91] While there is little debate that chronic understaffing undermined the Tribunal's capacity to manage its files, it is not clear that a lack of staffing explains the steady growth of the backlog preceding the election.

In retrospect, the problem appears structural. Between 2011-2012 and 2017-2018, Tribunal reports indicate that the number of applications filed at the Tribunal jumped from 2,740 to 4,425.[92] At the same time, the Tribunal's ability to resolve disputes through its mediation program declined considerably. In 2011-2012, the Tribunal offered 1,635 mediations and resolved 37% of its caseload through mediation.[93] In 2017-2018, the number

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85 SJTO, 2016–2017 Annual Report, *supra* note 84.

86 Tribunal Watch Ontario, "The Human Rights Tribunal of Ontario: What Needs to Happen" (January 2023) at 1, online (pdf): <tribunalwatch.ca/wp-content/uploads/2023/01/The-Human-Rights-Tribunal-What-Needs-to-Happpen.pdf?utm_source=pocket_saves> [perma.cc/8VAT-8PDE] [Tribunal Watch, 2023].

87 In January 2019, it became apparent that 18 of 22 full-time vice-chairs and eight of 25 part-time vice-chairs had appointments that were due to expire. See CHRR, "Is the Ontario Human Rights Tribunal in trouble?" (2019), online: <www.cdn-hr-reporter.ca/content/ontario-human-rights-tribunal-trouble> [web.archive.org/web/20200926200633/https://www.cdn-hr-reporter.ca/content/ontario-human-rights-tribunal-trouble].

88 Law Times, "Lawyers frustrated by vacancies at Human Rights Tribunal" (14 May 2019) at paras 6–8, online: <www.lawtimesnews.com/practice-areas/human-rights/lawyers-frustrated-by-vacancies-at-human-rights-tribunal/263549> [perma.cc/4F4M-A3MW].

89 *Ibid*.

90 Tribunal Watch 2022, *supra* note 4 at 1.

91 Tribunal Watch Ontario, "Backgrounder on Backlogs" (May 2023) online (pdf): <tribunalwatch.ca/wp-content/uploads/2023/05/Backlogs-at-Tribunals-Ontario-May-2023.pdf> [perma.cc/BRV8-V8GD].

92 SJTO, 2011–2012 Annual Report, *supra* note 81 at 14; SJTO, 2017–2018 Annual Report, *supra* note 25 at 25.

93 Pinto, *supra* note 10 at 213. This calculation is based on 2740 applications received and 1013 (37%) settled at mediation.

of mediations dropped to 1,355 and mediations resolved only 18% of the Tribunal's caseload.[94] *Figure 2* illustrates the problem, juxtaposing the number of applications filed against the number of mediations, and the number of applications resolved through mediation.[95]

Figure 2[96]

A Comparison of Applications, Mediations, and Resolutions: 2011-12 to 2017-18							
Application/ Mediation/1st Day of Hearing Statistics	**2011 - 12**	**2012-13**	**2013 - 14**	**2014-15**	**2015-16**	**2016-17**	**2017-18**
Applications Received	**2,740**	2,837	3,242	3,259	3,357	3,585	**4,425**
Number of Mediations	**1,635**	1,283	1,562	1,459	1,584	1,376	**1,355**
Number of Med. Resolutions	**1,014**	770	922	861	919	798	**799**
Mediation Resolution Rate	**62%**	60%	59%	59%	58%	58%	**59%**
Mediation Resolutions/ Number of Applications Received	**37%**	**27%**	**28%**	**26%**	**27%**	**22%**	**18%**

94 SJTO, 2017–2018 Annual Report, *supra* note 25 at 25, 27. The HRTO reports that 59% (799) of 1355 cases held were settled. The 799 cases settled at mediation represents 18% of the 4425 applications received in 2017–2018.

95 SJTO, 2011–2012 Annual Report, *supra* note 81 at 14–15; SJTO, 2017–2018 Annual Report, *supra* note 25 at 49.

96 SJTO, 2011–2012 Annual Report, *supra* note 81 at 14–15.; SJTO, 2012–2013 Annual Report, *supra* note 82 at 11, 13–14; SJTO, 2013–2014 Annual Report, *supra* note 84 at 15, 17; SJTO, 2014–2015 Annual Report, *supra* note 26 at 19–21; SJTO, 2015–2016 Annual Report, *supra* note 25 at 28, 30; SJTO, 2016–2017 Annual Report, *supra* note 84 at 27, 29; SJTO, 2017–2018 Annual Report, *supra* note 25 at 25, 27.

This is significant because the number of part time vice-chairs who managed the mediation program increased from twenty-five (25) in 2011-2012 to thirty-four (34) by 2017-2018.[97]

The Tribunal prevented the public from appreciating the problem with opaque reporting protocols. When the Tribunal's inventory climbed over 4,600 files, it stopped reporting the number of active files.[98] Similarly, it offers no statistics with respect to how many parties choose mediation-adjudication, or how many applications are resolved through this process.[99] It offers no information with respect to how many applications are resolved through the abbreviated hearing process, or on how many days it takes to resolve a dispute once a first day of hearing is commenced.[100]

There were signs that the system was failing, however. Between 2015-2016 and 2017-2018, the Tribunal's ability to schedule a hearing within 180 days slipped from 62% to 38%.[101] Similarly, the average number of days to resolve a file increased from 326 days to 352 days respectively.[102] But the fact remains that a failure to resolve disputes at mediation means that more applications pile up awaiting a first day of hearing. This uncoils the spring in the simplified system, releasing the pressure on the parties. This simplified system was intended to abide by a tight timeline.

A failure to resolve disputes through ADR prior to fact-finding means more pressure on merit hearings, which inhibits the ability of the Tribunal to set a quick date for a hearing. While adjudicators have inquisitorial powers, they are still subject to the vagaries of litigation, where dates for hearings are dependent on party schedules, expedited hearings require sufficient time to contemplate the evidence and awards take time to draft. With an increased volume of complaints travelling towards litigation, a bottleneck of complaints awaiting a first day of hearing is inevitable, and like the former Commission, the system pivots around fact-finding, which is not efficient.

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97 In 2012, Pinto reports that the HRTO had 22 full time vice-chairs and 25 part time vicechairs Pinto, *supra* note 10 at 34; Tribunal Watch 2022, *supra* note 4 at 9.

98 SJTO, 2016–2017 Annual Report, *supra* note 84 at 27; SJTO, 2017–2018 Annual Report, *supra* note 25 at 25.

99 SJTO, 2011–2012 Annual Report, *supra* note 81 at 14–15.

100 *Ibid.*

101 SJTO, 2016–2017, *supra* note 84.

102 SJTO, 2017–2018 Annual Report, *supra* note 25 at 25.

VI. The Emergence of the Iron Hand

There is a significant difference between the Tribunal and the former Commission with respect to fact-finding, however. Tribunal hearings are adversarial.[103] Self-represented applicants engage in a forum which subjects them to cross-examination and objections.[104] This is very different from the former Commission investigation process, where Commission staff shuttled between parties negotiating settlements on the footsteps of a discovery of important information. The Tribunal process effectively turns the philosophy of "iron hand in the velvet glove" on its head. When Tarnopolsky first coined this phrase, he used it to describe a process where respondents were offered repeated opportunities for introspection.[105] He writes: "… human rights legislation is a recognition that it is not only bigots who discriminate, but fine upright, gentlemanly members of society as well…. *As far as possible, these people should be given an opportunity to re-assess their attitudes, and to reform themselves"* [emphasis added].[106] The Tribunal's abbreviated hearing reverses this dynamic. The imbalance of power between parties places the focus squarely on the applicant, where the adjudicators' inquiries about settlement are not so much respites to reconsider positions, as they are time-outs — where the referee inquires whether applicants have had enough.

The plight of the self-represented applicant is reminiscent of the experience of Josef K. in Kafka's *The Trial*, as the applicants engage in a forum for which they have no understanding and frantically try to make sense of legal proceedings.[107] While Tribunal adjudicators may have inquisitorial powers, they are not investigators. They do not balance the duties of representing applicants with the community interest. They are not advocates. They are neutrals. But this is an unfair fight where an appeal to neutrality invites the critique of Nietzsche and Foucault. They argue that claims to neutrality in the liberal state create a forum where established

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[103] AODA Alliance, "Brief to Andrew Pinto Ontario Human Rights Code Review" (1 March 2012) at 9, downloaded from: <www.aodaalliance.org/ontario-human-rights/click-here-to-download-in-ms-word-format-our-march-1-2012-final-brief-to-the-andrew-pinto-human-rights-code-review/> [perma.cc/A859-KARV] ["AODA, HRC Review"].

[104] Pinto, *supra* note 10 at 100–07.

[105] Tarnopolsky, *supra* note 9 at 572–73.

[106] *Ibid*.

[107] Franz Kafka, *The Trial* trans. by Willa & Edwin Muir, (New York, NY: Schocken Books Inc, 1992).

power relations between individuals manage themselves.[108] This is the problem that Owen Fiss raised in his seminal article "Against Settlement".[109] Fiss argues that it is unrealistic to believe that unequally matched parties could negotiate fair settlements in a forum where they cannot mount a significant legal challenge.[110] The Tribunal's use of a hearing as a form of ADR invites applicants to engage in this very forum.

This has important consequences for applicants. The Direct Access Model was designed to remove the former Commission's control over the regulation of complaints that proceeded to a hearing.[111] This change was especially important for cases involving racial discrimination, where the former Commission was criticized for blocking these complaints, even though the complainants wanted to proceed to litigation.[112] These obstacles were traced to discriminatory practices, which arbitrarily raised the bar on proof of discrimination.[113] While the Tribunal removes these bureaucratic levers, it creates an environment which plunges self-represented applicants into a forum for which they have no understanding — a forum, where, like the former Commission investigations, settlements are encouraged through the process of fact-finding. The applicants' rate of success at merit hearings speaks for itself. It is the mirror image of the former Commission. Where the former Commission had a very high success rate at hearings, the applicants' success rate at the Tribunal is abysmally low.[114] In my review of Tribunal outcomes, applicants only have a one-in-three chance of being successful or partially successful at a hearing.[115]

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[108] Douglas Litowitz, "Foucault on Law: Modernity as Negative Utopia" (1995-6) 21 Queen's LJ 1 at 8–12.

[109] Owen M Fiss, "Against Settlement" (1984) 93 Yale LJ 1073 at 1076–77.

[110] *Ibid*.

[111] Tsun, *supra* note 2 at 125–26.

[112] Langer, *supra* note 20 at 63–66.

[113] Carol A Aylward, *Canadian Critical Race Theory: Racism and the Law*, (Halifax: Fernwood Publishing, 1999) at 16; For a comprehensive discussion of how Commission staff arbitrarily prevented racial complaints from proceeding to litigation see a synopsis of Donna Young's study in Langer *supra* note 20 at 63–66.

[114] Gupta, *supra* note 16 at 54.

[115] The numbers referenced here and presented in Figure 3 arise out of a review of selected cases for the years 2016–2017, 2017–2018 and 2018–2019. For the full set of data, see *supra* note 13. The purpose of the review is to codify cases based on the written reports in the CanLII database. All cases were selected from the CanLII database in two rounds of searches using the terms "balance of probabilities" and "testify, evidence". Cases selected recorded "Final Decisions" and excluded Notices of Intent to Dismiss (NOIDs), Interim Decisions, Reactivations, Minutes of Settlement (MOS), Reconsiderations, Interim Remedies, Remedy Decisions, Contravention of Settlements, and Procedural i.e. Requests for

Figure 3[116]

Applicant Success Rates at a Hearing						
	2016-17		2017-18		2018-19	
	Number	Percentage	Number	Percentage	Number	Percentage
Cases Reviewed	90	100%	107	100%	72	100%
Upheld	18	**20%**	24	**22%**	16	**22%**
Partial Upheld	9	**10%**	13	**12%**	2	**3%**
Dismissed	63	70%	70	65%	54	75%

Given these results, it is doubtful that such an environment offers applicants an opportunity to convey narratives that either challenge dominant values or provides a strong basis upon which applicants can broker a fair settlement.

The Tribunal attempts to restore fairness to the human rights system through a return to the liberal principle of neutrality. It replaces an intervention, where the former Commission straddled a duty to the complainant with public interest, with a return to formal equality — where all parties are treated the same, regardless of important differences in resources and histories. While Tribunal adjudicators possess inquisitorial powers, like former Commission investigators, the adjudicators' authority is

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Production. Summary and Preliminary Hearings were only included if the adjudicator noted that evidence was submitted and/or the applicant or respondent testified. Using these criteria and cross checking to ensure no duplication between the searches, 90 files were pulled for review in 2016–2017, 107 in 2017–2018 and 72 in 2018–2019 respectively. Each file was codified to indicate representation of the Applicant, Respondent and Intervenor as either self-represented (SR), representative (R), counselor (C), paralegal (P), student at law (SAL) or N/A if not attending or not indicated. In the analysis, SR and R were considered as not having legal counsel whereas C, P and SAL were all considered as providing legal counsel. Dispositions were coded as upheld (U), partial upheld (PU) or dismissed (D). Various files downloaded from CanLII online: <canlii.org/en/on/onhrt/> (date accessed: 28 February 2023 to 9 November 2023) "[Methodology of case review"].

116 *Ibid.*

not intended to rebalance a power differential between parties. Rather, it adopts a "colour-blind" approach which efficiently cuts to the heart of the dispute, denying oppressed people a contextual forum where their experiences can be unpacked.[117]

The Accessibility for Ontarians with Disabilities Act Alliance ("AODA Alliance") leveled similar criticisms and criticized the Direct Access Model for magnifying the power differential between parties through the "privatization" of human rights enforcement.[118] In their response to Pinto's Report, they highlight the deficits of legal representation, arguing that the Legal Support Centre's piecemeal legal assistance creates an environment where applications are either withdrawn or resolve on lesser terms without proceeding to a full hearing.[119] In its analysis, the AODA Alliance underscored the point that while 56% of all human rights complaints involve matters of disability, only 28% of cases relating to disability received support from the Legal Support Centre.[120] This is a concern given that people with disabilities can have lower levels of income and education. It places them at a distinct disadvantage because it raises the potential for them to navigate the human rights system as self-represented parties.[121] My review of Tribunal outcomes demonstrates the uphill fight for these applicants. The chart at *Figure 4* illustrates that where self-represented applicants are opposed by respondents with counsel, 60% end in defeat for the self-represented applicants.[122]

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[117] Critical Race Theory endorses the need to step beyond a claim to neutrality and recognizes that the corollary of a "colour blind approach", where all individuals are assumed to be treated equally, ignores substantive differences which silence the narratives of the oppressed. See Aylward *supra* note 113 at 19–34.

[118] AODA Alliance, "Brief to the Human Rights Tribunal of Ontario on its Proposed Permanent Rules of Procedure" (28 March 2008) at 10–29, online: <aodaalliance.org/wp-content/uploads/2016/01/0308-Brief-on-Human-Rights-Tribunal-Rules.doc> [perma.cc/5FKQ-BEA44].

[119] *Ibid*.

[120] AODA, HRC Review, *supra* note 103 at 24.

[121] SJTO, 2016–2017 Annual Report, *supra* note 84 at 27; Dianne Pothier & Richard F Devlin, *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law*, (UBC Press, 2006) at 35–37.

[122] Methodology of case review, *supra* note 113.

Figure 4[123]

Dismissal Rate of Self-Represented Applicant's at a Hearing						
	2016-2017		2017-2018		2018-2019	
	Number	Percentage	Number	Percentage	Number	Percentage
Dismissed	63		70		54	
Dismissed with Self-Represented Applicant Against Counsel	38	**60%**	49	**70%**	33	**61%**

While this is a descriptive analysis, which, given its small sample size does not purport to draw a statistical nexus between self-representation and success in outcome, it is reasonable to believe that self-representation can undermine the applicants' chance for success. In a system where pleadings are frequently self-drafted and the processes of disclosure, production and preparation for a hearing are managed by self-represented litigants (who are individuals unfamiliar with these protocols) the odds of success are hobbled at the outset.[124] It creates gaps where pleadings may lack the necessary *Code* grounds, relevant particulars may not be pled, production may go unscrutinized and not enough attention may be paid on the strategy to advance the case.[125]

Still, it is strange that there is little evidence that applicants were discontent with the Tribunal processes prior to the election of a Conservative government on June 6, 2018. The available evidence suggests that between 2008 and 2017-2018, applications increased steadily each year. If applicants were dissatisfied with the fairness of this system, one might expect some obvious sign of revolt. Lon Fuller makes a similar point with an analogy of

123 *Ibid*.
124 Flaherty, Reasonable Prospect, *supra* note 48 at 239–40.
125 *Ibid*.

a highwayman who robs and kills his victims even after he has promised safe passage.[126] Fuller writes:

> Let us test this view by a case of the most direct 'physical' power imaginable, that of a highwayman who has his victim at the point of a gun. If the highwayman shoots his victim down and then removes the purse from the dead body, we would hardly regard the highwayman's actions as an exercise of power in any sense relevant to social theory. Is the case different if he says, "your money or your life," and demands the victim himself hand over the purse?' Certainly, the highwayman may if he sees fit accept the innocent traveler's purse and then kill him. But this course of action would not be without its inconveniences and risks. *If our highwayman follows armed robbery as a profession and it becomes known that he shoots his victims down in spite of the fact that they surrender their purses to him, the practice of his profession may become dangerous, since his future victims will have little to risk in opposing his demands.* Furthermore, if he is a member of anything like a highwayman's guild, he may conceivably be called up for disciplinary action for needlessly endangering the lives of the other members of his guild [emphasis added].[127]

But Fuller's analogy has an important assumption. The would-be victims of the highwayman know ahead of time that the highwayman's negotiation offers no reciprocity. It is for this reason that they revolt. They have nothing to lose.

The answer lies in the Tribunal's reporting protocols. They do not offer applicants any warning. The Tribunal publishes no information with respect to the settlements that are achieved in its abbreviated hearing.[128] In fact, Tribunal Annual reports blur the line between the results of applicants with representation and applicants who are self-represented, even though the win/loss records between these groups are markedly different.[129] This places applicants in a position where they must learn about the Tribunal's abbreviated hearing process through personal experience. In fact, the Tribunal makes this lesson inevitable. Although mediation and mediation-adjudication are voluntary, fact-finding is involuntary — even though it is used as a form of ADR. The result is a system that subtly encourages protracted parties to pursue litigation, where the Tribunal uses pressure points in the hearing, capitalizing on an imbalance of power to convince applicants of the need for settlement.

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126 Lon L Fuller, "Irrigation and Tyranny" (1965) 17 Stan L Rev 1021 at 1027–28.
127 *Ibid*.
128 See the discussion about the problem with confidential settlements in Bryden, *supra* note 36 at para 35.
129 Methodology of case review, *supra* note 114.

VII. A Wrong Turn

The problem is inherent in a model which weds the concept of a Guardian with mediation. Given its emphasis on self-determination and agency, Tribunal staff adopt an approach where knowledge and truth are assumed to be obvious, existing independently outside a world of beliefs. Tribunal staff become guides who help to position parties so that they can apprehend the truth.[130] At mediation and mediation-adjudication, staff educate parties on perspectives given their experience with similar files. If these protocols fail to create a negotiated settlement, the Tribunal uses the adversarial process to "discipline" parties, constructing an efficient hearing that cuts to the frailties of a respective case, with the intention of showing parties the error of their ways.[131] Adjudicators intervene again, capitalizing on dramatic moments in the evidence by offering a kinder, gentler way — quietly suggesting that it may be in the parties' respective interests to resolve a dispute rather than proceed any further.

This structure fails to appreciate that individuals may approach the world from a perspective which is shaped by their values, beliefs, and experiences, and that this framework informs the way in which they understand the world. The philosophy of the "iron hand in the velvet glove" approaches disputes from this perspective; it incrementally increases pressure to settle, challenging beliefs through education, unpacking of the facts and, if all else fails, threatening consequences. In the interests of efficiency, the Direct Access Model simplifies these processes, consolidating them into one, where the adjudicator becomes the teacher who uses the hearing to create the environment for the lesson. While modelled on the former Commission investigator who shuttled back and forth between parties, questioning assumptions given their discovery of new evidence, the Direct Access Model is quite different. Since the applicant proceeds first, the

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[130] In *The Republic*, Plato argues that the state should be governed by Guardians. This is a class of individuals born with a superior intellect and who are educated to lead society to truth. For Plato, truth and knowledge exist independently of the world in an immutable form. He states that individuals can only achieve this understanding if the individual's soul functions in an orderly fashion - a fashion where reason marshals the human spirit to keep emotions in check. The Guardians' role, therefore, is a selfless one. They maintain a societal order in which reason prevails and individual souls are kept in order so that all members of society can lead lives which are informed by truth and knowledge. Plato, *supra* note 49 at 520 b.

[131] Ascanio Pionelli, "Foucault's Approach to Power: Its Allure and Limits for Collaborating Lawyering" (2004, No 2) Utah L Rev 395 at 442–44.

process of questioning in a Tribunal hearing is concluded by an adversary — typically respondent's counsel. In an adversarial proceeding, statements are not stripped of their emotion nor reframed by an interlocutor, and neither is common ground sought. Litigation can be a cruel teacher and the Tribunal's abbreviated hearing is a recipe for division, rather than social harmony, which is at odds with the philosophy of the "iron hand in the velvet glove."

It is also inconsistent with Fuller's definition of ADR. Although Fuller invited lawyers to become Guardians, he did not suggest that Guardians should become mediators. He viewed these pursuits very differently. While he invited lawyers to use their command of the law and the facts to encourage settlement, it was through collaborative negotiation with opposing counsel.[132] Mediators intervene alone. They are armed with the powers of communication, cunning and wit — not expertise and authority. The focus of mediation is on the parties, not the intervenor. Fuller offers the monkalun in the Ifugao society as an example. He writes:

> The office of the monkalun is the most important one to be found in Ifugao society. The monkalun is a whole court, completely equipped, in embryo. He is judge, prosecuting and defending counsel and the court record. His duty and his interest are for a peaceful settlement…To the end of peaceful settlement he exhausts every art of Ifugao diplomacy. He wheedles, coaxes, flatters, threatens, drives, scolds, insinuates…the monkalun has no authority. All he can do is act as a peace-making go-between. His only power is in his art of persuasion, his tact and his skillful playing on human emotions and motives.[133]

Tribunal mediators/adjudicators are neither Guardians, nor monkaluns. Given their need for impartiality, Tribunal staff neither use the full weight of their expertise to persuade parties nor engage them in a constructive dialogue which unpacks perspectives.

Instead, the Tribunal employs a mechanical approach where mediation is reduced to a formula of timing, interests and a hint of expertise. While each one of these approaches can have clear benefits, there is no research to suggest that the combination of all three is a panacea for all disputes. Certainly, the experience of the former Commission suggests against it, for although its early intervention initiative and mediation programs released

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[132] Lon L Fuller & John D Randall, "Professional Responsibility: Report of the Joint Conference" 44 ABAJ 1159 at 1160–61.

[133] The Ifugao society is found in Northern Luzon in the Philippines. Fuller, Mediation, *supra* note 61 at 338.

pressure on investigations, the default setting for complex disputes was fact-finding.[134] The Tribunal replicates this experience. While it combines early intervention and interest-based mediation into one and intervenes with an expert, the expert is not able to offer an evaluation or challenge perspectives and is not able to offset the power paradox. Like the former Commission, disputes proceed to fact-finding for perspectives to be unpacked.

The Tribunal needs to revisit the philosophy of the "iron hand in the velvet glove", recognizing that the principle begins with the assumption that human rights disputes are not all the same. Some disputes require education. Some require the facts to be unpacked. Others require the threat of litigation or litigation itself. While there were flaws in the former Commission's strategy of incrementally increasing the pressure to settle, the notion of offering opportunities for introspection was grounded in a sociological understanding of discrimination. It is intended to offer space for parties to make their own decisions. In its drive for efficiency, the Tribunal has overlooked the importance of this point. It creates a system which does not offer parties to a dispute the opportunity to realize each other's points of view unless they are engaged in combat. It is an unfair fight, where the weaker party is at risk of learning that they should never have raised the issue in the first place. This was the fear that critics of the Direct Access Model expressed.[135]

VIII. Back to the Drawing Board

In retrospect, the Tribunal should reconsider its approach to dispute resolution. It could start by expanding its assessment of complaints to include an evaluation of the ease or difficulty of settlement. Pleadings offer important clues to the nature of a dispute. They describe the history of the parties. They provide a duration of the conflict. They indicate the operative values underwriting party perspectives. In some cases, they offer a glimpse of the emotional intensity. This is the strength of self-drafted pleadings, for a narrative in one's own words can offer a portal by which to understand a dispute.[136]

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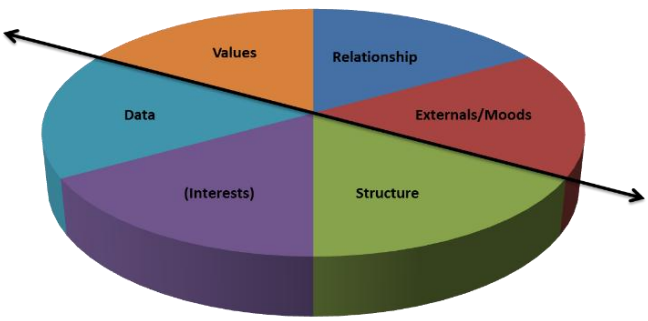
134 Joachim, *supra* note 33 at 83–84.
135 Tsun, *supra* note 2 at 125.
136 Lon L Fuller, "The Forms and Limitations of Adjudication" (1978) 92 Harvard L Rev 353 at 386.

Christopher Moore provides a useful framework for initiating this process. Moore states that disputes can be reduced to one of six categories which he illustrates in the Wheel of Conflict.[137] The most challenging disputes are placed on the top half of the wheel. They involve conflicting values (beliefs), a relationship with a historical problem, or an intense emotional response (externals/moods). Disputes that pivot around a lack of information (data), an organizational problem (structure) or party interests, form the lower half of the wheel.[138]

Figure 5[139]

Christopher Moore's Wheel of Conflict



Source: *The Conflict Resolution Toolbox*

The trick, if there is one, is to reframe the disputes involving values, historical problems and difficult relationships to matters of facts, interests and organizational problems.[140]

The Tribunal receives well over 3,500 files a year. It is impractical to suggest that it should attempt to rush each of these complaints into mediation 150 days after the application is filed. Moreover, it is unnecessary. While the former Commission suggested that early intervention can be a sweet spot for settlement, it also taught the opposite lesson as complex

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137 Bernard S Mayer, "The Dynamics of Conflict Resolution: A practitioner's Guide" (San Francisco: Jossey Bass, 2000) in Julie Macfarlane et al, *Dispute Resolution Readings and Case Studies* 3rd ed (Toronto: Emond Montgomery Publication, 2011) at 14-15; Gary T Furlong, *The Conflict Resolution Toolbox: Models & Maps for Analyzing Diagnosing and Resolving Conflict*, (Mississauga, ON: John Wiley & Sons Canada Ltd, 2008) at 29–60.

138 Furlong, *supra* note 137 at 29–60.

139 *Ibid*.

140 *Ibid* at 39.

disputes with protracted parties bypassed early intervention and mediation and headed straight for fact-finding. This raises a fundamental problem with the Tribunal architecture. Its efficacy is undermined by a desire to maintain mediation and fact-finding as independent of one another. Some disputes require the facts to be exposed so that assumptions can be challenged, which suggests that some disputes should be mediated after the Tribunal has ordered disclosure. This would certainly be more in line with labour arbitration.

Disability and accommodation applications offer a case in point: Tribunal Annual Reports state that 50% of all applications involve disability and accommodation.[141] Some of these disputes pivot around objective evidence in medical files. It is inefficient to mediate them in the absence of objective facts and creates the potential for these complaints to advance to a hearing with important assumptions untested. It would be more efficient, for instance, if the Tribunal offered mediations involving medical evidence after disclosure. This could eliminate any unnecessary misunderstanding of the facts. While mediation-adjudication offers this same recourse, there is no reason to wait. If a dispute fails to resolve at mediation, it should be scheduled for a hearing quickly, in front of a different adjudicator. This leaves the possibility for the mediator to engage the parties on the facts. If self-represented applicants need to vet offers of settlement with the Legal Support Centre, then they should be offered the time to do so.

Similarly, the Tribunal should abandon its mechanical appeal to a neutral third-party expert. This appeal can be a source of antagonism for some marginalized communities because members of these communities are often aware that they approach society from a given perspective. This experience makes them skeptical of intermediaries who claim to speak from a position of neutrality, because they associate these claims with the perspective that raises dominant societal beliefs to universal standards. Mark Davidheiser explains:

> The issue of mediator neutrality, which has been a central tenet of North American mediation, is another potential problem. According to Kochman, most African Americans believe that discussions over a given issue proceed best when the parties openly acknowledge their personal standpoints or perspectives. Consequently, they often have difficulties with the notion of impartiality that is valorized in mainstream

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[141] See e.g. SJTO, 2016–2017 Annual Report, *supra* note 84 at 27; SJTO, 2018–2019 Annual Report, *supra* note 83 at 46–49.

> mediation in White society. As he puts it, 'because blacks admit they deal from a point of view, they are disinclined to believe whites who claim not to have a point of view.' Thus, mediators' claims of neutrality can be interpreted as a ploy to mask a hidden agenda.[142]

An intervention that compels a settlement in a half day only exacerbates this problem because it encourages Tribunal mediators to fill in the missing gaps in an application with their own values, beliefs and experiences.

Over 20% of all applications filed at the Tribunal involve intercultural disputes.[143] These are disputes where parties may not speak the same language, nor share the same beliefs, values and experiences. This can complicate mediation. Worldviews not only define how individuals understand a dispute, but also how they interact. Gaps in understanding can cause barriers to settlement beyond an appreciation of the dispute itself because the parties are not aware of the important cultural differences that shape the conversation. Venashri Pillay explains:

> Pause for a moment and think about the cultural groups to which you belong. How have messages from these groups shaped who you are, what you think, how you perceive and interpret the world, and your actions ….As we begin to recognize alternative lenses to our own, stereotyping can result….Stereotyping functions as a safety and convenience mechanism. It allows us to make judgements about people, provides a basis from which to engage (or not engage) the other person, and gives us a false sense of knowing others.[144]

The Tribunal must recognize this point and expand its interventions, understanding that appeals to third-party neutral experts is not a substitute for dialogue.

However, the biggest obstacle confronting the Tribunal's efficacy is the imbalance of power between parties. While the Legal Support Centre has attempted to address this problem by directing more resources to mediation and mediation-adjudication, it has realistic financial constraints.[145] These constraints require the Legal Support Centre to allocate resources where they have the most impact, creating a system where questionable

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142 Mark Davidheiser, "Race, Worldviews and Conflict Mediation: Black and White Styles of Conflict Revisited" (2008) 33:1 Peace & Change 60 at 64, online (pdf): <onlinelibrary.wiley.com> [perma.cc/KT5R-6ECL].

143 SJTO, 2017–2018 Annual Report *supra* note 25 at 26–27.

144 Venashri Pillay, "Culture: Exploring the River" in Michelle LeBaron & Venashri Pillay, eds, *Conflict Across Cultures: A Unique Experience of Bridging Differences* (Boston, MA: Intercultural Press, Nicholas Brealey Publishing, 2006) at 31–32.

145 Flaherty, Reasonable Prospect, *supra* note 48 at 236.

applications proceed with self-represented applicants.[146] While one does not quarrel with the need for increased funding, the Legal Support Centre would also benefit from an increase in the range of ADR interventions. A more diversified dispute resolution system would enable the Legal Support Centre to direct its assistance to those applications where the merits of a case are less than clear. It is only through this type of intervention that the Tribunal will tame its inventory growth.

Finally, the legitimacy of the human rights system requires transparent public reports.[147] If a public institution is intentionally designed to facilitate settlement, then it is reasonable to expect that its annual reports should provide information regarding the types of settlements achieved and at what stage in its system these settlements occur. Given the volume of applications that proceed to Tribunal hearings, Tribunal reports should, at a minimum, provide data on its outcomes. Ideally, Tribunal reports should record the terms of resolution, the grounds of discrimination, the parties involved, and whether they are self-represented or represented. Additionally, the Tribunal should also include at what point in the hearing the resolution is reached. Data about the success rate of mediation-adjudication on the first day of hearing would be especially helpful. An accurate description of this process would include whether a matter is resolved after the applicant's examination or cross-examination and indicate the average number of days of a hearing needed to reach a resolution. While it is true that transparent reports helped erode public confidence in the former Commission, the remedy is not obfuscation. This approach runs contrary to the spirit of the *Code* and helps to perpetuate a system which is failing.

IX. Conclusion

The crisis confronting the Tribunal is historic. A ballooning inventory threatens Tribunal legitimacy. This is not simply a problem of staffing, since the reduction of staffing problems helps perpetuate a system that can continue to do harm. At issue is a model which sacrifices a sociological understanding of human rights for a legal process in order to create efficiency. Its architects have a misplaced confidence in the persuasive

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146 Pinto, *supra* note 10 at 107–08.
147 Tribunal Watch, 2023 *supra* note 86 at 4.

authority of experts who claim to speak from a position of impartiality. The result is a system which not only fails to create efficient outcomes, but a system which threatens to silence the voice of its applicants. Hearings are not an effective form of ADR when self-represented applicants square off against respondents with counsel. The Tribunal needs to recognize that, while its design offers a "simplified dispute resolution model", it employs the same approach to disputes as the predecessor system. That is, an approach which narrowly defines mediation as a matter of interests and timing, reserving the unpacking of perspectives for fact-finding. Not surprisingly, the Tribunal ends up in the same place and therefore needs to gaze beyond its narrow definition of ADR.