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OPINION

Justice delayed: The decline of the Ontario Human Rights Tribunal under the Ford government

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Raj Anand, partner, WeirFoulds LLP, has been appointed by the Ontario government to head agencies including the Ontario Human Rights Commission and the Human Rights Legal Support Centre board of directors, and to serve as an adjudicator at what is now the Human Rights Tribunal of Ontario.

Kathy Laird has been an adjudicator at several Ontario agencies including the Human Rights Tribunal of Ontario and the Pay Equity Hearings Tribunal. She has served as counsel to the chair of the Human Rights Tribunal and later as founding director of the Human Rights Legal Support Centre.

Ron Ellis, QC, PhD (administrative law) was the first chair of the Ontario Workplace Safety and Insurance Tribunal, from 1985 to 1997, and was reappointed by three successive Ontario governments.

Under cover of our current health crisis, Premier Doug Ford's government has been quietly and steadily reducing the quality of justice that people in the province can expect from the Human Rights Tribunal of Ontario. The final resolution of a claim can now take years for individuals who have experienced discrimination. This is not how human rights justice was delivered in Ontario before the Ford government was elected in 2018. Disturbingly, even as awareness of systemic discrimination has grown, Ontario's human rights enforcement system has become dysfunctional.

The system that was in place when the current government came into power was established in 2008. New legislation gave claimants the right to bring discrimination applications directly

to a hearings tribunal. Previously, access to a hearing was limited; only about 6 per cent of claims were sent to the tribunal. The new Human Rights Tribunal grew to include 22 full-time, experienced adjudicators and a robust administrative staff. For 10 years, the tribunal was able to efficiently handle more than 3,000 claims a year, up from an average of fewer than 200 a year under the previous system.

What has happened to the Human Rights Tribunal under the current government?

First and foremost, the number of full-time adjudicators has now been reduced to just 11 from 22, even as the number of new discrimination cases has grown to more than 4,400 in each of the past three years.

The tribunal's annual report provides a telling example of the impact of these cuts. In 2016-2017, the parties in 92 per cent of cases were offered a mediation date within five months of agreeing to mediation. In 2019-20, only 27 per cent of cases received a mediation date within the same time frame.

Thousands of discrimination applications are now stalled in the early stages of the process. In 2019-20, despite having the ability to conduct video-conference hearings, the tribunal only managed to schedule a first day of hearing in 7 per cent of cases within six months of them being ready to be heard. By way of comparison, 38 per cent of hearing-ready cases had a first day within six months in 2017-18. Alarmingly, even after a first day of hearing, it can now take more than a year to issue a preliminary decision and another year or two for the tribunal to schedule the additional day or two of hearing time necessary to complete the proceeding. Particularly indicative of a system in disarray is the fact that the tribunal will sometimes delay the beginning of the process for months by failing to even deliver the application to the responding party. And in cases where a hearing has been completed, many claimants (and respondents) wait well over a year for a final decision.

A critical factor in these delays has been the removal of experienced adjudicators from the tribunal. Expert human-rights adjudicators with excellent performance reviews have had their appointments prematurely discontinued when cabinet failed, without explanation, to renew their terms in the normal course. By the end of the first week in February, there will be only three remaining full-time experienced adjudicators out of the 22 who were at the tribunal when the current government took over.

Few of the discontinued adjudicators have been replaced and, of the handful of new appointees, not all can demonstrate competitive qualifications for the position. These criteria

would include some combination of human-rights expertise, legal training, experience as a mediator or adjudicator, and/or a litigation background before tribunals.

There are also concerns about the qualifications of new tribunal leadership appointed by the Ford government. According to the government's own website, neither the new associate chair of the tribunal, nor the executive chair of Tribunals Ontario, the person to whom she reports, have any adjudication or mediation experience, any legal or academic expertise in human rights or tribunal law, or any litigation or employment experience at an adjudicative tribunal. After working as a lawyer early in her career, the associate chair left the practice of law more than 13 years ago to start a retail business. The executive chair, a federal Conservative candidate in 2019, has retired from a law practice focused on advising financial institutions and pension funds, as well as managing a national law firm.

The record shows that, like so many recent appointments to Ontario tribunals, both the associate chair and the executive chair have solid connections to the Conservative Party (either provincially, federally or both). While not objectionable in and of itself, this pattern is troubling after the removal of so many qualified adjudicators appointed by the previous government.

By replacing expert adjudicators and experienced leadership with new appointees on short-term appointments, the government is not only undermining the capacity of the Human Rights Tribunal to make fair determinations in complex cases; critically, it is also undermining the integrity and independence of the tribunal's decision-making.

Today, Ontarians who appear before the Human Rights Tribunal cannot be confident that their case will move forward in a reasonable time period. Nor can they be sure that the adjudicator hearing the case is expert in the relevant law and will decide the case free of influence from the government that appointed them. The latter is especially important when the government policies or programs are being challenged as discriminatory.

In June of this year, when Mr. Ford spoke to the media after a first ministers' statement on racism and discrimination, he spoke strongly, saying: "Enough of the talking. Let's start getting action." But the only action his government has taken with respect to the human rights enforcement process in Ontario is to weaken its leadership and deprive it of expertise.

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