

ELIGIBILITY FOR LEGAL SUPPORT SERVICES & CASE SELECTION CRITERIA

The Human Rights Legal Support Centre (Centre) has developed the following guideline for its consideration in making determinations on the provision of legal services to persons who are potential applicants to the Human Rights Tribunal of Ontario (Tribunal). This guideline will inform, on a case-by-case basis, the Centre's determinations with respect to requests for its legal support services.

The Centre welcomes public feedback on this guideline. Comments can be sent to: jramsay@hrlsc.on.ca

A. OVERVIEW

This guideline recognizes that each applicant for legal support services will receive initial legal support services from the Centre, including advice and information on whether or not their claim would fall within the jurisdiction of the Tribunal.

However, due to the significant volume of inquiries and the demand for its legal support services, the Centre acknowledges that it will not be able to provide all applicants with complete legal support services up to and including full representation at a hearing before the Tribunal.

In order to best allocate its limited resources, the Centre reserves the right to decide, with respect to each applicant, the level of legal support services that will be provided, to be determined on a case by case basis, after consideration of the factors set out below.

In general, the Centre will give priority to applicants with meritorious claims who would face barriers to self-representing, especially where the application raises public interest issues or complex factual or legal issues or could have a broad impact on other claims under the Ontario *Human Rights Code* (Code)

B. DEFINITIONS

“*applicant*” means a person who has contacted the Centre for assistance with respect to a matter covered by the *Code*

“*eligibility for services*” means that the applicant is generally eligible for legal support services but does not mean that any particular level or amount of legal support services will be provided to the applicant

“*legal support services*” includes the initial intake procedure and interview, summary information and advice, assistance with application completion, assistance with preparing for mediation, representation at mediation before the Tribunal and representation at hearings before the Tribunal

C. FACTORS

In determining the extent of the legal services that the Centre will offer to applicant, the Centre will consider:

- (a) the nature of the application;
- (b) the capacity of the applicant;
- (c) the nature of the respondent;
- (d) the existence of any intervenor; and
- (e) any other additional factors the Centre may consider relevant.

Considerations (a) to (d) above are evaluated by the Centre in respect of the following factors:

(a) The Application

1. The proposed application falls within/outside the jurisdiction of the Tribunal.
2. The proposed application raises/does not raise a ground of discrimination recognized by the *Code* and/or by applicable human rights jurisprudence.
3. The proposed application has/does not have a reasonable chance of success as there:
 - is/is not a reasonable prospect that that the application will be able to establish an evidentiary link between the ground of discrimination and the negative or unequal treatment; and/or
 - is/is not a reasonable prospect that the application can be proven by the available evidence.

4. The proposed application raises/does not raise complex legal or factual issues that require legal representation.
5. The proposed application:
 - i. will/will not require particularly significant Centre staff resources;
 - ii. is expected/is not expected to impact on the Centre's ability to represent other applicants; and
 - iii. raises/does not raise issues that could have a broad positive or negative impact on other disadvantaged groups designated under the *Code* including other applicants or potential applicants for the Centre's services.
6. The proposed application is outside the one (1) year period for filing and there does not appear to be a significant public interest aspect to the application.

(b) The Applicant

1. In light of the nature of the proposed application and the remedies sought, the applicant would face challenges in representing him/herself before the Tribunal. These challenges may include:
 - lack of fluency in English/French;
 - functional literacy level;
 - issues related to a disability (including the need for accommodation of *Code*-related needs by the Centre);
 - issues related to poverty (such as access to telephone, affordable transportation);
 - unfamiliarity with legal processes;
 - absence of other supports in daily living;
 - challenges created by recent arrival in Canada, refugee status and related issues; and
 - marginalization associated with membership in a designated group recognized by the *Code* (e.g. youth; senior; member of a racialized community).
2. The applicant is/is not able to self-represent in the Tribunal's process. Consideration shall be given to the:
 - nature of the proposed application;
 - circumstances affecting the applicant, and
 - nature of the remedies sought.

3. The applicant lacks/ has access to other legal support in preparing their application or does not have reasonable access to legal support through a prepaid legal services plan, private resources, advocacy organization, Ontario Human Rights Commission (Commission), etc.
4. The applicant is/is not a member of a historically disadvantaged group or a marginalized group.

(c) The Respondent

- a. The respondent is/is not well-resourced.
- b. The respondent is/is not expected to have legal representation.

(d) Intervenors

- i. The Commission has indicated that it will/will not apply to intervene in support of the application.
- ii. There are/are not other organizations or individuals that have indicated an interest in intervening for or against the proposed application.

SERVICE ELIGIBILITY QUESTIONS AND ANSWERS: HOW THE CENTRE PROVIDES LEGAL SERVICES

Every person who contacts the Centre about discrimination receives preliminary legal information and advice about their potential claim and about the human rights process. However, the Centre cannot provide full legal services to every person who contacts us about a possible application to the Tribunal. It is important the Centre have transparent policies to govern how decisions are made about the level of services that will be provided to applicants and potential applicants. The Centre has developed *Service Eligibility Guidelines* which are posted on our website.

Below are answers to questions about how we apply our *Guidelines*.

Does the Centre investigate both sides of a human rights dispute before it agrees to provide legal services to an individual who wants to file a discrimination application?

No. Under Ontario's new human rights system, unlike the former system, your human rights application is not investigated for merit by the Commission or the Centre before you can file it at the Tribunal. When the Centre files an application, or assists an individual to file an application, we accept, as true and provable, the facts reported to us by the applicant. We do not investigate the other side of the case.

This means that the Centre does not contact your employer or landlord to get their side of the dispute before we agree to assist you in filing an application to the Tribunal.

Under Ontario's former human rights system, the Commission would investigate both sides of a dispute before it would allow a discrimination complaint to be filed at the Tribunal. The investigation process could take many months and it generally took over three (3) years for complaints to get to mediation or a hearing at the Tribunal. After investigation was completed, the Commission would take about 100-140 complaints to the Tribunal each year.

Under the new system, more than 3000 applications are filed annually and, in our experience, most applications reach mediation and/or a hearing within one (1) year.

Why doesn't the Centre agree to represent every applicant from the beginning to the end of a case?

Because the Centre does not investigate the evidence on both sides of a case before we file an application, we have to re-assess the merits of each application with the applicant after we receive the response to the application from the other side (referred

to as the “respondent”). The Tribunal's disclosure rules require the respondent to share, in advance of the hearing, all the evidence that will be relied upon in proving that discrimination did *not* occur.

What this means is that the applicant and the Centre often learn information about the other side of a claim after the application is filed. In some cases, the new information will significantly affect the merits of the application.

The applicant has the right to withdraw if they no longer want to pursue the application. As well, the Centre may decide, after receiving disclosure from the other side, that it will not represent the applicant at the hearing if the new information means that the application cannot succeed at the Tribunal. If the applicant wishes to continue to a hearing and the Centre is not willing to represent him/her at a hearing, the applicant can proceed on their own or can retain a paralegal or lawyer to represent them instead of the Centre.

Has the Centre set priorities in terms of issues or grounds of discrimination that will get enhanced service?

No. In general, our goal is to maximize the number of people who receive legal services while focussing our resources in particular on individuals who are unable to represent themselves in the human rights process.

Under the *Code*, the Centre's services are not restricted to individuals who meet prescribed criteria. However, in keeping with our *Service Eligibility Guidelines* and our Strategic Plan (also posted on our website), the Centre has managed its limited resources to give priority service, including representation, to individuals and groups who would face heightened barriers in navigating the human rights process without legal representation.

The Centre does not and has not given priority to any ground of discrimination or any issue. Sometimes, as a result of media attention to one of our cases, we get a cluster of similar inquiries from members of the public. This happened when we won a case for an employee terminated because she was pregnant, when we filed a race discrimination case against a school board and when we filed disability discrimination complaints against several municipalities.

What particular factors does the Centre consider in making decisions about the level of service to offer?

One thing that we consider is whether the person requesting service can take one or more steps in the process with our assistance but without full representation by one of our lawyers. The Tribunal has designed its process to be accessible to self-represented parties. If an individual can complete the Tribunal's application form with assistance, for example, the Centre will provide legal support to that person, including access to our lawyers for advice and consultation and detailed self-help materials on our website.

Some applicants who contact the Centre are highly educated and have access to other resources in taking forward their case at the Tribunal. These factors weigh against the Centre agreeing to provide representation.

Many individuals are not able to represent themselves effectively at mediation or at a hearing. In these cases, the Centre will provide full representation for the upcoming mediation or hearing in accordance with our *Service Eligibility Guidelines*, posted on our website.

The Centre will not provide representation if:

- A claim is not covered by the *Code*
- The conduct complained of is not related to a prohibited ground of discrimination
- The dispute does not arise in employment, housing, services or another area covered by the *Code*
- There is no factual evidence, including the applicant's evidence, that is capable of supporting the claim at a hearing
- There is a legal barrier to success at a hearing.

Does the Centre provide legal services or representation if our lawyers assess an application as being without merit?

No. The Centre will not provide full representation to an applicant if our legal assessment of a claim is that the facts or the law do not support a finding that discrimination under the *Code* occurred. We believe that it is important that our services be available to individuals who have experienced conduct that constitutes discrimination under the *Code*. The Centre would have fewer resources for meritorious

claims if our lawyers provided representation to individuals even after concluding that a claim does not amount to a provable infringement of a *Code* right.

If the Centre charged fees for its legal services, few individuals would be willing to spend money and time to pursue a claim after receiving our legal opinion that their case is not winnable. Because our services are provided without charge, it is our responsibility to focus our resources on applications that are supported by the evidence and the law and have a chance of succeeding at the Tribunal.

Beginning in 2012, our new case management system will give us the ability to produce data on the number of cases in which the Centre has declined to provide further services, and the basis for that decision.

Who at the Centre decides whether the Centre will represent an applicant at hearing?

The Centre has been asked at what level in our organization are decisions made about whether or not to provide representation. Where an individual has requested representation and the interviewing lawyer concludes that the claim has very little or no prospect of success or that the applicant is able to self-represent, the lawyer will bring a recommendation against representation to a team meeting attended by other lawyers, senior counsel and the Legal Team Manager. If the assessment is not shared by the group, the decision is brought to a senior team of all Legal Managers, both Legal Directors and the Executive Director.

If the decision of the senior team is that representation should not be provided, the lawyer will meet with the applicant to explain the decision and the reasons. In most cases, the individual has accepted our decision. In fact, many applicants have gone on to win their cases at the Tribunal with our assistance. As discussed above, where we decline to represent because the applicant is able to self-represent, the record of Tribunal decisions demonstrates that the applicant consistently goes forward to win at the Tribunal, with our assistance.

We discuss below the complaint process that can be used by an applicant who does not accept a decision to not provide representation.

How often does the Centre decline to provide further or ongoing legal services, including representation, based on a negative assessment of the merits of an application or potential application to the Tribunal?

We cannot give a reliable number in answer to this question. In 2012, the Centre's new case management system will, for the first time, be able to produce statistical data with respect to our service eligibility determinations. There is currently no information available about the number of instances in which further legal services were not provided because our lawyers concluded that an application was not supported by the evidence or the law.

To assess our own process, the Centre undertook a review of final substantive Tribunal decisions during a 10-month period in 2010, examining our own role in supporting/representing the applicants or declining to provide ongoing service. This is what we found:

- Of the winning applicants, over 80% had been provided with legal services by the Centre, either full representation or legal assistance in self-representing.
- Of the losing applicants, 40% did not contact the Centre at any point to request service; 10% were fully represented by the Centre and the remaining 50% all received legal assistance from the Centre up to and including a negative legal opinion of the merits of their application, following which, no further legal service was provided.

When we looked just at the self-represented applicants, we found two things of interest:

- over 90% of the winning self-represented applicants had received legal assistance from the Centre in arguing their own case at the hearing;
- among the self-represented applicants who lost, every individual who contacted the Centre had been given a negative legal opinion (excluding the 10% represented by our lawyers).

This means that the Centre has done an excellent job of identifying individuals who are able to represent themselves with our legal assistance but without having full representation by a Centre lawyer.

We were very pleased that none of the losing applicants were individuals who we had encouraged to litigate on their own, based on a positive assessment of the merits.

By making these assessments, the Centre is able to provide representation to more individuals who are not able to self-represent. To date, the Centre has not declined to represent any individual with a meritorious claim who we believed would face challenges in self-representing.