

The Pay Equity Hearings Tribunal



**Annual Report
2019-2020**

PEHT Annual Report 2019-2020

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Message from the Presiding Officer

I am pleased to present the 2019-2020 Annual Report for the Pay Equity Hearings Tribunal.

There were significant changes to the Tribunal in 2019-2020. First and foremost, Mary Anne McKellar announced her well-deserved retirement as the Presiding Officer of the Tribunal; and Patrick Kelly, the Tribunal's Alternate Presiding Officer, also left the Tribunal in 2019. The Tribunal is grateful to them for their leadership and expertise during their tenures at the Tribunal.

I was appointed as the Interim Presiding Officer effective August 13, 2019, and the Interim title was lifted effective April 2, 2020. I hope to build on the progress that Presiding Officer McKellar initiated, especially with regard to making the Tribunal more accessible electronically, such as having cases proceed by video hearing where it is appropriate.

I am pleased to welcome Johanne Cavé as a Deputy Presiding Officer, cross-appointed from the Ontario Labour Relations Board, and Patricia Greenside and Stephen Roth as members, both of whom are cross-appointed from the Workplace Safety and Insurance Appeals Tribunal.

The Tribunal received 10 new applications in the fiscal year 2019-2020, the highest number since 2016-17 and disposed of 18 applications on or before March 31, 2020 which is the highest disposition rate since 2015-16. Of course, there were cases that remained pending at the commencement of the fiscal year and, including those in the calculation, the Tribunal disposed of 46% of all cases in 2019-2020.

In April 2019, the Divisional Court issued its judicial review decisions in *Participating Nursing Homes v. Ontario Nurses' Association*, 2019 ONSC 2772 and *Ontario Nurses' Association v. Participating Nursing Homes*, 2019 ONSC 2168. These decisions could have a major impact on how the *Pay Equity Act* is interpreted and applied by the Tribunal. Leave to the Court of Appeal has been granted and is scheduled to be heard later in 2020.

Lastly, I would be remiss if I did not mention that the declaration of a pandemic and emergency in March 2020 has changed the landscape of all legal proceedings, including those before the Tribunal. This especially affects the Tribunal because a large percentage of employers who are party to these applications are municipalities and health care providers, all of which have had extreme operational pressures placed on them during the pandemic. The Tribunal is proud that it has been able to continue to operate at full capacity during this unparalleled time and has ensured that parties can file applications, responses and submissions electronically. The Tribunal has also ensured that cases, including resolution discussions, continued to be conducted by video hearing where it was appropriate to do so, and I want to note that the cooperation from all of the parties to these proceedings during this time has been greatly appreciated.

Overview

The Pay Equity Commission (the “Commission”) was established by section 27 of the *Pay Equity Act, 1987*, c.34 and is continued by subsection 27(1) of the *Pay Equity Act*, R.S.O. 1990, c.P.7 as amended (the “PEA”). The Commission consists of two separate, independent parts: the Pay Equity Hearings Tribunal (the “Tribunal”) and the Pay Equity Office. The purpose of the Pay Equity Act is to redress systemic gender discrimination in compensation for work performed by employees in female job classes. Its implementation contributes to a fairer and more productive workplace.

The Tribunal is an adjudicative agency of the Government of Ontario responsible for adjudicating disputes that arise under the *PEA*. Pursuant to section 28(1) of the *PEA*, the Tribunal is a tripartite board, composed of the Presiding Officer, Alternate Presiding Officer, a number of Deputy Presiding Officers and Members, representative of employers and employees (Appendix A).

The Tribunal deals exclusively with issues arising under the *Pay Equity Act*. The Tribunal has exclusive jurisdiction to determine all questions of fact or law that arise in any matter before it. Tribunal decisions are based on the evidence presented and submissions received and on the panel’s interpretation of the facts in dispute, legislation and jurisprudence. The Tribunal is committed to a hearing process that balances the need to be fair, accessible, economical and efficient. It deals as expeditiously and fairly as reasonably possible in processing, settling or adjudicating all matters that come before it. The decision of the Tribunal is final and conclusive for all purposes. Decisions of the Tribunal cannot be appealed but may be judicially reviewed. The Tribunal encourages co-operation among employers, bargaining agents and employees and is committed to encouraging settlement among the parties

The Tribunal is entitled to determine its own practices and procedures and has the authority to make rules and forms governing its practices and the conduct of those appearing before it. The Tribunal’s Rules, Forms and Information Bulletins are available on its website at <http://www.peht.gov.on.ca> or from its offices at 505 University Avenue, 2nd Floor, Toronto, Ontario, M5G 2P1.

Organizational Structure

The Ontario Labour Relations Board (the “OLRB”) provides administrative and institutional support to the Tribunal. The Tribunal benefits from the OLRB’s sophisticated administrative and legal support, as well as information technology and the potential to take advantage of the expertise of its mediators. While the Tribunal has its own complement of Deputy Presiding Officers and Members, the Tribunal Presiding Officer, Alternate Presiding Officer, all of the Deputy Presiding Officers and four of the current Members are cross-appointed to other tribunals ensuring that the Tribunal is staffed with experienced decision-makers at a cost that is shared with other tribunals (full-time appointments only). (Appendix A)

The Tribunal also participates in a broader, shared-services arrangement with the OLRB and the Workplace Safety and Insurance Appeals Tribunal. These adjudicative agencies share printing and production, and common library services.

Tribunal Processes

Upon receipt of an application, the Tribunal sends a Confirmation of Filing out to the parties confirming that the application has been filed, providing the Tribunal file number and advising the parties of the date by which a response must be filed.

With respect to the adjudication of disputes, the Tribunal continues to encourage the parties to resolve their disputes without the need for adjudication. Once the response has been filed, many cases which involve more than a single party are scheduled for a Pre-Hearing Conference with the Presiding Officer, Alternate Presiding Officer or Deputy Presiding Officer where one of the objectives is to explore with the parties opportunities to settle all or a part of the dispute.

In order to increase its efficiency and reduce the parties' costs, the Tribunal continues its efforts to reduce the number of days it takes to adjudicate a matter. The Tribunal proactively identifies preliminary issues and directs the parties to address them, and encourages the parties to raise any issues they may identify well in advance of the hearing with a view to determining these matters on the basis of written submissions. The Tribunal continues to use Pre-Hearing Conferences and/or case management meetings to organize and streamline the issues in dispute so that a matter can be adjudicated as efficiently as possible. In addition, parties are routinely asked to exchange detailed submissions and documents well in advance of a hearing in order to make better use of available hearing time. It has been the Tribunal's experience that requiring the exchange of detailed submissions and documents in advance of the hearing not only serves to reduce hearing time but also facilitates the parties' ability to resolve some or all of the dispute.

In the past, the parties frequently agreed to extend the time limits for the filing of submissions and/or agreed to adjourn set hearing dates. This practice led to applications remaining outstanding for unacceptable periods of time. The Tribunal now discourages adjournments except where compelling circumstances arise and requires parties to offer substitute dates within 72 hours.

Key Activities

The Tribunal's key activities are adjudication and dispute resolution in the area of Pay Equity. These two functions are the foundation for the Tribunal's objective of adjudicative and dispute resolution excellence.

Adjudication

The Tribunal is tripartite in nature, comprised of neutral presiding officers and member representatives of employers and employees/trade unions. The members are expected to bring the perspective and concerns of their community to the task of adjudication. All of the presiding officers have cross-appointments with at least one other adjudicative agency. The Tribunal holds hearings where evidence is presented and oral arguments are made. Pay equity issues are often complex; hearings can take multiple days to complete. Tribunal decisions are issued in writing and posted on accessible

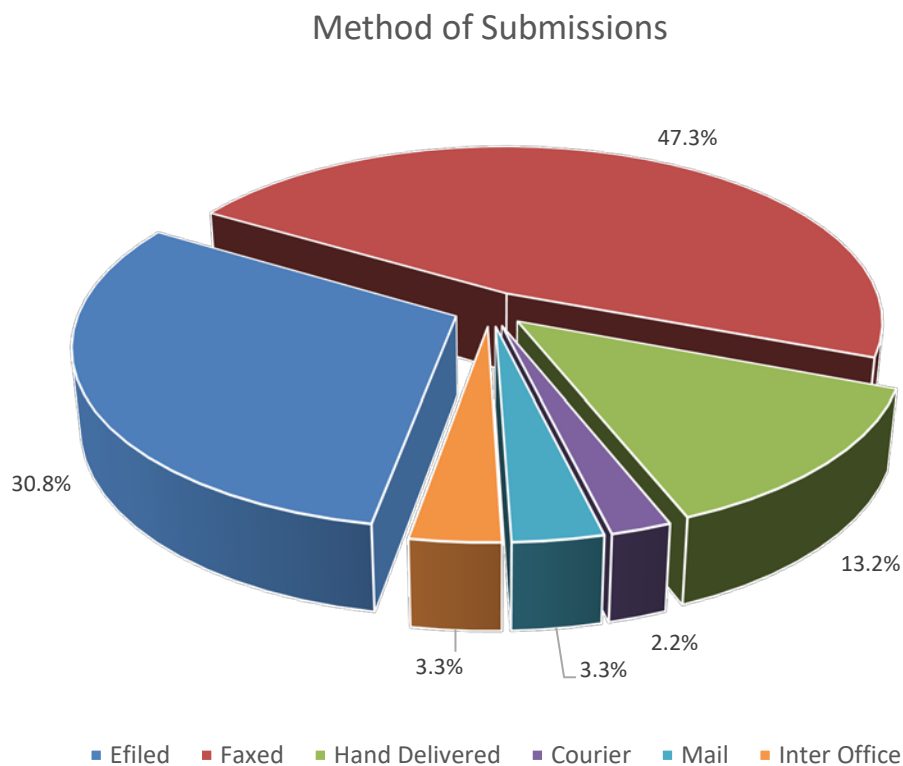
websites (www.canlii.org). Parties are encouraged to seek independent legal advice before coming to the Tribunal.

Mediation

Almost every case is scheduled for a pre-hearing consultation before a presiding officer, other than the one who will hear the case. The goal of the pre-hearing is to identify and narrow the issues in dispute, organize the litigation to ensure that it is ready for hearing and look for opportunities to settle some or all of the issues. Pre-hearings are more informal than a hearing and provide an opportunity for parties to ask questions about the Tribunal's hearing procedures. Pre-hearings reduce hearing time, saving both parties and the Tribunal time and expense.

IT Initiatives and Electronic Filing

In early 2018-2019, the Pay Equity Hearings Tribunal was able to offer electronic filing to its stakeholders. The Tribunal's forms were made available electronically on its website and are hosted by Ontario Shared Services. A total of seven forms, in both French and English, are currently available to be submitted electronically. Parties are now able to file correspondence, submissions and other material electronically as well. The e-filing project necessitated the modernization of the Tribunal's forms, Notices, Information Bulletins, and Rules of Practice. In 2019/2020, 30.8% of the total number of forms and submissions filed with the Tribunal were filed electronically. Since the pandemic was declared in March 2020, all submissions and applications have been received electronically.



A project to replace the Tribunal's older website with a new modernized website commenced in 2019/2020 and is expected to continue in the next fiscal year, subject to resources. Technology has advanced considerably since the current website was created. The Tribunal expects to attain a more user-friendly and accessible website for the public and stakeholders as well as an updated look. Due to the Covid-19 pandemic, the website modernization project was put on hold while the OLRB's IT staff, who support the Tribunal's IT needs, worked to ensure the continued operations of both tribunals. Electronic filing became mandatory, all staff, management and OICs were required to work remotely, new website notices were posted to inform the public of pandemic-related process changes and new methods of video hearings were explored while in-person hearings were cancelled.

Caseload Processing

The total caseload for the fiscal year 2019/2020 amounted to 39 applications, which was a combination of 29 pending applications carried over from the previous year plus 10 new applications. The Tribunal's caseload each year is made up of two parts: the cases carried over into the year from the previous year and the cases filed during the current year.

During the 2019/2020 fiscal year, the Tribunal disposed of 18 applications. One application was granted, 13 were dismissed, one was settled, 3 were adjourned pending other cases.

Twenty-one applications remained pending on March 31, 2020. Ten of them relate to a single Order of the Pay Equity Office and were filed on the same day in 2016. These should properly be counted as a single case, bringing the pending number as of March 31, 2020 down to 12. The pending number also includes applications that remain open but were not actively pursued by the parties in 2019/2020, such as cases adjourned pending a court decision in another file, and therefore the Tribunal could not take steps to dispose of them in the fiscal year. Thus, the number of actual disputes pending before the Tribunal on March 31, 2020 is 9 when inactive or pending files are not taken into account. This is significantly lower than suggested by the number of applications that remain open.

The Tribunal has made a practice in its Annual Report of providing caseload data of the kind set out in the preceding paragraphs and in the Caseload Statistics table. These numbers alone do not always provide a meaningful picture of the demand that those cases place on adjudicative resources, principally because that demand varies significantly from one application to another. A more nuanced understanding emerges from statistics relating to the number of pre-hearing conference dates scheduled and held (3), case management hearings scheduled (2) and held (1), hearings scheduled (7) and held (5), and number of written decisions issued this year (33). Even then, of course, there is considerable variation in the complexity of the decisions and the amount of time required to generate the reasons.

Caseload Statistics

Fiscal Year	Caseload			Disposed of						
	Total	Pending April 1	Received Fiscal Year	Total Disposed	Granted	Dismissed	Terminated	Settled	Pending Other Case	Pending March 31
2019-20	39	29	10	18	1	13	0	1	3	21
2018-19	36	31	5	8	3	0	2	3	-	29
2017-18	44	37	7	13	4	2	2	5	-	31
2016-17	46	25	21	13	3	0	2	8	-	37
2015-16	45	13	32	21	5	3	1	12	-	25
2014-15	30	18	12	17	3	2	2	10	-	13
2013-14	31	20	11	14	5	2	4	3	-	18
2012-13	35	21	14	11	0	4	4	3	-	23
2011-12	39	21	18	21	3	4	3	11	-	21
2010-11	35	13	22	16	4	3	5	4	-	21
2009-10	50	28	22	37	8	4	1	24	-	13
2008-09	48	25	23	20	0	4	0	16	-	28
2007-08	34	12	22	9	2	1	0	6	-	25
2006-07	25	10	15	13	3	4	0	6	-	12
2005-06	16	5	11	6	3	2	0	1	-	10
2004-05	5	0	5	0	0	0	0	0	-	5

Definition of Terms:

- 1) Granted means that the application was, in whole or in large part, successful.
- 2) Dismissed means that the application was, in whole or in large part, not successful.
- 3) Terminated means that the application was not granted, dismissed or settled but was terminated at the parties' request or abandoned.
- 4) Settled includes all cases where the parties, either with or without the assistance of the Tribunal, settled the dispute, as well as cases that were adjourned.

Key Decisions

The Tribunal considered whether various employer care homes were required to negotiate pay equity maintenance with a Union upon the Union's request, pursuant to sections 11.3, 13.1 and 14.1 of the *Pay Equity Act*. The majority of the panel of the Tribunal found that the Employers were not required by the Act to negotiate pay equity maintenance but noted that Unions play a significant role under the Act in establishing the pay equity plans and in bargaining compensation of its members through the normal collective bargaining process. The Tribunal relied on the fact that the legislative scheme imposes certain duties and responsibilities solely on employers and the Act does not include an express right of a union to negotiate or give notice to negotiate the issue of maintaining pay equity or maintaining compensation practices. In the result, the applications were dismissed. The Applicant has applied to the Court for judicial review of this decision.

ONTARIO NURSES' ASSOCIATION V. CENTRAL COMMUNITY CARE ACCESS CENTRE; PEHT File Nos. 0085-16-PE, 0086-16-PE, 0087-16-PE, 0088-16-PE, 0089-16-PE, 0090-16-PE, 0091-16-PE, 0092-16-PE, 0093-16-PE, and 0094-16-PE; September 10, 2019, 2019 CanLII 86314 (ON PEHT)

The Tribunal considered whether the individual applicants had established that their classification was not paid in accordance with the *Pay Equity Act*. The applicants submitted that the full extent of their job duties were unreasonably scored. The Tribunal considered the applicants' arguments, but concluded that they had not made out a *prima facie* violation of the Act. The Tribunal concluded that the applicants had not led evidence that, if accepted as true, could lead to the conclusion that the job evaluation system either: "ignored or failed to apply one or the statutory criteria or unreasonably excluded important job information related to any of the four statutory criteria." Accordingly, application was dismissed.

BONNIE E. MACLEOD, IRENE HUTTON, LINDA GEMMELL V. BROCKVILLE GENERAL HOSPITAL; PEHT File No. 1763-17-PE; November 20, 2019, 2019 CanLII 113536 (ON PEHT)

The Tribunal considered whether a six-year span between an order by a Review Officer and the filing of an application objecting to the order constituted an abuse of process should warrant the dismissal of the application. The Tribunal found that, when considering whether delay constitutes an abuse of the Tribunal's processes, the Tribunal may have regard to the following non-exhaustive list of factors: the length of the delay, the explanation for the delay, prejudice, the nature of the case and its complexity, the facts and issues in dispute, the purpose and nature of the proceedings, the nature of the various rights at stake in the proceedings, and the extent to which the responding party contributed to (or waived) the delay. The Tribunal concluded that the delay was lengthy, the Employer did not contribute to the delay, there was no compelling explanation for the

delay, the delay was presumptively prejudicial, and the Employer had demonstrated actual prejudice because of the delay. The Application was dismissed.

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1328 V. TORONTO CATHOLIC DISTRICT SCHOOL BOARD; PEHT File No. 0288-15-PE; December 2, 2019, 2019 CanLII 116293 (ON PEHT)

Court Activity

During the 2019-2020 fiscal year, there was one new application for judicial review filed with the Divisional Court.

As of April 1, 2019 there were two matters pending before the Courts. Those remaining matters were two applications for judicial review of the same Tribunal decision. One of those applications was granted and the other was dismissed by the Divisional Court. The Board received three applications for leave to appeal arising from those Divisional Court decisions. Leave to appeal was granted by the Court of Appeal in all three applications and all three appeals will proceed together on the merits before a five judge panel at the Court of Appeal. These matters were scheduled to be heard in April 2020 but have been adjourned until October 2020 due to the pandemic. Therefore, as of March 31, 2020, there are four outstanding matters before the courts.

Performance Measures

Efficient Case Processing

2019/2020 Commitments

- 75% of new files opened within two business days after an application is filed in accordance with the Tribunal's Rules of Practice
- 75 % of confirmations of filing of applications sent to parties within four business days of application filed in accordance with the Tribunal's Rules of Practice
- 75% of files closed within two business days following final decision

2019/2020 Achievements

- 100% of new files opened within two days after an application is filed in accordance with the Tribunal's Rules of Practice
- 80% of confirmations of filing of applications sent to parties within four days of application filed in accordance with the Tribunal's Rules of Practice
- 100% of files closed within two business days following final decision

Adjudication and Disposition

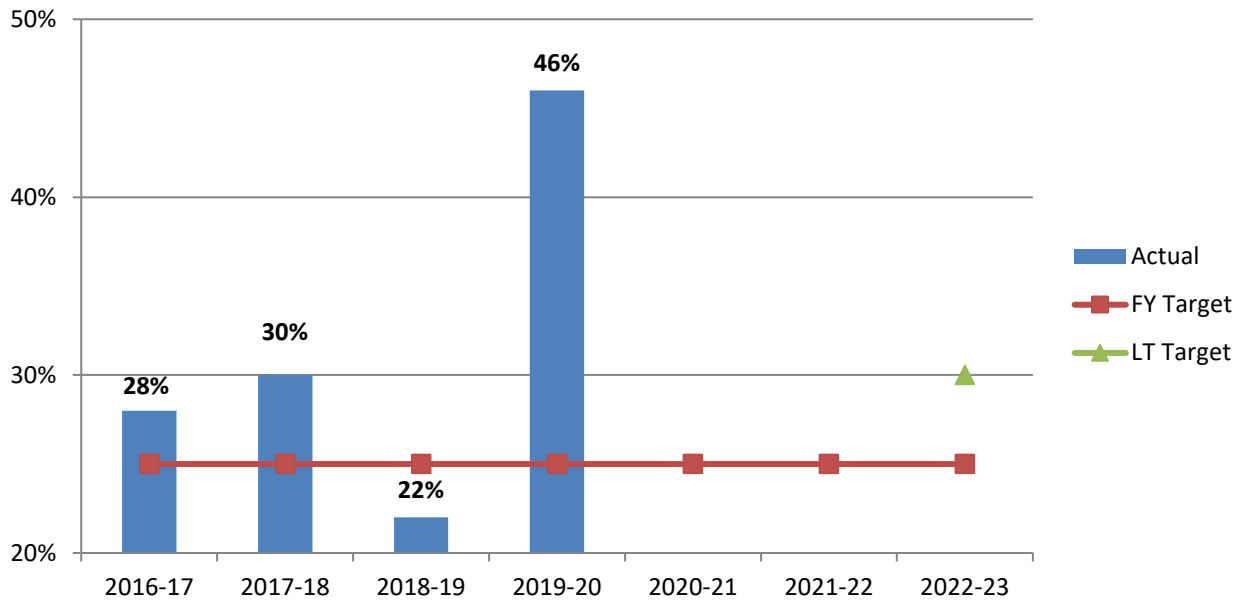
2019/2010 Commitments

- 90% of files reviewed by Presiding Officer or Deputy Presiding Officer within two weeks of response date
- Where a case management hearing is held, in 50% of those cases at least one issue is resolved
- 25% of outstanding cases disposed of during the year

2019/2020 Achievement

- 100% of files reviewed within two weeks of response date
- Where a case management hearing was held, at least one issue was resolved in 40% of those cases.
- 46% of cases disposed of during the year overall
- 80% more cases were disposed of than were filed in in the 2019-2020 fiscal year.

Note: The settlement rate and time to conclude cases recognizes the complex nature of pay equity disputes which results in few negotiated settlements. As a result, almost all cases are decided only after lengthy hearings. In general, the same counsel represent the parties in pay equity cases and the scheduling of hearings is further extended by the availability of counsel as well as presiding officers and members who are cross-appointed to other Tribunals. In addition, a number of cases may arise out of the same Order or be otherwise related or will remain pending at the Tribunal as they work their way through the courts on judicial review or appeal, which also impacts the disposal rate.



Ombudsman Review

The Ontario Ombudsman has the authority to investigate complaints about the Ontario Government and its agencies, including the Tribunal. There were no new or outstanding investigations in 2019/2020.

Financial Performance

In accordance with the Ministry of Labour's Delegation of Financial Authority Framework, financial authority is delegated to the Presiding Officer (Chair) of the Tribunal. The Presiding Officer is required to ensure that public funds are used with integrity and honesty. The Tribunal's operating budget is included in the Ministry of Labour's estimates and allocation process, and the Tribunal is required to report to the Ministry each quarter with respect to its expenditures and planned future financial commitments. The total annual remuneration paid by the Tribunal for OIC appointees was \$281,331. A cost-sharing of salaries with the Ontario Labour Relations Board is in place.

All figures in \$000.0 thousand

Account	Expenditure Estimates	In-year Board Approvals	Year-end Budget	Year-end Actuals	Variance	% Variance
Salaries & Wages	275.1		275.1	233.4	41.7	15.1%
Benefits	39.7		39.7	19.9	19.8	50.0%
ODOE:						
Transportation & Communication	15.0	(0.1)	14.9	2.6	12.3	82.6%
Services (Including Lease)	167.3		167.3	77.0	90.3	54.0%
Supplies & Equipment	1.0		1.0	0.3	0.7	71.2%
Total ODOE	183.3	(0.1)	183.2	79.9	103.3	56.4%
Grand Total	498.1	(0.1)	498.0	333.2	164.8	33.1%

Appendix A

Order in Council Appointments

The Tribunal's adjudicators (Presiding Officer, Alternate Presiding Officer, Deputy Presiding Officer and Members) are all appointed by the Lieutenant Governor in Council as Order in Council appointments (OICs), for a fixed term. The following is a chart of OICs working in 2019 – 2020, their appointment terms and remuneration*

Name	First Appointed	Term of Appointment	Annual Remuneration
Presiding Officer			
McKellar Mary Anne	August 7, 2019	September 1, 2019	\$72,962.00
Ross, David	August 13, 2019	May 12, 2020	\$101,445.00
Deputy Presiding Officers			
Cavé, Johanne (P/T)	October 31, 2019	October 30, 2021	\$788.00
Kelly, Patrick M.	May 17, 2009	August 30, 2019	\$16,202.29
McGilvery, Roslyn	August 25, 2015	December 3, 2019	\$38,885.50
Rowan, Caroline	June 2, 2010	September 16, 2019	\$38,885.50
P/T Members (Employer)			
Bolton, Lori	September 13, 2017	September 25, 2022	\$2,265.50
Burke, Ann	April 4, 2012	April 3, 2022	\$1,132.75
Cook, William S.	September 13, 2017	September 12, 2019	\$0.00
Greenside, Patricia	November 21, 2019	November 20, 2021	\$0.00
Zabek, Carla	April 4, 2012	April 3, 2022	\$2,955.01
P/T Members (Employee)			
Harris, Irene	December 21, 2012	December 20, 2022	\$1,871.50
Nielsen, Heino	September 13, 2017	September 12, 2019	\$0.00
Phillips, Carol	August 15, 2012	September 16, 2022	\$3,940.00
Roth, Stephen	December 12, 2019	December 11, 2021	\$0.00

* The PEHT utilizes a cost sharing agreement with the OLRB which allows the Tribunal to capitalize on cost efficiencies. Remuneration for full-time appointees to the Tribunal is determined by a Directive issued by Management Board of Cabinet. Full-time appointees of the PEHT who are cross-appointed with the OLRB are paid 25% of their salaries for Deputy Presiding Officers and 50% of the salary for the Presiding Officer of the Tribunal, with the remaining salaries paid by the OLRB. The remuneration actually paid to an individual appointee may be less than the maximum set by the Management Board Directive due to individual circumstances such as a change in term of appointment during the year, sick leave, unpaid leave of absence or time spent by an appointee cross-appointed to another tribunal. Remuneration for part-time appointees to the Tribunal is based on a per diem rate established by Management Board of Cabinet. As a result, annual remuneration set out in the chart above is reflective of actual monies received by an individual appointee.

Accountability Statement

The Tribunal's Annual Report for the fiscal year ending March 31, 2020 was prepared under my direction for submission to the Minister of Labour in accordance with the Agencies and Appointments Directive as issued by Management Board of Cabinet. The Public Accounts of Ontario are the annual financial statements that are prepared in compliance with the requirements of Section 13 of the Ministry of Treasury and Economics Act. The Public Accounts consist of the financial report of the Government of Ontario and the financial reports of each ministry. In accordance with the Ministry of Labour's Delegation of Financial Authority Framework, financial authority is delegated to the agency. Each year the Tribunal verifies that all its transactions are reflected accurately and completely in the Public Accounts through the execution of a Certificate of Assurance.

As an agency of the Ministry of Labour, the Tribunal's Annual Report is subject to the minimum reporting requirements established in the Agencies and Appointments Directive, including:

- Financial statements that have been audited or subject to the appropriate level of external assurance;
- Analysis of operational performance;
- Analysis of financial performance;
- Names of appointees, term of appointments and remuneration;
- Performance measures, targets achieved/not achieved and action to be taken.

This report covers the fiscal year April 1, 2019 to March 31, 2020.

For More Information

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Hearing Impaired (TTY): 416-212-7036

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Hours of Operation: 8:30am – 5:00pm

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