# ENFORCING HUMAN RIGHTS:
# Choices and Strategies
# Under the New *Human Rights Code*

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## I. INTRODUCTION

Bill 107, *An Act to Amend the Human Rights Code* introduces substantial changes to how human rights are enforced in the province. The amendments build a reformed human rights system consisting of three pillars: the Ontario Human Rights Commission, the Human Rights Tribunal of Ontario and the new Human Rights Legal Support Centre. The Bill significantly changes the existing roles of the Commission and Tribunal to introduce a "direct access" model of enforcement. Although the Bill received Royal Assent on 20 December 2006, most of the substantive changes will not come into force until a date to be named by proclamation. The provisions establishing and governing the new Human Rights Legal Support Centre are, however, already in effect. Unless otherwise noted, the section numbers referred to in this paper are to the new sections of the *Code* that have been enacted by Bill 107.

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Under Bill 107, claimants will file applications directly with the Human Rights Tribunal rather than the Human Rights Commission. The Tribunal has the power to develop its own rules of practice and procedure. In disposing of applications, it can employ a range of adjudicative and alternative dispute resolution techniques that it will set out in its rules, selecting the method that "offers the best opportunity for a fair, just and expeditious resolution of the merits of the application": s. 40. The Tribunal has enhanced powers to award damages and, in particular, the existing $10,000 cap on damages for mental anguish has been eliminated. Under Bill 107, courts will play a more limited role in reviewing Tribunal decisions. The existing right to appeal to the Divisional Court has been replaced by a strong privative clause which allows judicial review only on the strict standard of patent unreasonableness.

Under Bill 107, the Commission will no longer investigate, mediate or settle individual complaints; nor will it screen complaints to determine whether a complaint can be heard by the Tribunal. The Commission's re-oriented mandate will focus on pro-active efforts to ensure human rights compliance and to eliminate discriminatory practices, including the power to initiate complaints and to participate in Tribunal hearings on issues of public interest. The Commission will also have powers which allow it to ensure the development of human rights principles in a consistent manner in the public interest. The Commission will have the explicit power to develop policies to guide the application of Parts I and II of the Code which set out the protected freedoms from discrimination and their interpretation. The Commission will also have the power to state a case to Divisional Court where the Tribunal's decision is not consistent with Commission policy.

The third pillar to the system is new: the Human Rights Legal Support Centre. Under Bill 107 the Commission will no longer have carriage of every individual human rights complaint that is before the Tribunal. Instead, applicants will have carriage of their own cases as they do before other administrative tribunals and courts. When introducing Bill 107, the Attorney General promised to create a human rights support centre that would provide "full access to legal assistance", including information, support, advice and legal representation to all persons seeking a remedy. At First Reading the Government committed to "ensure that, regardless of level of income, abilities, disabilities or personal circumstances, all Ontarians would be entitled to share in receiving equal and effective protection of human rights, and all will receive that full legal representation."[2] While the initial versions of the Bill did not include provisions establishing the Centre, during the Legislative Committee hearings the Bill was amended to expressly create the Centre, set out its broad mandate to provide advice, support and legal representation that is available across the province, and confirm public funding for the Centre.

The recent amendments have generated much debate among human rights advocates. Concerns expressed by a number of groups led the Government to introduce numerous significant changes that strengthened and clarified details of the Bill that were underdeveloped in earlier versions. Now that the amendments have received Royal Assent, it will be important for human rights advocates, unions, and other organizations to think creatively and strategically about how to ensure that the new framework is applied in a progressive manner to achieve its promised objectives of advancing systemic human rights compliance and providing more

[2] Attorney General Michael Bryant, Hansard, 26 April 2006

accessible, efficient adjudication and resolution of human rights disputes. As described below, this will not only involve advancing claims before the Human Rights Tribunal but, significantly, it will also involve leveraging the new/re-oriented powers of the Human Rights Commission to fully develop and carry out its pro-active public interest mandate. The new human rights framework presents human rights advocates with choices and opportunities: it challenges advocates to think more systemically about the enforcement of human rights in a way that extends beyond litigation and that recognizes the interconnections between litigation and broader pro-active interventions. This paper, then, reviews some of the key changes that have been implemented by Bill 107, provides commentary on the implications the changes will have for human rights adjudication and identifies some broader strategies for securing human rights under the *Code*.

## II. HUMAN RIGHTS ENFORCEMENT PROCESS PRIOR TO BILL 107

Under the existing *Human Rights Code*, a person who believes their rights have been infringed files a complaint with the Ontario Human Rights Commission. The Commission also has the power to initiate a complaint, although this power has rarely been exercised. Under the current regime, the Commission has broad powers under the existing s. 34 of the *Code* to exercise its discretion to decide not to deal with complaint.[3] Where the Commission deals with

[3] The grounds on which the Commission can decline to deal with a case are "(a) the complaint is one that could or should be more appropriately dealt with under an Act other than [the Code]; (b) the subject-matter of the complaint is trivial, frivolous, vexatious, or made in bad faith; (c) the complaint is not within the jurisdiction of the Commission; or (d) the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay." This is a discretion

a complaint, it is charged with investigating the complaint, providing the opportunity to mediate the complaint, attempting to effect a settlement, and then determining which complaints will be dismissed or referred to the Human Rights Tribunal for a hearing on the merits of the claim. The only complaints that proceed to adjudication are those which are referred to the Tribunal by the Commission "where it appears to the Commission that the procedure is appropriate and the evidence warrants an inquiry."[4] As such, the Commission has often been characterized as playing a "gatekeeper" role. Currently an average of 2500 complaints are filed with the Commission each year. Of those, only approximately 50-150 complaints are referred to the Tribunal for hearing each year.[5] If the Commission does refer a matter to the Tribunal, it has carriage of the file. The Commission leads the evidence and makes the legal argument in advancing the human rights complaint, but does not act on behalf of the complainant. The Commission is instead an impartial third party representing the public interest. While many complainants rely on the Commission to advance the complaint, many others retain their own counsel to represent their interests in the proceedings.

The current Tribunal process is premised on the fact that only a limited number of

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respondents have frequently sought to invoke to have complaints dismissed without a decision on the merits.

[4] See current s. 36(1)

[5] The number of complaints referred to the Commission over the past five years are as follows:

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| 2000-2001: | 73 referrals |
| 2001-2002: | 60 referrals |
| 2002-2003: | 58 referrals |
| 2003-2004: | 89 referrals (this includes some 200 individual human rights complaints dealing with access to education for children with autism which have been combined into a single hearing) |
| 2004-2005: | 150 referrals |

complaints are referred to it each year and that these complaints have already been fully investigated and prepared by the Commission. In this respect, the Tribunal process is designed to provide for full and formal adjudication of the complaint. As set out in the July 2004 Rules of Procedure, the Tribunal process can involve a range of steps including an initial conference call; exchange of pleadings (Statement of Facts, Issues and Remedy and Response); pre-hearing disclosure and production of evidence, including witness statements and relevant documents; opportunities to attempt mediation and settlement where the parties consent, pre-hearing conferences to address issues such as identification and simplification of issues, resolution of preliminary issues, and so on; pre-hearing motions; and ultimately the leading of evidence and making legal argument. In introducing the Bill, the government indicated that under the existing system, it can take up to four or five years between when a complaint is filed with the Commission and when it is finally determined by the Tribunal.

## III. THE COMMISSION'S NEW ROLE

Although much attention has been paid to the changes made to the Tribunal's mandate as well as to the specifics of the new Human Rights Legal Support Centre, the changes to the Commission's mandate are equally significant. These amendments deserve attention on the part of human rights advocates interested in broader systemic forms of discrimination and in enforcement strategies that extend beyond litigation. The changes to the Commission's mandate have the potential to provide human rights advocates with more levers for activating the human rights system – that is, these changes can provide a broader range of choices and strategies for promoting and enforcing human rights in the province. The efficacy of the

Commission as one of those levers will depend on a number of factors, including in particular the level of government funding and resources provided to the Commission to carry out its mandate. However, human rights advocates may also play a role in developing the Commission's efficacy by undertaking creative strategies to encourage the Commission to realize its mandate's full potential.

### A. Composition of the Commission

Under Bill 107 the members of the Commission will be appointed by Cabinet. There is now an express requirement that persons who are appointed "have knowledge, experience or training with respect to human rights law and issues" and the appointment process recognizes "the importance of reflecting, in the composition of the Commission as a whole, the diversity of Ontario's population": s. 27(3) and (4). Longstanding concerns about safeguarding the Commission's independence were addressed by ensuring that the Commission reports directly to the Legislature rather than to the Ministry of the Attorney General: s. 31.6(2).

### B. Commission Functions: Non-litigation and Litigation Tools for Advancing Human Rights

Once the new amendments are brought into force, the Commission's functions will include the following:

* to forward the fundamental policy of the *Code* that "the dignity and worth of every person be recognized and that equal rights and opportunities be provided without discrimination that is contrary to law";

* to develop and conduct public information and education programs to promote awareness, understanding of and compliance with the *Code* and to prevent and eliminate discriminatory practices;
* to undertake research into discriminatory practices and make recommendations to prevent and eliminate such practices;
* to examine and revise any statute, regulation, or program or policy made under statute for compliance with human rights and make recommendations in respect of any inconsistency with the *Code*;
* to initiate reviews and conduct inquiries and make recommendations regarding incidents or conditions in a community, institution, industry or sector of the economy and encourage and coordinate plans, programs and activities to reduce such incidents;
* to make policies to provide guidance on the *Code*'s application; and
* to report to the public on the state of human rights in Ontario.

Although the Commission will perform some of its work independently of any litigation before the Tribunal, the Commission and the Tribunal still stand as connected pillars in the new system. The Commission still has a significant role to play in litigating human rights complaints and in ensuring and guiding the development of consistent human rights jurisprudence.

First, the Commission is empowered to file its own applications to the Tribunal if it is of the opinion that the application is in the public interest: s. 35(1). This will allow the Commission to bring cases to the Tribunal as an extension of its investigative and educational work on

issues of systemic discrimination. While earlier versions of the Bill appeared to set preliminary criteria for when the Commission could bring complaints (i.e. the complaints had to be "systemic", the Commission must have been unable to adequately address the issues under its non-litigation powers),[6] the final version of the Bill makes clear that the Commission alone has discretion to determine what are issues that should be litigated in the public interest and when it is appropriate for the Commission to use litigation as a tool to advance compliance with the *Code*. These amendments recognize the expertise and experience of the Commission in pursuing its mandate. A complaint by the Commission will not affect the right of any individual to make their own application to the Tribunal in respect of the same matter. The Commission and individual complaints will be dealt with together unless the Tribunal decides otherwise: s. 35(3)(4).

Second, the Commission has the express right to intervene in any application before the Tribunal on such terms as the Tribunal may determining having regard to the role and mandate of the Commission under the *Code*: s. 37(1). The Commission may intervene as a party where a party to an application consents which would give the Commission full rights of participation in the hearing, including the right to lead evidence, the right to disclosure and the right to make argument. One of the concerns that had been raised with the initial version of Bill 107 was that if the Commission was no longer receiving and screening complaints, its ability to effectively intervene before the Tribunal and pursue the public interest would be hampered by its lack of access to information about the complaints that were being filed. This concern has been

[6] See, Bill 107, First Reading version, s. 36(1)

remedied by s. 38 which provides that "at the request of the Commission, the Tribunal shall disclose to the Commission copies of applications and responses filed with the Tribunal and may disclose to the Commission other documents in its custody or in its control." This ability to access this information will not only enable the Commission to participate in litigation before the Tribunal but will inform the Commission's broader pro-active mandate with respect to education, inquiries and policy development.

In a related issue, just as the Commission can bring matters to the Tribunal, the Tribunal can now also refer public interest matters arising out of any proceedings before it to the Commission: s. 45.4(1). The Commission may, in its discretion, decide whether to deal with a matter referred to it by the Tribunal: s. 45.4(2). This does, however, provide another point at which the activities of the Commission and the Tribunal can work independently and yet reinforce or harmonize the development of human rights principles.

Third, the Commission has the power to affect litigation of human rights through its power to make policies to provide guidance on the *Code*'s application: s. 30. Bill 107 expressly provided that the Tribunal may consider these policies in its deliberations, and that the Tribunal is specifically required to consider these policies if requested to do so by a party or intervenor in a case: 45.5. While the *Code* does not state that the policies are binding on the Tribunal (as is the case with guidelines of the Canadian Human Rights Commission), the Commission has the ability to state a case to Divisional Court if it believes that a decision or order of the Tribunal is inconsistent with one of the policies the Commission has approved: s.45.6. Within 30 days of a Divisional Court decision on a stated case, any party to the proceeding may apply to the

Tribunal for a reconsideration of its original decision. The Tribunal may also, of its own motion, reconsider its own decision in accordance with its rules: s. 45.6(7), 45.7. These provisions enable the Commission to provide a significant role in setting policy with respect to the interpretation of the *Code*'s provisions and seeking a consistent development of human rights law in the public interest.

### C. Anti-Racism and Disability Rights Secretariats

A new Anti-Racism Secretariat and a new Disability Rights Secretariat will be established within the Commission to undertake research and make recommendations to prevent discriminatory practices, and to develop and provide public education programs to eliminate race and disability-related discrimination: ss. 31.3 and 31.4. The Chief Commissioner may delegate any of his or her powers, duties or functions to a member of these two secretariats. Although their roles remain undeveloped, these secretariats could provide important resources on race and disability-related discrimination. As with other parts of the new system, their effectiveness will depend in part on the resources allocated to them.

### D. Leveraging the Commission's Multidimensional Approaches to Addressing Discrimination

Human rights advocates, unions and other organizations can play an important role in ensuring that the Commission fulfils its comprehensive mandate for addressing human rights. Although direct access to litigation before the Tribunal is significant, what is equally significant

is that the new *Code* puts in place a system with the potential to address human rights systemically and pro-actively and with the mandate to actively intervene to encourage and facilitate a culture of compliance with the *Code*. Under the new system, the Commission and Tribunal can be seen as playing distinct but complementary roles. These roles and the interconnections between the two institutions have the potential to allow for a more multidimensional approach to human rights promotion and enforcement in Ontario.

The reformed *Code* provides several key levers that human rights advocates may examine to ensure that the new *Code* is implemented in a progressive and creative way.

First, the Commission is given the power to create advisory committees. Section 31.5 provides that "The Chief Commissioner may establish such advisory groups as he or she considers appropriate to advise the Commission about the elimination of discriminatory practices that infringe rights under this Act." These advisory committees may provide an opportunity for human rights advocates to identify and propose key areas for pro-active and systemic action.

Second, as set out above, the Commission can exercise its power to develop policies. Human rights advocates can encourage the Commission to develop such policies to ensure a consistent and vigilant standard for enforcing human rights.

Third, the Commission's new public inquiry power has the potential to be a very powerful tool to examine and investigate systemic discrimination in a particular institution, throughout

an industrial sector, or within any area of community interaction. The Commission's inquiry power is very broad. Section 31 provides that the Commission "may conduct an inquiry under this section for the purpose of carrying out its functions under this Act if the Commission believes it is in the public interest to do so." Within its mandate is the function

> "to initiate reviews and inquiries into incidents of tension or conflict, or conditions that lead or may lead to incidents of tension or conflict, in a community, institution, industry or sector of the economy, and to make recommendations, and encourage and co-ordinate plans, programs and activities, to reduce or prevent such incidents or sources of tension or conflict": s. 29(e).

A person appointed to conduct such an inquiry has the authority to enter premises, during regular business hours without a warrant, where they have reason to believe there may be documents, things or information relevant to the inquiry. They have the power to

* request production of documents and things for inspection and examination;
* remove documents for the purpose of making copies or extracts;
* question a person on matters that are or may be relevant to the inquiry, subject to the person's right to counsel or representation;
* use any data storage, processing or retrieval device or system used in carrying on business in the place in order to produce a document in readable form;
* take measurements or record physical dimensions of a place;
* take photographs, video recordings or other visual or audio recordings of the interior or exterior of a place; and
* require that a place or part therefore not be disturbed for a reasonable period of time for the purposes of carrying out an examination, inquiry or test: s. 31(7).

The person conducting the inquiry may be accompanied by any person who has special, expert or professional knowledge and who may be of assistance in carrying out the inquiry. There are also legal obligations to cooperate with the inquiry. A person who has been requested to produce a document or thing shall produce it and shall provide any assistance that is reasonably necessary to produce a document in readable form: s. 31(11). The Commission may also authorize the person conducting the inquiry to apply for a search warrant: s. 31.1 The evidence that is obtained on a inquiry under either s. 31 or s. 31.1 may be received into evidence in a proceeding before the Tribunal: s. 31.2

As a result, the Commission's public inquiry power can leveraged to at least three different ends:

(a) It can be utilized to pro-actively investigate an area of systemic discrimination, make recommendations for preventing and eliminating discrimination and to develop plans to eliminate discrimination. This is something that would be of assistance, for example, for examining systemic discrimination in a particular economic sector, involving multiple employers, unions and non-unionized employees without having to be limited by the scope of individual complaints. It could also be of assistance in areas where particularly vulnerable or marginalized workers are unable to bring individual complaints without fear of reprisal.

(b) This power can be utilized to support either the complaints initiated by the

Commission or in other complaints as the evidence that is secured through the inquiry may be lead in evidence before the Tribunal: s. 31.2

(c) This power can be used to focus and support the Commission's reports to the Legislature. The Commission is required every year to prepare a report of its activities during the 12 months preceding 31 March and to submit that report to the Speaker of the Assembly by no later than 30 June. The Speaker shall cause the report to be laid before the Assembly: s. 31.6(1)(2). Importantly, though, the Commission has also been given the broader power to "make any other reports respecting the state of human rights in Ontario and the affairs of the Commission as it considers appropriate, and may present such reports to the public or any other person it considers appropriate": s. 31.7. This broader reporting power is similar to that held by the Canadian Human Rights Commission which has used it to conduct investigations into and report on urgent issues of systemic discrimination.[7]

The Commission, then, has many tools at its disposal to become a strong, vigilant champion of human rights in Ontario. The degree to which it embraces this new role will be in part dependent on the funding and resources that it is granted, but also on the degree to which human rights advocates envision creative ways to engage these processes and make them accountable.

[7] See, for example, *Protecting Their Rights*, the Canadian Human Rights Commission's 2004 Special Report regarding systemic discrimination in correctional services for federally sentenced women.

## IV. TRIBUNAL'S MANDATE AND PROCESSES

Under Bill 107, the Human Rights Tribunal will also be restructured as part of the Government's stated goal of providing "a more open, accessible and faster complaint resolution process" and "to resolve individual disputes fairly, quickly and effectively."[8] As a result of amendments made at the public hearing stage, appointments to the Tribunal will be made through a competitive process based on certain criteria, including experience, knowledge or training in human rights, aptitude for impartial adjudication and aptitude for applying the alternative adjudicative practices and procedures that may be set out in the Tribunal rules: s.32(3).

### A. Who may make an application to the Tribunal and when?

Significantly, the new amendments expand the range of people and groups who may bring applications to the Tribunal. Under the new amendments, complaints (now referred to as "applications") can be made by individuals, groups, or by the Human Rights Commission.

The new amendments extend the time limits for filing applications from the current 6 months to 1 year after the incident to which the application relates or, if there was a series of related incidents, within 1 year after the last incident in the series: s. 34(1)(a)(b). A person may make an application after this time limit "if the Tribunal is satisfied that the delay was incurred

[8] Ministry of the Attorney General, news release and backgrounder, 26 April 2006

in good faith and no substantial prejudice will result to any person affected by the delay": s.34(2). While the one-year period is shorter than the standard 2 year limitation for filing civil claims, the extension of the time limit certainly provides individuals and groups with more opportunity to bring complaints to the Tribunal.

### 1. Applications by individuals or groups

Under section 34, a person who believes that his or her rights have been infringed can make an application to the Tribunal, and two or more persons who are each entitled to make an application, can make an application jointly: s. 34(1)(4). As well, a new provision permits a person or organization, other than the Commission, to make an application on behalf of another person if that person consents: s. 34(5). This provision will enhance access to justice by allowing individuals or organizations to make applications in a representative or public interest capacity. For example, under this provision, unions will be permitted to make applications to enforce a member's or members' rights under the *Code*. Similarly, public interest groups will now be able to file complaints on behalf of individuals who are vulnerable to reprisals if they bring applications in their own names. Groups that make applications on behalf of another person may participate in the proceeding in accordance with the Tribunal rules: s. 34(6). A person on whose behalf a complaint is made, however, retains the power to withdraw an application in accordance with Tribunal rules: s. 34(10).

### 2. Applications by the Human Rights Commission

As noted above, the Commission has the power to file an application with the Tribunal if it considers it in the public interest to do so: s. 35. Earlier versions of this provision referred to rights infringements of a "systemic nature" that the Commission had not been able to address and that were of public interest. In response to concerns expressed as to what would be considered "systemic", the Government removed the term thereby allowing the Commission to bring all complaints that it considers to be of a "public interest" nature.

This will permit the Commission to bring complaints with respect to human rights infringements that might otherwise fall through the cracks or remain unaddressed because there are no complainants willing and/or able to come forward with complaints. Further, the provision is an important extension of the Commission's investigative functions. It will allow the Commission to incorporate litigation into the range of other pro-active strategies it undertakes to address discriminatory practices. Under s. 29(e), the Commission is provided with the power to initiate review and inquiries into incidents and conditions in particular communities, institutions, industries, or sectors of the economy. In the course of such inquiries, if the Commission considers that an application should be made to challenge practices, for example, regarding discriminatory practices in a particular industry, it would have the power to bring a complaint itself under s. 35. This could be especially important for vulnerable individuals and workers who would not want to risk bringing applications themselves.

### B. Rules of Practice

Like other administrative bodies, the Tribunal has the power to make rules of practice and procedure, including rules regarding alternatives to traditional adversarial or adjudicative procedures. While concerns had been raised about whether the Tribunal would have enhanced powers to dismiss applications quickly and without a hearing, these concerns were directly addressed through amendments at the public hearing stage which expressly ensure that process and expediency do not trump the substance of a claim. The amendments require that procedure will always be focused on securing the fair resolution of the merits of an application as Bill 107 expressly provides that

> "The Tribunal shall dispose of applications made under this Part by adopting the procedures and practices provided for in its rules or otherwise available to the Tribunal which, in its opinion, offers the best opportunity for a fair, just and expeditious resolution on the merits of the matters before it": s. 40

One of the critical concerns raised by human rights advocates through the development of Bill 107 is the importance of human rights complainants feeling like they have been heard – that they have had a fair "day in court" – and ensuring that they understand why their complaint has been dismissed if it is dismissed. To this end, Bill 107 provides that the Tribunal rules shall ensure that, in any proceeding before the Tribunal:

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

2. An application may not be finally disposed of without written reasons: s. 43(2).

Bill 107 makes clear that the Tribunal will have the power to create rules of practice and procedure which allow the Tribunal to be an active, interventionist adjudicator with effective powers to control its process to best suit the case before it and to ensure that appropriate and relevant evidence is brought forward. Without limiting the generality of the Tribunal's power to make rules, the Bill provides that the Tribunal rules may

* provide for and require the use of hearings or of practices and procedures that are provided for under the *Statutory Powers Procedure Act* or that are alternatives to traditional adjudicative or adversarial procedures;
* authorize the Tribunal to define or narrow the issues, limit the evidence or submissions of parties on such issues and determine the order in which issues and evidence will be presented;
* authorize the Tribunal itself to conduct examinations in chief or cross-examinations of a witness;
* prescribed the stages of its processes at which preliminary, procedural or interlocutory matters will be determined;
* authorize the Tribunal to make or cause to be made such examinations of records and other inquiries as it considers necessary in the circumstances;
* authorize the Tribunal to require a person to produce any document, information or thing, provide a statement or oral or affidavit evidence; or adduce evidence or produce witnesses who are reasonably within the party's control: s. 43(3)

The provisions of the *Statutory Powers Procedure Act* apply to a proceeding before the Tribunal unless they conflict with a provision of the *Code*, the regulations or the Tribunal rules. In the

event of a conflict, the *Code*, the regulations or the Tribunal rules prevail: s. 42.

### C. Power to order inquiries

Under the present system, the Commission has broad powers to investigate complaints that it has determined should proceed to the Tribunal. Under the new *Code*, investigative powers are granted to both the Commission and the Tribunal. Under s. 44, the Tribunal has broad powers, where requested by a party, to appoint a person to conduct an inquiry where it is appropriate in the circumstances in order to obtain evidence "that may assist in achieving a fair, just, and expeditious resolution of the merits" of an application. Alternatively, the Tribunal may request the Commission to appoint a person to conduct an inquiry: s. 44(15). Whether at the request of a party or the Tribunal, the Act vests the person conducting the inquiry with broad powers similar to those of the Commission under the present system and similar powers that the Commission has in conducting public inquiries under Bill 107. These include the power to enter premises without warrant, request documents or things, question persons, and take photographs or make other recordings. The person conducting the inquiry shall prepare a report and submit it to both the Tribunal and the parties to the application: s. 44(14). This investigative power is significant as it ensures that individual applicants will not bear the full burden of investigating their own complaints and it gives the Tribunal the tools to ensure that appropriate and full evidence in respect of an application is brought before it.

### D. Remedial powers

The new *Code* sets out different remedial schemes depending on whether an application is brought by an individual or by the Commission. Section 45.2 sets out the following remedies that may be sought by individual applicants or groups who have brought complaints under s.34:

1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.

2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.

3. An order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act, both in respect of the infringement that was the subject of the application and in respect of future practices.

Section 45.2(2) underscores that where there is an infringement, the Tribunal may make an order to promote compliance with the *Code* in respect of future practices, even if no such order was requested. This remedial power may be important for ensuring that the systemic public interest objectives of the *Code* are fulfilled.

Section 45.3 provides that, in applications made by the Commission under s. 35, the Tribunal "may make an order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance" with the *Code*. As with

individual applications, subsection 45.3(2) provides that, in response to applications brought by the Commission, the Tribunal may direct a person to do anything with respect to future practices. Unlike earlier versions of the section, the Tribunal is not restricted to making orders only with respect to future practices but may make orders with respect to remedy past practices as well.

These remedial provisions represent an improvement over the current provisions of the Code in several respects

(a) they eliminate the current $10,000 cap on monetary damages for "mental anguish";

(b) they eliminate the distinction which is often difficult to draw between damages for mental anguish and damages for losses arising out of the infringement of rights;

(c) by doing so, the provisions also eliminate the necessity for the applicant to show that conduct was engaged in "wilfully or recklessly" in order to successfully claim damages to compensate for mental anguish arising from the infringement.

As a final point, it should be noted that the new remedial provisions refer to ordering parties to do anything they ought to do to "promote" compliance with the *Code* rather than to "achieve" compliance with it. While the two terms are similar in meaning, it can be argued that any change in terminology must have significance. The term "promoting" is arguably broader than "achieving" and appears to be more consistent with the broader approach to human rights enforcement taken under the new *Code*.

## V. DISMISSAL OF APPLICATIONS WITHOUT HEARING

Under s. 34 of the current *Code*, as set out above, the Commission may decide to not deal with a complaint for a number of reasons: whether the complaint could be brought under another Act; whether it is trivial, frivolous, vexatious or brought in bad faith; whether it is outside the Commission's jurisdiction; or whether it is brought out of time. In addition, the Commission has the power to decide which cases it will refer to the Tribunal based on its assessment of whether the Tribunal procedure is appropriate and the evidence warrants an inquiry. As a result, only a small fraction of complaints actually proceed to the Tribunal to be adjudicated on the merits.

Under the new *Code*, except where applications fall outside the Tribunal's jurisdiction, the Tribunal is required to afford parties an opportunity to make oral submissions prior to disposing of any application that is timely and within the Tribunal's jurisdiction. However, the Tribunal still maintains power to govern its own proceedings by requiring the use of "alternatives to traditional adjudicative or adversarial procedures": s.39(3)(a). It may also exert control over proceedings by defining or narrowing the issues in an application and limiting the evidence and submissions of the parties on these issues: s.39(3)(b). These provisions have the potential to enhance access to the Tribunal while also vesting the Tribunal with the power to manage its caseload as effectively as possible.

## VI. MULTIPLE PROCEEDINGS/CHOICE OF FORUM

### A. Concurrent Jurisdiction of Different Administrative Tribunals

Under the current s. 34(1)(a), the Commission may decide not to deal with a complaint if it *could* or *should* be more appropriately dealt with under another Act. Particularly in respect of unionized employees, complaints have been routinely dismissed under s. 34(a) on the basis that they could or should more appropriately be dealt with in grievance arbitration, whether or not a grievance has in fact been filed and whether or not a grievance has adequately addressed human rights issues.

By contrast, under the new amendments, the Tribunal will have a much more limited power to dismiss claims that may arise before different adjudicative bodies. What the reforms signal is that the Tribunal has the mandate to monitor consistent compliance with human rights standards across the system and to act as the guardian of those legal standards. Where there is overlapping jurisdiction and claims are filed before different bodies, the Tribunal will maintain jurisdiction over an application. However, it can defer the application until it decides whether on a case-by-case basis the other proceeding has substantively dealt with the claim.

Under s. 45, the Tribunal may defer an application in accordance with its rules. Under the new s. 45.1, the Tribunal may dismiss an application, in whole or in part, only if it finds that the other administrative tribunal “has appropriately dealt with the substance” of the human rights claim. This provision appears to provide both the applicants and the Tribunal with greater

flexibility in determining how to proceed where two or more tribunals may have overlapping jurisdiction over a matter. Unlike the current s. 34(1)(a), the new provision looks not to the form of a complaint (should it or could it proceed under a different Act?) but instead to how the human rights issue was in fact dealt with on the merits. It looks at whether a different proceeding has "appropriately dealt with the substance of an application". This provides greater protection to claimants to ensure that the substance of their human rights claim can be fairly and fully dealt with on the merits.

### B. Concurrent Claims Brought in Civil Courts

While concurrent claims before different administrative bodies are permitted, the new amendments will automatically bar applications where there are concurrent civil claims before a court that have not been finally determined or withdrawn: s. 34(10). A civil claim is not considered finally determined if a right of appeal exists and the time for appealing has not expired: s. 34(11). The bar appears to have been introduced because the new amendments give courts a clear power to award monetary damages where a human rights issue arises in the context of an existing civil claim. As is discussed further below, Bill 107 also introduces the new s. 46.1 which provides that a court may order monetary compensation in respect of an infringement of a right in Part I of the *Code*. Section 34(10) appears to overrule recent Ontario jurisprudence which provided that a civil suit and a human rights complaint could be filed concurrently.[9] It is as yet unclear whether a claimant will be able to seek broader human rights

[9] See *Farris v. Staubach Ontario Inc.*, [2004] O. J. No. 1127 ( S.C.J.)

remedies before the Tribunal if a court either denies a monetary remedy or fails to adequately address the human rights implications of the civil claim.[10]

### C. Concurrent Jurisdiction: Opportunities and Strategies

The amendments with respect to the Tribunal's role where there is concurrent jurisdiction offer interesting new opportunities and strategies for unions advancing the human rights of their members.

First, the amendments ensure that unions can bring human rights claims to the Tribunal when they feel this is the most appropriate forum to resolve those disputes. This is an issue that may arise when a union is trying to address broad concerns about systemic discrimination and/or seeking systemic remedies. While arbitrators have the jurisdiction to interpret and apply the *Human Rights Code*, they have rarely issued the kinds of systemic remedies that are necessary to eradicate the dynamics or practices that support discriminatory behaviour or the kinds of damages that have been awarded by human rights tribunals. Arbitrators also face

[10]The provisions listed above arguably enhance the enforcement of human rights by ensuring that individuals have access to different forums to assert their claims. More obscure amendments that may provide for harmonization of approaches to human rights in different forums are the changes made to provisions dealing with undue hardship. The existing sections of the Code which address undue hardship provide that "The Commission, the Tribunal or a court" shall consider any standards prescribed by regulation for assessing what is undue hardship (ss. 11(3), 17(3) and 24(3)). The new provisions state that "a tribunal or court" shall consider any standards prescribed by regulation. As the term "tribunal" is not defined in the *Code*, it is expected that this would apply to any "tribunal" as defined under the *Statutory Powers and Procedures Act* which would include arbitrators or other administrative adjudicators. As such, these amendments provide the potential for greater harmonization of approaches to the issue of undue hardship across different tribunals with the power to enforce the *Code* if standards for assessing undue hardship are prescribed by Regulation by the Lieutenant Governor in Council.

institutional limits in that they are unable to amend the collective agreement and lack the institutional independence or security of courts and tribunals.[11] Accordingly, unions will have new opportunities to consider what is the most effective and appropriate way to resolve a particular dispute.

Second, there will be opportunities to use the enhanced human rights protection before the Tribunal to influence the development of law and remedies in the arbitration forum. This is so because the developments before the Tribunal have the potential to feed back into the promotion of human rights in arbitration itself. To the extent that the Tribunal maintains jurisdiction over an application until such time as it ensures that the substantive matter of the human rights claim has been adequately dealt with, this could lead to greater harmonization between the application of human rights principles and remedies at arbitration and the Tribunal. This should give unions an opportunity to think more creatively about the arguments they may make at arbitration and the remedies they seek in that forum.

Third, a question also arises with respect to the Tribunal's concurrent jurisdiction over applications by individual union members which raise issues regarding the union's duty of fair representation, regardless of whether those complaints are concurrently filed at the Ontario Labour Relations Board. While in the past such complaints could be and often were dismissed by the Commission on the basis that they should be dealt with before the Ontario Labour Relations Board, it is unclear under the current system whether the Tribunal will consider these

[11] See, Fay Faraday, "The Expanding Scope of Labour Arbitration: Mainstreaming Human Rights Values and Remedies", (2006) 12:3 Canadian Journal of Labour and Employment Law

claims to be within or without its jurisdiction. The fundamental point of tension is that the union has a statutory duty to represent the collective interests of its members; as long as it does not act in a manner that is arbitrary, discriminatory or in bad faith, the union's choices must be assessed in view of its protection of collective rather than strictly individual rights and interests. These collective duties do not sit easily in a legal framework that is oriented around individual rights. To the extent that the Tribunal may retain supervisory jurisdiction to address such claims or to determine whether the Board proceedings adequately deal with the human rights implications of such claims, it will be necessary for unions to make full argument enabling the Tribunal to recognize the collective interests that the union has a duty to serve in representing its members.

## VII. JUDICIAL REVIEW OF TRIBUNAL DECISIONS

The new amendments compel the courts to accord greater deference to both the Tribunal's substantive and procedural decisions. Under the current *Code*, parties have a statutory right to appeal Tribunal decisions to the Divisional Court. While appellate courts have accorded deference to the Tribunal's findings of fact, they did not accord similar deference to the Tribunal's decisions on questions of law and have broad jurisdiction to overturn a decision if they disagree with it.

By contrast, the new s. 45.8 provides for the more limited route of judicial review where the Tribunal makes a patently unreasonable decision. Subject to s. 21.1 and 21.2 of the *Statutory Power Procedure Act* which allow a tribunal to correct errors or establish rules to

permit a tribunal to review all or part of its own order, a decision by the Tribunal is final and is not subject to appeal. A decision of the Tribunal shall not be altered or set aside in an application for judicial review or in any other proceeding unless the decision is patently unreasonable.

As a matter of general administrative law, the decisions of many specialized tribunals are not subject to appeal but are subject instead to more limited rights of judicial review. On an application for judicial review, the court cannot overturn the tribunal decision simply on the basis that it disagrees with it. Instead, the court can only overturn a decision where the tribunal has acted outside its jurisdiction either in process or in substance by making a decision that is patently unreasonable. Specialized tribunals are accorded deference by the courts because this respects the purpose of establishing administrative tribunals and respects the specialized expertise of the tribunals. The general system of judicial review allows for greater access to justice by creating tribunals with special expertise that can deal with substantive claims more quickly than courts. However, unlike similar provisions in other statutes, s. 45.8 does not simply call for deference but instead expressly sets out the standard of review to be applied by a reviewing court: that is, the most deferential standard of patent unreasonableness.

Parties will be able to seek review in the courts if they believe the Tribunal process has denied them the rights of procedural fairness. In those circumstances, the court has broader scope to overturn a decision if there is a simple breach of natural justice rather than needing to establish that the breach was patently unreasonable. However, the new s. 41 and s. 43(8) will likely provide some privative effect in respect of procedural errors. Section 41 provides that

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

Section 43(8) further provides that:

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

Ultimately, though, the rules of procedural fairness are broader than mere compliance with a tribunal's own rules of procedures. Therefore, it remains to be seen how much deference courts will accord to the Tribunal on procedural matters. This is especially the case since courts have traditionally accorded tribunals very little or no deference on procedural issues. As a matter of administrative law, breaches of procedural fairness generally are reviewable and will result in a decision being set aside regardless of whether the breaches affected the final disposition of the case. It remains to be seen whether s. 43(8) will be read as amending the common law in this respect as it applies to the Tribunal. What is clear, however, is that the *Code* intends to give the Tribunal considerable power and flexibility to shape and implement its procedures to arrive at a fair determination on the merits.

## VIII. JURISDICTION OF COURTS TO ENFORCE THE *CODE* IN CIVIL PROCEEDINGS

The new *Code* explicitly confirms the power of courts to order monetary compensation where human rights issues arise in the context of a civil claim. This power had already been recognized by the Ontario Court of Appeal in *Keays v. Honda*[12]. Section 46.1 now expressly provides that a court may order monetary compensation in respect of an infringement of a right in Part I of the *Code*. The section indicates that the court's remedial power in this respect does not create a cause of action based on an infringement of Part I (i.e. it does not create an independent tort of discrimination) but is a remedial order that could be made in the context of another broader civil claim (i.e. discrimination in the context of a wrongful dismissal).

It should be noted that, although this section grants courts jurisdiction to award monetary compensation for injury to dignity, feelings and self-respect, it does not address the court's jurisdiction to grant other possible monetary claims, restitution or remedial orders that may flow from a finding of discrimination before the Tribunal.

## IX. HUMAN RIGHTS LEGAL SUPPORT CENTRE

The third pillar of the new direct access system, the Human Rights Legal Support Centre, is a critical part of the proposed human rights reform. The fact that the initial version of Bill 107 contained few details on this point was a significant focus of criticism of the Bill.

[12] [2006] O.J. No. 3891 (Ont. C.A.)

However, subsequent amendments to the Bill do address that concern by setting out explicitly in the legislation that the Minister will establish a Human Rights Legal Support Centre and confirming public funding for the Legal Support Centre.

### A. Governance Structure and Funding for the Centre

Bill 107 establishes the Human Rights Legal Support Centre as a corporation without share capital. The Bill states that "The Centre shall be independent from, but accountable to, the Government of Ontario as set out in this Act": s. 45.11(5). The Centre will be governed and managed by a Board of Directors of between five and nine members who will be appointed by Cabinet in accordance with regulations: s. 45.14(2). The Chair of the Board will be designated by Cabinet: s. 45.14(3) Section 45.14(8) and (9) further set out the Board's duty to act responsibly and its standard of care:

> (8) The board of directors shall act in a financially responsible and accountable manner in exercising its powers and performing its duties.
>
> (9) Members of the board of directors shall act in good faith with a view to the objects of the Centre and shall exercise the care, diligence and skill of a reasonably prudent person.

Section 45.15 of the Act sets out the provisions regarding public funding for the Centre. The Centre shall submit its annual budget to the Minister. If approved by the Minister, the annual budget shall be submitted to Cabinet to be reviewed for inclusion in the estimates of the Ministry. At s. 45.15(3), the Bill provides that "the money required for the purposes of this Act

shall be paid out of such money as is appropriated therefore by the Legislature." Further, at s. 45.16, the Bill provides that "the Centre's money and investments do not form part of the Consolidated Revenue Fund and shall be used by the Centre in carrying out its objects." The Centre shall submit an annual report to the Minister within four months after the end of its fiscal year: s. 45.17.

### B. The Centre's Mandate

The new *Code* sets out the following as the Centre's objects:

> (a) to establish and administer a cost-effective and efficient system for providing support services, including legal services, respecting applications to the Tribunal under Part IV;
>
> (b) to establish policies and priorities for the provision of support services based on its financial resources: s. 45.5.

Consistent with the broader approach to human rights taken in the new *Code*, the amendments require that the Centre provide a broad range of "support services" which extend beyond representation in proceedings before Tribunal. Section 45.6 provides that the Center will provide the following support services:

* advice and assistance, legal and otherwise, respecting the infringement of rights under Part I of the Code
* legal services in relation to making applications to the Tribunal, proceedings before the Tribunal, applications for judicial review arising from Tribunal proceedings, stated case proceedings, and the enforcement of Tribunal orders

* such other services as may be prescribed by regulation: s. 45.6(1).

As such, the Centre will be required to provide a full range of services – both legal and non-legal – that include advice and assistance prior to making an application with the Tribunal as well as steps following the disposition of a matter by the Tribunal. It appears that the Centre will provide support only to those seeking to enforce human rights under the *Code* rather than to those responding to applications.

The new provisions require the Center to ensure that its services are available "throughout the Province, using such methods of delivering the services as the Center believes are appropriate": 45.6(2). The new *Code* does not establish any criteria that individuals have to meet in order to receive services from the Centre. However, in light of the emphasis on "cost effectiveness" in the Center's objects, it is possible that the Center will adopt criteria to screen or prioritize who has access to its services.

The full scope of the Centre's role is not apparent yet as Cabinet has broad jurisdiction to make regulations affecting many of the core duties of the Centre. Section 48(1)(c) gives Cabinet broad authority to make regulations "respecting the Human Rights Legal Support Centre". Section 48(2) elaborates upon this as follows in a way that allows significant aspects of the Centre's mandate, operation, and funding to be governed by regulation:

> A regulation made under clause (1)(c) may,
> (a) further define the Centre's constitution, management and structure as set out in Part IV.1;
> (b) prescribe powers and duties of the Centre and its

members;

(c) provide for limitations on the Centre's powers under subsection 45.11(4); [powers of a natural person]

(d) prescribe services for the purposes of paragraph 3 of subsection 45.13(1); [such other services as may be prescribed by regulation]

(e) further define the nature and scope of support services referred to in subsection 45.13(1);

(f) provide for factors to be considered in appointing members and specify the circumstances and manner in which they are to be considered;

(g) provide for the term of appointment and reappointment of the Centre's members;

(h) provide for the nature and scope of the annual report required under section 45.17;

(I) provide for reporting requirements in addition to the annual report;

. . .

(m) specify requirements and conditions for the funding of the Centre and for the Centre's budget;

. . .

(p) provide for anything necessary or advisable for the purposes of Part IV.1.

There is no doubt that the Centre's effectiveness will depend on how well it is funded and what level of resources it is given. This is an important area that human rights advocates will need to monitor closely to ensure that the reforms can meet their promise of providing accessible enforcement of human rights to all in Ontario.

## X TRANSITIONAL PROVISIONS

As indicated at the outset, apart from the provisions creating the Human Rights Legal Support Centre, the substantive amendments to the Commission's and Tribunal's roles will not be effective until a date to be named by proclamation.

Bill 107 does set out the provisions that will govern the transition to the new system once those amendments come into force. That date is referred to in the transitional provisions as the "effective date".

## A. What Provisions are Currently in Effect

### 1. Appointments to the Tribunal

The criteria identified in the new s. 32(3) with respect to the selection and appointment of persons to the Tribunal, came into effect on 20 December 2006 when the Act received Royal Assent: s. 51. As a result, all new appointments will be made in accordance with these criteria.

### 2. Tribunal's Power to Make Rules

The Tribunal has the express power to make new rules of practice and procedure and to deal with complaints before it in accordance with those new rules even in advance of the Part IV coming into effect. Under s. 52, the Tribunal may, before the effective date, make rules in accordance with its new rule making power in the amended Part IV. In addition, when dealing with complaints that the Commission has referred to it under the existing s. 36, the Tribunal may even before the new Part IV is proclaimed in effect

(a) deal with the complaint in accordance with the new rules it may make;

(b) deal with all questions of fact and law that come before it;

and

(c) dispose of the application using the procedures and practices that "offer the best opportunity for a fair, just and expeditious resolution of the merits of the applications."

## B. Process for Dealing with Complaints As of the Effective Date

### 1. Complaints that are before the Commission

Where a complaint is already before the Commission or is filed with the Commission before the effective date, the following process applies:

(a) For a six-month period beginning on the effective date, the Commission shall continue to deal with the complaints that are before it in accordance with the old Part IV: s. 53(2)

(b) At any time during this six-month period, a person who has a complaint before the Commission may, in accordance with the Tribunal rules, elect to abandon the complaint and make an application to the Tribunal with respect to the subject-matter of the complaint. The Tribunal shall make rules to ensure that such applications are dealt with in an expeditious manner: s. 53(3)(4).

(c) If, after the six-month period, the Commission has failed to deal with the merits of a complaint and the complaint has not been withdrawn, the complainant may make an application to the Tribunal with respect to the subject-matter of the complaint within a further six-month period.

(d) No application, other than the two kinds of applications identified above, may be

made to the Tribunal if the subject-matter of the application is the same or substantially the same as the subject-matter of a complaint that was filed with the Commission under the old Part IV: s. 53(8)

(e) Where before the effective date or during the six-month period following the effective date a settlement was effected by the Commission and agreed to in writing, signed by the parties and approved by the Commission, the settlement can be enforced under the new s. 45.9.

### 2. Complaints that have been referred to the Tribunal

Where a complaint was referred to the Tribunal by the Commission either before the effective date or during the six-month period following the effective date, the following procedures apply:

(a) On or after the effective date, the new Part IV applies to the complaint as though it were an application made to the Tribunal and the Tribunal shall deal with it in accordance with the new Part IV: s. 55(2).

(b) The Commission shall continue to be a party to a complaint that was referred to the Tribunal before the effective date: s. 55(3)(a).

(c) The Commission shall not be a party to a complaint that is referred to the Tribunal during the six-month period after the effective date unless (i) the complaint was initiated by the Commission, or (ii) the Tribunal sets a date for the parties to appear before the Tribunal before the end of the six-month period: s. 55(3)(b),(4). Nothing, however, prevents the Tribunal from adding the

Commission as a party or prevents the Commission from intervening in such a complaint: s. 55(5).

### 3. Regulations

Finally, Cabinet has the power to make regulations "providing for transitional matters which, in the opinion of the Lieutenant Governor in Council, are necessary or desirable to facilitate the implementation of the *Human Rights Code Amendment Act, 2006*": s. 56.

## XII CONCLUSION

Ultimately, the real measure of success for the human rights system as a whole must be whether it can achieve significant and ongoing reductions in the inequalities facing those who are protected by the *Human Rights Code* and whether it can secure a culture of pro-active human rights compliance. While certainly the number of applications filed with the Tribunal each year and the Tribunal's ability to dispose of these applications fairly and expeditiously on the merits are a measure of its effectiveness, the success of the system as a whole must also look beyond complaints to examine whether there is an increase in overall human rights compliance. In this respect, Bill 107 requires that the Minister appoint a person to conduct public consultations and submit a report reviewing "the implementation and effectiveness of the changes resulting from the enactment of the Act".